

# NINE-TENTHS OF THE LAW: THE ENGLISH COPYRIGHT DEBATES AND THE RHETORIC OF THE PUBLIC DOMAIN

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## I

### INTRODUCTION

To compare the present moment in the history of intellectual property to the English enclosure movements of the early modern period, as James Boyle and others do, is to employ a version of a metaphor that reaches back to the early history of copyright in the late seventeenth and early eighteenth centuries—the literary work as a kind of landed estate.<sup>1</sup> Embedded in this metaphor is an implicit narrative about the origin of copyright, a version of the familiar Enlightenment narrative about the origin of landed property in general. In the beginning, so the story goes, all the literary world lay free and open, but then various parts were settled and enclosed and literary property came into being. The story implies that the public domain, the literary commons, precedes copyright. But this is not quite the case. By 1557, when the Stationers' Company was chartered, printing and publishing had already become a highly regulated activity in which rights to print books of all kinds, both new and old, were either assigned directly by the crown or managed by the Stationers' Company.<sup>2</sup> True, many aspects of writing lay open in the pre-copyright period. Shakespeare, for example, had no hesitation about appropriating others' works in ways that would clearly constitute infringement today. So far as printers and booksellers were concerned, however, the book trade was regulated in all its dimensions, including such matters as the number of presses a printer might own and the number of apprentices and journeymen he might keep. Thus, even such Latin

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1. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 33 (Winter/Spring 2003). On the landed estate metaphor, see Mark Rose, *Copyright and Its Metaphors*, 50 *UCLA L. REV.* 1 (2002).

2. See generally CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959* (1960). Whether printing was open or regulated in the early period of printing in England was the subject of intense debate in the seventeenth and eighteenth centuries. One party insisted that printing was originally common, while another argued that it was part of the royal prerogative and the personal dominion of the king. See ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* 324-79 (1998). I am grateful to David Lange for raising questions about the status of printing in England in the earliest period.

and Greek classics as Aesop, Cicero, Ovid, Terence, and Virgil were protected titles, the property of the Stationers' Company itself, which could assign individual books to whichever guild members it chose for printing.<sup>3</sup> We must be cautious, therefore, about projecting into the past an idyll of communality from which we have supposedly declined. The absolutist regimes of the Tudor and Stuart monarchs were characterized by pervasive regulation, and they were very different from the post-revolutionary civic society in which copyright law emerged.

## II

### CIVIL SOCIETY AND THE BIRTH OF THE PUBLIC DOMAIN

Copyright and the public domain were born together. They were formed in the course of the long social process that Jürgen Habermas identifies as the emergence of the "public sphere."<sup>4</sup> This process involves the circulation of cultural products as commodities rather than as displays of aristocratic magnificence, and it involves a sense of civil society as a collectivity distinct from either the private realm of the family or the public realm of the state. The emergent sense of civil society was crucial to the transformation of the old regime of royally chartered regulation into the new regime of property rights defined by the legislature and the courts. It was also an important rationale for the limited term of copyright, a limitation that brought the public domain into being. As Samuel Johnson remarked in conversation in 1773:

There seems . . . to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual; but the consent of nations is against it, and indeed reason and the interests of learning are against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain its circulation. No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world, therefore, whatever valuable work has once been created by an authour, and issued out by him, should be understood as no longer in his power, but as belonging to the publick; at the same time the authour is entitled to an adequate reward. This he should have by an exclusive right to his work for a considerable number of years.<sup>5</sup>

Thus, the establishment of the author as an owner and the establishment of the rights of the public at large were both Enlightenment products, embedded in Enlightenment modes of thought.

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3. See *BLAGDEN*, *supra* note 2, at 243 fig. XII (reprinting a broadside of 1766 listing some of the titles that were part of the company monopoly).

4. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 57-67 (Thomas Burger trans., 1991).

5. JAMES BOSWELL, *BOSWELL'S LIFE OF JOHNSON* 546-47 (R.W. Chapman ed., Oxford Univ. Press 1953) (1791).

The 1709 Statute of Anne<sup>6</sup> recognized authors as owners and also provided for term limits—twenty-one years for books already in print and fourteen years for new books, with the possibility of a second fourteen-year term if the author were still living at the end of the first term. But even after the passage of the Statute, the major London booksellers continued to treat literary property—including works by such classic English writers as Shakespeare and Milton—as perpetual properties, and they regularly secured chancery injunctions against those who would reprint such classic texts. In practice, then, the public domain did not exist even after the passage of the Statute of Anne. The London booksellers' claims were based on the theory that an author enjoyed a perpetual common-law right of property in his or her work, and that this property right was transferred to the bookseller by deed when the work was sold. The statutory right, the booksellers argued, was merely a supplement to the common-law right, and that right lasted forever. These claims led to six decades of legal struggle over the question of literary property, as it was called, and to two great cases in which the matter was resolved.

First, in the King's Bench case of *Millar v. Taylor*<sup>7</sup> a divided court upheld the author's common-law right and the perpetuity. Then, in *Donaldson v. Becket*,<sup>8</sup> the House of Lords overturned *Millar* and declared that literary property was limited to the terms specified in the Statute. For the first time, classic works became free for anyone to print. Soon after the *Donaldson* decision, booksellers in Edinburgh and London issued multi-volume collections of classic British works under titles that emphasized the national character of the publications. The Edinburgh bookseller John Bell, for example, introduced a multi-volume Shakespeare even as *Donaldson* was pending, and then, after the decision, went on to publish *Bell's British Theatre* in twenty-one volumes (1776-80) and the monumental *Poets of Great Britain* in one hundred and nine volumes (1776-82).

### III

#### THE DISCOURSE OF THE PUBLIC DOMAIN

We need to distinguish, however, between the fact of the public domain and what might be called the discourse of the public domain—that is, the construction of a legal language to talk about public rights in writings. One component in the development of this discourse was the strong anti-monopoly sentiment that reached back to the days of Queen Elizabeth and came to a head in the Jacobean Statute of Monopolies in 1623.<sup>9</sup> Although this act abolished most existing monopolies and established limited terms for the grants of monopoly rights in inventions, it explicitly excluded printing privileges from these limita-

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6. Statute of Anne, 1709, 8 Ann., c. 19 (Eng.). On the Statute and for fuller discussion of the literary property struggle, see generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

7. 98 Eng. Rep. 201 (K.B. 1769).

8. 1 Eng. Rep. 837 (H.L. 1774).

9. Statute of Monopolies, 1623, 21 Jac. 1, c.3 (Eng.).

tions. By the late seventeenth and early eighteenth centuries, the great London booksellers had become wealthy and important men in large part as a consequence of their monopolies of ancient and modern classics. There was considerable resentment against what was known as the “trade.”

One of the earliest writers to agitate against the booksellers' perpetual monopolies was John Locke. In 1693, the Licensing Act,<sup>10</sup> the instrument through which the Stationers' Company was empowered to regulate the trade, faced renewal. Concerned particularly with the guild's monopolies in Latin writers, Locke wrote to his friend, Edward Clarke, a Member of Parliament, urging him to speak in Parliament for the interests of the educated public at large:

I wish you would have some care of book-buyers as well as all of booksellers and the company of stationers, who having got a patent for all or most of the ancient Latin authors (by what right or pretense I know not) claim the text to be theirs, and so will not suffer fairer or more correct editions than any they print here, or with new comments to be imported without compounding with them, whereby these most useful books are excessively dear to scholars, and a monopoly is put into the hands of ignorant and lazy stationers.<sup>11</sup>

One year later, when the Licensing Act was again being considered, Locke drafted a formal *Memorandum* for Clarke in which he repeated his objection to the guild's monopolies in the Latin classics and argued that copyrights in contemporary authors should also be limited in term:

That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years.<sup>12</sup>

Locke's comments blend traditional anti-monopoly sentiment with the Enlightenment commitment to the circulation of knowledge, a view he shared with other members of the recently founded Royal Society. His *Memorandum* was influential in securing the lapse of licensing in 1695, but it remained unpublished until the early nineteenth century.

Whether Locke's *Memorandum* was known to the drafters of the Statute of Anne is unclear, but the Statute shows both the influence of anti-monopoly sentiment and of the Enlightenment commitment to the circulation of knowledge. The title emphasizes the encouragement of learning: “An act for the encouragement of learning, by vesting the copies of printed books in the authors or publishers of such copies, during the times therein mentioned.”<sup>13</sup> And, although the preamble opens by addressing the need to protect literary property, it goes

10. Licensing Act, 1662, 14 Car. II, c. 33 (Eng.).

11. Letter from John Locke to Edward Clarke (Jan. 2, 1693), in *THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE* 366 (Benjamin Rand ed., 1927).

12. LORD PETER KING, *THE LIFE OF JOHN LOCKE* 208 (London, Henry Colburn 1829). On Locke's role in securing the end of licensing, see Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *LIBR.* 296-322 (1978).

13. Statute of Anne, 1709, 8 Ann., c. 19 (Eng.).

on to say that the purpose of the Act is also “the encouragement of learned men to compose and write useful books.”<sup>14</sup> In this way, the Statute aligns itself with broad civic purposes as well as with private property.<sup>15</sup> As originally introduced in Parliament, the booksellers' bill said nothing about term limits. These, along with the provision for authors, were added in the legislative process, probably because of the suspicion about booksellers' monopolies, as is suggested by the fact that the terms of protection are modeled on those of the Jacobean Statute of Monopolies.<sup>16</sup> Nonetheless, although the influence of anti-monopoly and Enlightenment ideas on the Statute of Anne is clear, the Statute is a sketchy document that did not in itself directly contribute much to the development of a discourse of the public domain.

What the Statute did, however, was set the stage for the legal debate over the booksellers' claims about perpetual copyright. The single most influential figure in this struggle, and the one who more than any other determined the frame in which the debate took place, was Lord Mansfield, the great Chief Justice of the Court of King's Bench. Mansfield certainly appreciated the progress of knowledge, but he saw the copyright question primarily as a matter of property rights, and in his opinion in *Millar* he formulated the classic statement of the author's natural right: Upon what basis was the author's common-law right founded?

From this argument—because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.<sup>17</sup>

Mansfield concluded that perpetual copyright followed as a matter of course from these fundamental principles. He had nothing to say about the kinds of issues John Locke had raised seventy years earlier, and most likely he knew nothing of Locke's *Memorandum*.

The most prominent opponent of the common-law right was Justice Joseph Yates, who cast the sole dissenting vote in *Millar* and who maintained that by their very nature writings, being immaterial, were incapable of being regarded as property. An author had a property in his manuscripts, of course, but the act of publication necessarily constituted a gift to the public. A published work was “like land thrown into the highway.”<sup>18</sup> The legislature might create a limited

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14. *Id.*

15. Ronan Deazley has recently emphasized the civic purposes of the Statute of Anne, arguing that the statute incorporates an exchange between the author and society in which the author receives a limited monopoly in return for making the work public. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* at 81 (2001) (unpublished Ph.D. dissertation, Queen's University of Belfast) (on file with author).

16. Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.).

17. *Millar v. Taylor*, 98 Eng. Rep. 201, 252 (K.B. 1769).

18. *Tonson v. Collins*, 96 Eng. Rep. 180, 185 (K.B. 1761). In this case, Yates was counsel for the defense. Yates later used a similar phrase in his minority opinion in *Millar*: “[W]hen an author prints

privilege as it had done in the Statute, but there could be no common-law right. Yates touched upon some of the arguments drawn from anti-monopoly and Enlightenment thought, noting that, if copyright were determined to be perpetual, works might be priced at exorbitant rates or arbitrarily withdrawn from circulation. Moreover, he invoked the concept of dedication to the public and, in speaking about land thrown into the highway, he even came close to the trope of a literary commons. Nevertheless, the heart of his position was a scholastic point about the nature of property. How could ideas, which have no bounds or marks or anything that is capable of visible possession, give rise to a common-law right of property?

Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable, from their own immateriality: no trespass can reach them; no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself . . .<sup>19</sup>

The legal struggle in which Mansfield and Yates were antagonists was thus only indirectly a struggle over knowledge and the public domain. It was essentially an argument over the theory of property. Moreover, in terms of logic and rhetorical power, Mansfield got the better of the day, for his argument not only invoked high-minded principles of fitness and justice but also implied a forward-looking theory of property. Yates's position, on the other hand, implied a rigid conception of property of a kind that would soon become outmoded.

*Donaldson* overturned *Millar*, but this climactic case, too, was framed in terms of property theory. Was there a common-law right of literary property? Did it survive publication? Was it taken away by the Statute? Before voting on whether to sustain the chancery injunction on which the case turned, the lords solicited the opinions of the twelve common-law judges on these questions. The judges were divided in their opinions, but it appears that a majority maintained that there was a common-law right, that it survived publication, and that it was not taken away by the Statute. In overturning *Millar*, then, the lords were probably going against the majority opinion of the judges. But on what grounds did they do so? What, in other words, was the rationale through which the public domain was finally confirmed? Given the nature of the process—the matter appears to have been decided by a simple voice vote—it is of course impossible to say. The major statement of the day, however, came from Mansfield's old political and legal antagonist Lord Camden, who delivered a long address to the House after the judges had spoken.

Camden began by tracing the legal record and explaining his specifically legal reasons for rejecting the common-law right. But then he moved to the broader grounds of public policy:

If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water.

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and publishes his work, he lays it entirely open to the public, as much as when an owner of a piece of land lays it open into the highway." *Millar*, 98 Eng. Rep. at 234 (Yates, J., dissenting).

19. *Millar*, 98 Eng. Rep. at 233 (Yates, J., dissenting).

They forget their Creator, as well as their fellow creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock.<sup>20</sup>

In this passage, Camden was perhaps echoing the distinguished Scottish jurist and author Lord Kames, who had recently published a speech delivered in a Scottish case in which he countered Lord Mansfield's opinion on the common-law right.<sup>21</sup> Whereas Mansfield had grounded his opinion in the fundamental principle of the individual's right to property, Kames grounded his in "the first principles of society." "Why," he asked, "was man made a social being, but to benefit by society, and to partake of all the improvements of society in its progress toward perfection?"<sup>22</sup> He went on to contend that the limited term was useful because it provided an incentive for authors at the same time that it avoided the evils of a perpetual monopoly which would raise the price of books and limit their sale to the rich. As a result, commerce would decline and fewer books would be written. Thus, Kames said, "a perpetual monopoly of books would prove more destructive to learning, and even to authors, than a second irruption of Goths and Vandals."<sup>23</sup>

Likewise, Camden asked rhetorically about the social nature of mankind. "Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species?"<sup>24</sup> Camden, too, touched upon anti-monopoly and Enlightenment themes. But Camden's speech did not emphasize the destructive potential of a perpetual monopoly; instead he focused on the meanness of writing for money. The climax of his speech would be much quoted in later years:

Glory is the reward of science, and those who deserve it, scorn all meaner views: I speak not of scribblers for bread, who tease the press with their wretched productions; fourteen years is too long a privilege for their perishable trash. It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press. When the bookseller offered Milton five pound for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pit-

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20. WILLIAM COBBETT, XVII THE PARLIAMENTARY HISTORY OF ENGLAND col. 999 (London, R. Bragshaw 1813).

21. The case was *Hinton v. Donaldson*, in which the Scottish Court of Session decided that, despite the King's Bench decision in *Millar*, so far as Scotland was concerned, there was no common-law right of literary property. 1 Hailes Dec. 535 (Sess. Cas. 1773). It was reported by Boswell in *The Decision of the Court of Session upon the Question of Literary Property*, and issued while *Donaldson* was pending so that the Scottish case might be taken into account in the lords' decision. See JAMES BOSWELL, THE DECISION OF THE COURT OF SESSION UPON THE QUESTION OF LITERARY PROPERTY (Edinburgh, James Donaldson 1774).

22. BOSWELL, *supra* note 21, at 19.

23. *Id.* at 20.

24. COBBETT, *supra* note 20.

tance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it.<sup>25</sup>

If copyright were confirmed as perpetual, Camden said:

All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public become as much their slaves, as their own hackney compilers are . . . . [E]very valuable author will be as much monopolized by them as Shakespeare is at present . . . .<sup>26</sup>

Thus, Camden combined a denunciation of the very idea of professional authorship with a derisive swipe at “dirty” booksellers.

Camden's speech was widely circulated in newspapers and magazines, and it was generally regarded as a key factor in the lords' vote against perpetual copyright. But the extravagance of his rhetoric and anachronistic contempt for literary commerce made him an easy target for, among others, the republican historian Catharine Macaulay. She responded immediately with a pamphlet in which she heaped sarcasm on the notion that worthy authors ought not to be concerned with money:

There are some low-minded geniusses, who will be apt to think they may, with as little degradation to character, traffic with a bookseller for the purchase of their mental harvest, as opulent landholders may traffic with monopolizers in grain and cattle for the sale of the more substantial product of their lands. They will be apt to consider, that literary merit will not purchase a shoulder of mutton, or prevail with sordid butchers and bakers to abate one farthing in the pound of the exorbitant price which meat and bread at this time bear . . . .<sup>27</sup>

The reverberations of his speech continued to be heard for many years with the arguments for the author's common-law right—now, typically, coming from authors themselves—often being fashioned as responses to Camden.

The poet Robert Southey, for example, who agitated for new copyright legislation in the early nineteenth century, singled out Camden's fervid passage about glory as the reward of science:

Is it possible that this declamation should impose upon any man? The question is simply this: upon what principle, with what justice, or under what pretext of public good, are men of letters deprived of a perpetual property in the produce of their own labours, when all other persons enjoy it as their indefeasible right—a right beyond the power of any earthly authority to take away? Is it because their labour is so light,—the endowments which it requires so common,—the attainments so cheaply and easily acquired, and the present remuneration so adequate, so ample, and so certain?<sup>28</sup>

Whereas Camden had cited Milton and Shakespeare as examples of authors who did not care about money, Southey noted that Milton's descendants had died in poverty and that Shakespeare's were still living in poverty. Many books of the highest merit achieved recognition slowly and therefore permanent copy-

25. *Id.* col. 1000.

26. *Id.* Kames had also mentioned that the “best authors write for fame.” BOSWELL, *supra* note 21, at 21. Camden, however, was much more dismissive of professional writers than was Kames.

27. CATHARINE MACAULAY, A MODEST PLEA FOR THE PROPERTY OF COPY RIGHT 14-15 (Bath, R. Cruttwell 1774).

28. *Inquiry in the Copyright Act*, 21 Q. REV. 211-12 (1819) (attributed without evidence to Robert Southey in *Quarterly Review Index*).



right was a necessity if the “reward of literary labour” was to be “in just proportion to its deserts.”<sup>29</sup>

The reaction continued in the late 1830s and early 1840s in the movement for copyright reform led by Thomas Noon Talfourd in collaboration with his friend William Wordsworth. Talfourd, too, invoked Camden's remark about glory.

When the opponents of literary property speak of glory as the reward of genius, they make an ungenerous use of the very nobleness of its impulses, and show how little they have profited by its high example . . . . The liberality of genius is surely ill urged as an excuse for our ungrateful denial of its rights . . . . Do we reward our heroes thus? Did we tell our Marlboroughs, our Nelsons, our Wellingtons, that glory was their reward, that they fought for posterity, and that posterity would pay them? We leave them to no such cold and uncertain requital; we do not even leave them merely to enjoy the spoils of their victories, which we deny to the outhour; we concentrate a nation's honest feeling of gratitude and pride into the form of an endowment, and teach other ages what we thought, and what they ought to think, of their deed, by the substantial memorials of our praise. Were our Shakespeare and Milton less the ornaments of their country, less the benefactors of mankind?<sup>30</sup>

Thus, the language of civil society—or rather the language of nationalism into which it had by this point mutated—could be deployed against the limited term as well as against the perpetuity.

Talfourd and Wordsworth both believed that copyright was a natural right of authors and should last forever, but they were willing to compromise on an extended term of sixty years to be computed from the death of the author. Their reform movement led to the Copyright Act of 1842, which extended the term to the life of the author plus seven years or a total of forty-two years, whichever was longer.<sup>31</sup> The pivotal figure in defeating Talfourd's movement for a greatly extended term was Thomas Babington Macaulay, whose speech to the House of Commons in 1841 has become a standard point of reference in discussions of the history of copyright, one often quoted for his epigrammatic description of copyright as “a tax on readers for the purpose of giving a bounty to writers.”<sup>32</sup> Macaulay refused to be drawn into theoretical discussion of the nature of property—the subject that had dominated the copyright debates in the courts—and he also avoided invoking Camden. Instead, he eloquently recapitulated the anti-monopoly tradition, combining it with a utilitarian calculus about the benefits to be derived from a limited monopoly. “Copyright is monopoly, and produces all the effects which the general voice attributes to monopoly,” Macaulay said.<sup>33</sup> Considered in itself, therefore, copyright had to be regarded as an evil, but it was necessary to submit to this evil in order to pro-

29. *Id.* at 213.

30. THOMAS NOON TALFOURD, *Speech Delivered in the House of Commons* (May 18, 1837), in *THREE SPEECHES DELIVERED IN THE HOUSE OF COMMONS IN FAVOUR OF A MEASURE FOR AN EXTENSION OF COPYRIGHT* 16-18 (London, Edward Moxon 1840).

31. Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.).

32. Thomas B. Macaulay, *A Speech Delivered in the House of Commons* (Feb. 5, 1841), in *VIII THE LIFE AND WORKS OF LORD MACAULAY* 201 (London, Longmans, Green, and Co. 1897).

33. *Id.* at 198.

vide for authors. But, he added, “the evil ought not to last a day longer than is necessary for the purpose of securing the good.”<sup>34</sup>

The nineteenth century controversy over Talfourd's copyright campaign can be understood as a recapitulation of the eighteenth century literary property debates. Once again, the issue of perpetual copyright was raised, and once again the legislature rejected the idea of a perpetual monopoly. But the notion that an author really *should* have a perpetual copyright remained alive after 1842, as did the memory of Lord Camden's speech. Thus, in 1879, Eaton S. Drone, the author of a standard treatise on British and U.S. copyright, praised Lord Mansfield's argument for the author's common-law right as “one of the grandest judgments in English judicial literature,”<sup>35</sup> and argued that *Donaldson* was wrongly decided through the influence of Lord Camden's “specious harangue.”<sup>36</sup>

It would seem that this extravagant speech would have moved the peers only to disgust; that the highest judicial tribunal of England, deliberating on one of the greatest questions ever brought before it, would have been guided by the pure principles which had been so forcibly expounded by the Chief Justice and the profoundest jurists of England, rather than by the fallacious theories of Judge Yates and the Sophomoric rhetoric of Lord Camden. But it was not so.<sup>37</sup>

Drone was writing only a few years before the term “public domain” entered Anglo-American copyright discourse through the French of the Berne Convention.<sup>38</sup> This reminds us that, though one might speak with Yates of a published work as a “gift to the public” or as “land thrown into the highway,” or one might, as Camden did, employ the Latin tag *publici juris*, there was, in the early period, no positive term in which to speak affirmatively about the public domain.

The one strong form of discourse that was available to counter the arguments for perpetual copyright was the anti-monopoly tradition. Although this tradition reached back to the sixteenth century, for various reasons it did not lead to an effective major statement until Macaulay's speech in 1841. Locke's *Memorandum* had, of course, invoked the old anti-monopoly feeling, but the *Memorandum* remained unpublished until the nineteenth century. Ironically, Locke was most often cited by the supporters of the perpetuity, who relied on his labor theory of property for the foundation of their claim, but who were

34. *Id.* at 199.

35. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 37 (Boston, Little, Brown and Co. 1879).

36. *Id.* at 39.

37. *Id.* at 40. Drone also argued that *Wheaton v. Peters*, 33 U.S. 591 (1834), the foundational American case in which copyright was held to be limited in term, was of dubious authority. DRONE, *supra* note 35, at 43-49. It is worth noting that the line of Anglo-American copyright treatises from Robert Maugham to Drone strongly supported authors' rights and, among other reforms, the extensions championed by Sergeant Talfourd. *See id.*; ROBERT MAUGHAM, A TREATISE ON THE LAWS OF LITERARY PROPERTY (1828).

38. On the use of the term in Anglo-American discourse, see Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 975 n.60 (1990).

unaware that he actually had opposed perpetual copyright. The sketchy and ambiguous Statute of Anne, clear though it was on the matter of the terms, was not an effective source of rationale for the defense of the general public interest either. Perhaps the most important early published statement in defense of the public interest was Lord Kames's speech, but, despite Kames's personal stature both as a jurist and an author, his speech was delivered in a comparatively marginal context and it was soon lost in the publicity that attended the *Donaldson* decision and Lord Camden's address to the House of Lords.

#### IV

##### THE WEAKNESS OF PUBLIC DOMAIN DISCOURSE IN THE LAW

James Boyle notes that the anti-monopoly position did not represent an affirmative defense of the public interest so much as it did a criticism of literary property.<sup>39</sup> Perhaps, when blended with Enlightenment ideas about the circulation of knowledge as it was by both Locke and Kames, the anti-monopoly position might be understood as having something of an affirmative dimension. Nonetheless, it is clear that such arguments were better suited to legislative deliberation than to common law debate. Indeed, every time the matter came before the legislature, the perpetuity was defeated.<sup>40</sup> Whenever it came before the English law courts, however, the issue was approached in terms of property theory. Samuel Johnson might speak eloquently about works belonging to the public for the general good of the world, but the lawyers had a harder time than Johnson in dismissing a property right that, as even Johnson said, “should from its nature be perpetual.”<sup>41</sup> That the English lawyers were able to develop a strong discourse of property rights but not an equivalent discourse of public rights should not be very surprising. As the adage has it, possession is nine-tenths of the law—or, as I would like to understand it, the law is mostly about property. The eighteenth century common lawyers had a much easier time thinking about copyright in terms of property rights—either pro or con—than they did in thinking about how to formulate the claims of civil society. The conclusion that one is forced to reach, then, is that in the early period in which modern copyright was forming in England, the legal discourse related to the public domain was feeble when compared to the strong arguments for authors' property rights.

The comparative weakness of public domain discourse contributes to Eaton S. Drone's conviction that *Donaldson* was wrongly decided,<sup>42</sup> and the compara-

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39. Boyle, *supra* note 1, at 120-125.

40. That is to say, in 1709, when the House of Commons limited the term in the Statute of Anne; in 1774, when the House of Lords refused to confirm the perpetuity in *Donaldson*; and in 1842, in the context of Talfourd's movement for an extended term, when Parliament limited the term to the author's life plus seven years. Although *Donaldson* was, of course, a legal decision, nonetheless, the act of overturning the chancery decree by a vote of the full House of Lords was in practice more like a legislative than a legal decision.

41. BOSWELL, *supra* note 5, at 546.

42. DRONE, *supra* note 35, at 40-42.

tive weakness of public domain discourse remains evident today. As Lawrence Lessig puts it, “to question the universality and inevitability of complete proper-tization is [today] to mark yourself as an outsider.”<sup>43</sup> The two hundred years of progressive expansion of property rights that followed the resolution of the eighteenth century copyright debates resulted in the present state of copyright. In this period, protection has been systematically extended to cover a wider and wider range of materials for longer and longer periods of time. Macaulay's “tax on readers” speech, for example, was framed in opposition to Talfourd's proposal that the term of copyright be extended to the life of the author plus sixty years, but in both Britain and the United States, the basic copyright term is now longer than that which Macaulay opposed. True, Locke and Johnson both imagined copyright terms that were long and based on the author's life, but neither imagined anything like the depth of protection that modern copyright affords. In the early period, protection did not extend to abridgements or translations, and the right protected was specifically the right to print and publish. Today, protection extends to every kind of derivative that may be produced from a work, and the right protected is not merely the right to print but to make copies of any kind including photocopies for one's own use. Copyright has therefore ceased to be primarily a matter of concern to booksellers; or even a matter of concern to booksellers and authors. It has become a subject of general concern.

## V

### CONCLUSION

Habermas's study of the public sphere in connection with the dual emergence of copyright and the public domain in the eighteenth century also describes the structural transformation of the public sphere, the process that he describes as its “hollowing out” in the context of advanced capitalism in the nineteenth and twentieth centuries.<sup>44</sup> Just as the early history of copyright is embedded in the formation of the public sphere, so the later history is embedded in the structural transformation of the public sphere. Any detailed discussion of that history is beyond the scope of this discussion, but it is apparent that the eighteenth century debates did not produce a legal discourse of public rights strong enough to balance the discourse of property rights.<sup>45</sup> Perhaps the single

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43. Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L. J. 1783, 1784 (2002).

44. HABERMAS, *supra* note 4, at 141-80.

45. My focus has been on the English copyright debates of the eighteenth century, but in revolutionary France and the republican United States the discussion was somewhat different from that in Britain. In late eighteenth century France, the author was represented in some quarters as a public servant with the nation as his or her heirs, but within a few decades authorial legal identity began its course toward reprivity. See CARLA HESSE, PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789-1810, at 83-124, 205-39 (1991). American discourse of the Federal period also emphasized the public nature of print. See Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21 (1997). How do we get from the public concerns of the Federal period to the emphatically privatized position of Eaton S. Drone in 1879? One turning point is *Wheaton v. Peters*, 33 U.S. 591

most important moment in the establishment of the public domain was, as this article suggests, the foundational case of *Donaldson* in 1774, which confirmed that the term of protection was limited. But, at the same time, *Donaldson* appears in hindsight to have been, so far as the development of a discourse of the public domain is concerned, something of a rhetorical disaster. Lord Camden's famous speech to the House of Lords may have influenced the lords in their decision, but it also probably did long-term damage to the cause of the public domain.

At the present moment, as we attempt to argue for the value of the public domain, we need to understand that we are fashioning a rhetoric as well as a politics of the public domain. Casting a defense of the public domain on the model of the environmental movement seems promising. As Boyle notes, before the movement, the environment was in effect invisible.<sup>46</sup> Likewise, one element of the task today is to make the public domain visible—to develop an affirmative discourse that will make it a positive and prominent part of the social and cultural landscape. Part of the rhetorical strength of such an environmental model is that it draws on a metaphor that is already deeply embedded in copyright thought. Rhetoric is crucial. And the English copyright debates of the eighteenth century illuminate both the difficulties and the importance of the rhetorical task.

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(1834), in which, as McGill notes, the U.S. Supreme Court emphasized the limited nature of U.S. copyright, but also, I would add, incorporated the property discourse of the English debates into American law. For an excellent comparative discussion of French and American copyright law in the early period, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in *OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW* 131 (Brad Sherman & Alain Strowel eds., 1994).

46. Boyle, *supra* note 1, at 69-74.