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Contracts Mattered as Much as Copyrights

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CONTRACTS MATTERED AS MUCH AS COPYRIGHTS

by ROBERT W. GOMULKIEWICZ*

ABSTRACT

Scholars have begun to appreciate the fundamental role that contracts played in the development of copyrights. Contracts gave copyrights vitalilty. This article explores the network of book publishing contracts that formed the legal infrastructure for a pre-modern "internet" at the dawn of copyright law in Great Britain in the eighteenth century. Drawing on insights from archival research, the article shows how this network of copyright contracts advanced an important goal of copyright: the spread of ideas and information throughout all parts of society. Appreciating the historical significance of copyright contracts provides valuable context for modern debates about copyright policy. Indeed, contracts matter as much as copyrights in fostering innovation in the modern information economy because contracts enable the beneficial sharing of ideas and information. This insight about contracts is particularly vital for those judges and lawmakers who make decisions about innovation policy, including the scope of copyright law's first sale doctrine and the enforceability of software license agreements.

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INTRODUCTION

Copyright scholars focus on copyright law. They evaluate whether the presence or absence of legal protection encourages the creation and distribution of works of authorship. Scholars debate, for example, the appropriate duration of exclusive copyrights,[1] the adequacy of fair use privileges,[2] and the proper remedies for infringement.[3] The implicit assumption is that if policymakers can adjust copyright law optimally, then society can maximize copyright's benefits and minimize its negative effects.[4]

Recently, scholars have broadened this focus to include the use of contracts with copyrighted works. These scholars point out that the role of contracts in the creation and distribution of works of authorship is a criti-

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[1] *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 134 (2004).

[2] *See, e.g.*, Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

[3] *See, e.g.*, BJ Ard, *Notice and Remedies in Copyright Licensing*, 80 MO. L. REV. 313 (2015).

[4] *See generally* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011).

cal part of the copyright protection equation.[5] Perhaps most prominently, copyright contracting is fundamental to both technological and business model innovation in the software industry.[6] The combination of copyright and contract, for instance, helps explain the innovation fostered in the open source software revolution.[7]

The use of contracts with intellectual property did not begin in the modern information age, of course. Licensing is as old as intellectual property itself — licensing is specifically mentioned in the 1474 Venetian Patent Act.[8] Copyright scholars studying England's 1710 Statute of Anne, which is arguably the oldest copyright legislation,[9] have also noticed the importance of contracts. Lionel Bently, for example, explored the use of contracts in his study of the reversion right in the Statute of Anne.[10] Rebecca Curtin examined the "transactional origins of author's copyright in

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[5] *See, e.g.*, Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111 (1999); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891 (1998) [hereinafter Gomulkiewicz, *License Is the Product*]; Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption and Software License Terms*, 45 DUKE L.J. 479 (1995).

[6] *See* ROBERT W. GOMULKIEWICZ, SOFTWARE LAW AND ITS APPLICATION 276-79 (2d ed. 2018).

[7] *See* Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution,* 36 HOUS. L. REV. 179 (1999).

[8] *See* Giulio Mandich, *Venetian Patents (1450–1550)*, 30 J. PAT. & TRADEMARK OFFICE SOC'Y 166, 177 (1948) ("[E]very person who shall build any new and ingenious device in this City, not previously made in our Commonwealth, shall give notice of it to the office of our General Welfare Board . . . . It being forbidden to every other person in any of our territories and towns to make any further device conforming with and similar to said one, *without the consent and license of the author* for the term of 10 years." (emphasis added)). *See also* Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 21-50 (Deazley, Kretschmer & Bently eds. 2010).

[9] *See* HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710 (1956); Tomás Gómez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-At-Law Requirement*, 81 S. CAL. L. REV. 1197, 1218 (2008); *but see* Lionel Bently, *Introduction to Part I: The History of Copyright*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE 7-13 (Bently, Suthersanen & Torremans eds., 2010) (qualifying and challenging this view of the Statute of Anne).

[10] Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKLEY TECH. L.J. 1475 (2010) [hereinafter Bently & Ginsburg, *Anglo-American Authors' Reversion Rights from the Statute of*

England" in her work.[11] Peter Lindenbaum[12] and Michael Suarez[13] likewise have noted the important (and underappreciated) role of contracts in understanding the historical relationship between authors and publishers.

Appreciating the historical importance of contracts alongside copyright law serves an important goal: it eases the concern that intellectual property licensing is a new device dreamed up by intellectual property owners to exploit their exclusive rights in an unfair manner.[14] Lessons from history[15] explain how the use of contracts can (and did) advance the fundamental goals of copyright. We see that contracts benefitted authors, publishers, and consumers of works of authorship. And, most importantly, we see that contracts helped foster the spread of ideas and information throughout society.[16]

Anne]. In this co-authored article, Professor Bently wrote the section exploring the reversion right in the Statute of Anne.

[11] Rebecca Schoff Curtin, *The Transactional Origins of Author's Copyright*, 40 COLUM. J.L. & ARTS 175 (2016) [hereinafter Curtin, *Transactional Origins*]. *See also* Rebecca Schoff Curtin, *The "Capricious Privilege": Rethinking the Origins of Copyright under the Tudor Regime*, 59 J. COPYRIGHT SOC'Y U.S.A. 391 (2012); Rebecca Schoff Curtin, *Hackers and Humanists: Transactions and the Evolution of Copyright*, 54 IDEA 103 (2013) [hereinafter Curtin, *Hackers and Humanists*].

[12] Peter Lindenbaum, *Authors and Publishers in the Seventeenth Century II: Brabazon Alymer and the Mysteries of the Trade*, 31 THE LIBRARY 32, 50 (2002) [hereinafter Lindenbaum, *Mysteries of the Trade*].

[13] Michael F. Suarez, *To What Degree Did the Statute of Anne Affect Commercial Practices of the Book Trade in Eighteenth-century England? Some Provisional Answers About Copyright, Chiefly from Bibliography and Book History*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE 54, 67 (Bently, Suthersanen & Torremans eds., 2010).

[14] *See* Jonathan M. Barnett, *Why Is Everyone Afraid of IP Licenses?*, 30 HARV. J.L. & TECH. 123 (2017); Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687 (2004) [hereinafter Gomulkiewicz, *Getting Serious*] (noting that in the past twenty years, over 100 law-review articles had been written about software license agreements, almost all of them critical of software licensing).

[15] BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760–1911, at 1-2 (2002) [hereinafter SHERMAN & BENTLY] ("[W]e believe that many aspects of modern intellectual property law can only be understood through the lens of the past." "[M]uch of what is taken as unique and novel about the interaction of intellectual property law and the new environment in which it finds itself can, especially when placed in its historical context, be seen as examples of the law working through an on-going series of problems that it has grappled with for many years."). *Cf.* JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) (using historical research on the development of the right of publicity to provide insights to address today's policy challenges).

[16] Copyright protection can be justified based on principles of natural rights, personhood, and/or utilitarianism. *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011). Ultimately, copyright protection serves the cause of

Scholars studying the historical relationship between contracts and copyrights during the seventeenth, eighteenth, and mid-nineteenth centuries in Britain, a period some scholars call the "pre-modern" era of British intellectual property law,[17] tend to focus on those aspects of author-publisher agreements that relate to the creation of works of authorship. For example, they focus on what contracts said about the remuneration given to and the control retained by authors.[18] However, there is another critical dimension of copyright contracts: the contractual dealings between pub-

promoting the broad availability of works and their ideas. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y 425, 435 (2002); Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 384 (2009); *see also* JAMES RAVEN, THE BUSINESS OF BOOKS: BOOKSELLERS AND THE ENGLISH BOOK TRADE 1450–1850, at 45 (2007) [hereinafter RAVEN, THE BUSINESS OF BOOKS] (ultimate goal of publishing is to spread ideas and knowledge).

17 SHERMAN & BENTLY, *supra* note 15, at 2-5 (coining and describing the term "pre-modern" as it relates to intellectual property protection in Great Britain).

18 *See. e.g.*, David Fielding & Shef Rodgers, *Copyright Payments in Eighteenth-Century Britain, 1701–1800*, 18 THE LIBRARY 1 (2017); Peter Lindenbaum, *Milton's Contract*, 10 CARDOZO ARTS & ENT. L.J. 439 (1992) [hereinafter Lindenbaum, *Milton's Contract*]; Peter Lindenbaum, *Mysteries of the Trade*, *supra* note 12; Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations*, 17 THE LIBRARY 250 (1995) [hereinafter Lindenbaum, *New Evidence*]; Bently & Ginsburg, *Anglo-American Authors' Reversion Rights from the Statute of Anne*, *supra* note 10. For additional explorations of the author-publisher relationship, *see, e.g.*, Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371 (2016); Wendy Gordon, *The Core of Copyright: Authors Not Publishers*, 52 HOUS. L. REV. 613 (2014); Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381 (2009); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE. L.J. 186 (2008); Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y 425 (2002).

lishers[19] and the related "downstream"[20] features of author-publisher contracts.[21]

Book history scholars such as Hugh Amory, Terry Belanger, and Cyprian Blagden have explored copyright transactions between British booksellers in the pre-modern era of copyright.[22] This article builds on that scholarship by arguing that copyright contracts between publishers and the related downstream aspects of author-publisher contracts formed a critical part of the legal infrastructure for the mass distribution of works of authorship.[23] The article highlights the importance of these copyright contracts in fostering the widespread dissemination of ideas and information. Indeed, this network of contractual relationships created a pre-modern "internet" in Great Britain — a network where authors of all types and stations, including politicians, preachers, poets, and polemicists, could bring their works into the marketplace of ideas.[24]

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19 In using the term "publisher" I mean those who invested and dealt in the ownership of copyrights rather than those who simply printed or sold books. As discussed *infra*, these publishers were known in the eighteenth-century as "booksellers." *See* Michael Treadwell, *London Trade Publishers, 1675–1750*, 4 THE LIBRARY 99 (6th ser. 1982); *see also* LISA MARUCA, THE WORK OF PRINT: AUTHORSHIP AND THE ENGLISH TEXT TRADES, 1660–1760, at 66-67 (2007). In addition to investing in copyrights, when it came time to produce an edition of a book, booksellers put up money for the cost of printing, binding, and paper in proportion to the shares of the copyright that the bookseller owned and, after the book edition was manufactured, the bookseller received a proportionate share of book copies which the bookseller sold wholesale and/or at retail. *See* Terry Belanger, *Booksellers' Trade Sales,1718–1768*, 30 THE LIBRARY 281, 285 (5th ser. 1975) [hereinafter Belanger, Booksellers' Trade Sales *1718–1768*].

20 The "upstream" aspects of copyright contracts focus on the *creation* of works of authorship; the "downstream" aspects of copyright contracts focus on the *distribution* of works of authorship.

21 Some scholars have noted certain downstream aspects of author-publisher contracts. *See* Curtin, *Transactional Origins*, *supra* note 11, at 184, 194, 203, 207, 212, 214.

22 *See* Hugh Amory, "De Facto *Copyright"? Fielding's* Works *in Partnership, 1769–1821*, 17 EIGHTEENTH-CENTURY STUDIES 449 (1984); Terry Belanger, *Booksellers' Trade Sales, 1718–1768*, *supra* note 19; Terry Belanger, Booksellers' Sales of Copyrights: Aspects of the London Book Trade 1718–1768 (unpublished Ph.D. dissertation, Columbia University 1970) [hereinafter Belanger, Booksellers' Sales of Copyrights: Aspects of the London Book Trade 1718–1768]; Cyprian Blagden, *Booksellers' Trade Sales, 1718–1768*, 5 THE LIBRARY 243 (5th ser. 1951) [hereinafter *Booksellers' Trade Sales, 1718–1768*]; NORMAN HODGSON & CYPRIAN BLAGDEN, THE NOTEBOOK OF THOMAS BENNET AND HENRY CLEMENTS: WITH SOME ASPECTS OF BOOK TRADE PRACTICE (1951).

23 This article draws on insights gained from studying manuscripts held at the University of Cambridge, the University of Leeds, and the British Library.

24 *See generally* MARJORIE PLANT, THE ENGLISH BOOK TRADE: AN ECONOMIC HISTORY OF THE MAKING AND SALE OF BOOKS (1939) [hereinafter PLANT, THE ENGLISH BOOK TRADE]; WILLIAM ST. CLAIR, THE READING NATION IN THE RO-

The article proceeds in several parts following this introduction. Section I summarizes the genesis of book publishing in Great Britain and Section II the corresponding evolution of copyright law, including passage of the Statute of Anne. Section III describes the historical evidence of contracts between publishers as well as the related downstream aspects of author-publisher contracts. In particular, Section III looks at copyright assignment contracts between publishers and the related transferability provisions in author-publisher contracts. Section III discusses what these contracts teach us about the importance of contracting in the story of copyright protection and how contracts contributed to a flourishing marketplace of ideas in Great Britain.

Section IV addresses how book publication contracts fostered the publication of books that had little or no commercial value. Section V illustrates how publishers used a variety of contractual arrangements to provide low cost copies to users for charity, a pre-modern example of price discrimination that is common today in software licensing. Section VI explores the use of contracts in the face of both very weak and very strong exclusive rights using case studies based on archival documents. Finally, Section VII discusses modern applications and policy implications of lessons from the pre-modern era of copyright and contract, concluding that contracting remains as important as copyrighting in the modern information economy.

I. BRITISH BOOK PUBLISHING IN THE PRE-MODERN COPYRIGHT ERA

Book production began with scribes composing manuscripts at the behest of governments, churches, or wealthy patrons. Such bespoke books did little to directly communicate information or ideas to the great majority of the population. However, the printing press revolutionized book production and distribution beginning in the mid-fifteen century.[25] As the mass production and distribution of books accelerated, books became an important agent for directly circulating ideas and information across all levels society.[26] Books established and challenged standards of behavior, acted as vehicles for social cohesion and dissent, and promoted political and religious control and independence.[27]

MANTIC PERIOD (2004) [hereinafter ST. CLAIR, THE READING NATION]; 5 THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN 1695-1830 (Suarez & Turner eds., 2009) [hereinafter 5 CAMBRIDGE HISTORY OF THE BOOK].

25 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 224.

26 *See generally* ELIZABETH EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE (1979).

27 *See* ST. CLAIR, THE READING NATION, *supra* note 24, at 1-18.

Continental Europe dominated the early production of printed books, but by the early eighteenth-century, Great Britain had become a book production powerhouse.[28] Consequently, the book publishers of Britain became critical conduits for the spread of ideas and information to the general public. Indeed, we can think of the British book publishers as entrepreneurs of culture for the English-speaking world, including England's colonies in North America.[29]

II. BRITISH COPYRIGHT LAW AND THE STATUTE OF ANNE

British monarchs were not enamored with the declining control of the marketplace of ideas that they experienced due to the mass market publishing of books, especially ideas about religion and politics. They asserted royal control by mandating that no book could be published unless it was licensed by the crown.[30] In 1557 Queen Mary I appointed an agent for this purpose: the Stationers' Company which was the book publishers' guild.[31] To acquire the legal right to print a book thereafter, a publisher had to enter the book's title on the Stationers' Company's registry.

As the book publishing industry matured, those known generally as "stationers" played several roles.[32] Those who primarily manufactured

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[28] JAMES RAVEN, PUBLISHING BUSINESS IN EIGHTEENTH CENTURY ENGLAND 16, 188 (2014).

[29] By the nineteenth century, British publishers were dispatching books, magazines, and other printed materials not only to England, Scotland, and Europe, but to North America, the Caribbean, India, Africa, Australasia, and the Far East. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 103-04, 144-53, 169. "The book trade advanced as a trade in argument, in knowledge, in belief, in instruction, and in entertainment." JAMES RAVEN, PUBLISHING BUSINESS IN EIGHTEENTH CENTURY ENGLAND 33 (2014) [hereinafter RAVEN, PUBLISHING BUSINESS].

[30] *See generally* RONAN DEAZLEY, ON THE ORIGINS OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (2004).

[31] *See* William Cornish, *The Statute of Anne 1709–10: Its Historical Setting*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE 17 (Bently, Suthersanen & Torremans eds. 2010) [hereinafter Cornish, *The Statute of Anne*]. The Stationers' Company worked in liaison with leading officials from the Church and State to police its members as well as unlicensed publishing. *Id.*

[32] *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 125-27; PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 66-68; *see also* Terry Belanger, *From Bookseller to Publisher: Changes in the London Book Trade, 1750-1850*, *in* BOOK SELLING AND BOOK BUYING: ASPECTS OF NINETEENTH CENTURY BRITISH AND NORTH AMERICAN BOOK 7 (Richard Langdon ed., 1978). *See generally* CYRUS BLAGEN, THE STATIONERS COMPANY: A HISTORY 1403–1959 (1960). For a modern example of the roles of printing, publishing, and bookselling, *see* Jeffrey A. Trachtenberg, *Amazon Rewrites Publishing By Pushing Its Own Books*, WALL ST. J., Jan. 17, 2019, at A1, A8 (tracing Amazon's evolution from seller of books, to provider of printing services for authors, to publisher of its own books).

books were called "printers" or "binders" of books. Those who controlled the rights to print and re-print books were known as "booksellers."[33] The booksellers were the richest and most powerful of the stationers.[34] Booksellers such as Andrew Millar, Thomas Osbourne, and Jacob Tonson Sr. were prominent public figures of their day.[35]

By the seventeenth century the crown's licensing system for books relied on Parliamentary legislation and Parliament took the precaution of requiring that the Licensing Act be renewed from time to time.[36] The Company of Stationers' privilege ended in 1695 when the Licensing Act expired. By this time Parliament was wary of renewing the great power of the booksellers. In 1710, Parliament took a different approach: it gave authors, rather than booksellers, the exclusive right to print books for a fourteen-year period with the potential for an additional fourteen-year renewal term.[37] This statute is known as the Statute of Anne, although most scholars doubt that Queen Anne had any particular interest in the legislation.[38]

Not only did the Statute of Anne attempt to restrain the power of the booksellers, it also recognized the emerging influence of authors, including authors such as Alexander Pope and John Dryden who could make a liv-

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[33] *See* Treadwell, *supra* note 19, at 99. Booksellers owned the copyrights to works they published while those known as "trade publishers" did not. *Id.* at 100-04. As bookseller William Strahan explained to an American correspondent: "[w]hat constitutes a Bookseller is having Property in Copies." *See* R.D. Harlen, *William Strahan: Eighteenth-Century Printer and Publisher* 236 n.58 (1960) (unpublished Ph.D. dissertation, University of Michigan).

[34] RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 37, 125-26.

[35] Millar and Osbourne participated in a concerted but ultimately unsuccessful effort by London booksellers to assert a perpetual common law copyright after passage of the Statute of Anne in the cases *Osbourne v. Donaldson*, *Millar v. Donaldson*, and *Millar v. Taylor*. Early nineteenth century biographer Thomas Dibdin in his *Bibliomania* called Osbourne the most celebrated bookseller of his day, although Osbourne was also mocked by Alexander Pope in the 1743 edition of *The Dunciad*. Tonson championed John Milton and John Dryden, brought Shakespeare back to popularity, and befriended aspiring authors like Alexander Pope. *See generally* G.F. PAPALI, JACOB TONSON, PUBLISHER: HIS LIFE AND WORK 110-15 (1968) [hereinafter PAPALI , JACOB TONSON, PUBLISHER].

[36] RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 125-26.

[37] The legislation's official title was: "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchaser or purchasers of such copies, during the times therein mentioned . . . ." The legislation is available at: *Primary Sources on Copyright* (1455-1900), Arts & Humanities Research Council, www.copyrighthistory.org (last visited Jan. 24, 2019), http://www.copyrighthistory.org/record/uk_1710a.

[38] Cornish, *The Statute of Anne*, *supra* note 31, at 17.

ing from their writings.[39] According to the legislation's preamble, the statute sought to prevent publishing books without the author's consent, which had been to "their very great detriment and too often to the ruin of their families," and to encourage authors "to compose and write useful books."[40]

After passage of the Statute of Anne, however, the booksellers tried to re-assert their power by claiming a perpetual common law copyright that survived Parliament's time-limited statutory copyright. At first the booksellers were successful when a divided King's Bench in *Millar v. Taylor* concluded that copyright was a creature of common law and thus lasted in perpetuity.[41] However, in 1774 the House of Lords came to a different conclusion in *Donaldson v. Beckett*, holding that published works were subject to the durational term of the Statute of Anne.[42]

III. COPYRIGHT ASSIGNMENT CONTRACTS INVIGORATED THE MARKETPLACE OF IDEAS

This Section explores bookseller to bookseller copyright assignment contracts, as well as the related "further assignment" aspects of author-bookseller contracts, and shows how, taken together, these contracts invigorated the marketplace of ideas in the pre-modern era of copyright.

A. "Further Assignments" in Author-Bookseller Contracts

Even though enactment of an author-owned copyright seemed like a dramatic paradigm shift, most authors continued to assign their copyrights to their booksellers in the decades following Parliament's enactment of the Statute of Anne.[43] Booksellers even used assignment contracts to counteract and capture the reversion right that had been given to authors in the Statute of Anne.[44]

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[39] *See generally* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Dustin Griffin, *The Rise of the Professional Author?*, *in* 5 CAMBRIDGE HISTORY OF THE BOOK, *supra* note 24, 132-45; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH CENTURY STUDIES 425 (1984).

[40] Cornish, *The Statute of Anne*, *supra* note 31, at 21-22.

[41] 98 ENG. REP. 201 (K.B.) (1769).

[42] 98 ENG. REP. 257 (1774). *See generally* Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 45 (2014).

[43] There were some notable exceptions, but that was the general rule. For most authors, surrender of the copyright in advance appeared the less risky and troublesome option; by assigning their copyrights, authors gained immediate compensation and stepped away from further participation in the "unpredictable business of publishing." RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 242.

[44] *See generally* Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKLEY TECH. L.J. 1475 (2010).

Some scholars have concluded that post-Statute of Anne author-to-bookseller assignment contacts show that copyright law did little to change things for authors in commercial reality.[45] However, by focusing on the circumstances of authors, scholars have largely ignored a significant aspect of these contracts.[46] What is particularly notable about the assignment contracts is not only that they assigned copyrights to booksellers in the first place, but also that the contracts allowed booksellers to further assign the copyrights to other booksellers.

The right to further assign provided a crucial part of the legal foundation for the market for copyrights in the pre-modern copyright era. Further assignment mattered just as much as the first assignment, as "copyright shares became major tradeable assets."[47] Consequently, the further assignment right allowed booksellers to keep works alive to fuel the marketplace of ideas, as explored in greater detail below.

Scholars have discovered many historical copyright assignment contracts between authors and booksellers. The earliest extant example is the 1667 contract between John Milton and Samuel Simmons (also spelled "Symons") for Milton's *Paradise Lost*.[48]

Here is a transcription of the assignment clause[49] in the Milton-Simmons contract:

> These Presents made the 27th day of April 1667 between John Milton, gen. of [the one part] and Samuel Symons printer of [the other part] Witness That the said John Milton in consider[con] of fiue pounds to him now paid by the said Sam Symons, & other the considerations hereund[er] mencoed, Hath *given and assigned*, and by these [presents] doth *giue, grant & assigne* vnto the said Sam Symons, *his executors, and assignees*, All he Booke, Copy, or Manuscript of a Poem intitluled Paradise lost, or by whatsoever other title or name the same is or shalbe called or distinguished, now lately Licensed to be printed, Together wth the full bene-

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[45] *See, e.g.*, Michael F. Suarez, *To What Degree Did the Statute of Anne Affect Commercial Practices of the Book Trade in Eighteenth-century England? Some Provisional Answers about Copyright, Chiefly from Bibliography and Book History*, *in* GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE 54, 67 (Bently, Suthersanen & Torremans eds., 2010).

[46] *But see* Curtin, *Transactional Origins*, *supra* note 11, at 203 (identifying the commercial importance of the assignability of Milton's contract for *Paradise Lost*); Amory, *supra* note 22, at 454-55 (1984) (noting the importance of negotiability of copyright shares acquired at copyright auctions).

[47] RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 126. However, authors and booksellers may have had different perspectives on copyrights as property rights. *See* Simon Stern, *Copyright as Property Right? Authorial Perspectives in Eighteen-Century England*, 9 U.C. IRVINE L. REV. 461 (2019).

[48] *See* Peter Lindenbaum, *Milton's Contract*, 10 CARDOZO ARTS & ENT. L. J. 439, 440-41 (1992).

[49] 4 THE LIFE RECORDS OF JOHN MILTON 429 (J. Milton French ed., 1956).

> fit, profit, & advantage thereof, or [which] shall or may arise thereby . . . . (Emphasis added.)

Notably, the Milton-Simmons contract contains a "further assignment" provision.

Additionally, we see significant evidence of "further assignment" contractual provisions in the British Library's Upcott Collection[50] where nearly every fully articulated author-bookseller contract[51] permits further assignment.[52] The importance of the further assignment provision in author-bookseller contracts is highlighted, for example, by an insertion in a March 14, 1706 contract between bookseller Jacob Tonson[53] and Reverend Laurence Echard for Echard's *History of England*.[54] In a draft of the contract, one of the parties inserted the words "or their Executors admins or assigns" after the copyright assignment provision.[55] Clearly, something important had been omitted from the body of the text in the initial drafting and someone added the appropriate wording via an insert on a re-read of the text. Indeed, in a subsequent version of the contract (presumably the final version, written in more elegant handwriting), the further assignment wording appears in the body of the text.[56]

B. Bookseller to Bookseller Assignment Contracts

William Somerville was born in 1677 to a well-established country family in Staffordshire, England. He studied at Winchester College and at New College, University of Oxford, and then studied law at the Middle

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50 The Upcott Collection is an extensive collection of book author and bookseller documents from the pre-modern era of copyright compiled in 3 volumes by antiquary and autograph collector William Upcott (1779-1845), currently held at the British Library. *See* Brit. Lib. Add MS 38728, 38729, 38730. Volume I is titled *Original Assignments of Manuscripts Between Authors and Publishers 1703–1810 principally for Dramatic Works*. Brit. Lib. Add MS 38728. Volume II is titled *Original Assignments of Manuscripts Between Authors and Publishers principally for Mathematical & Elementary Works 1707–1818*. Brit. Lib. Add MS 38729. Volume III is titled *Original Assignments of Copyrights of Books and other Literary Agreements between various Publishers 1712–1822*. Brit. Lib. Add MS 38730.

51 The Upcott Collection contains many receipts and other documents that provide evidence of a contract in addition to several fully articulated contracts.

52 *See* Brit. Lib. Add MS 38728 at 26, 29, 37, 43, 45, 55, 107, 115, 117, 128-129, 142, 146, 148, 150, 152, 155, 159, 161, 200, 206, 210; Brit. Lib. Add MS 38729 at 20, 22, 24, 25, 27-28, 31-32, 50, 85, 87, 89, 91, 93, 95, 102, 104, 135, 140, 143, 152; *but see* Brit. Lib. Add MS 38729 at 79, 82-83 (Dodson-Nourse contracts).

53 Jacob Tonson Sr. was a prominent eighteen century publisher of works by John Dryden and John Milton's *Paradise Lost*. *See generally* PAPALI, JACOB TONSON, PUBLISHER, *supra* note 35; KATHLEEN M. LYNCH, JACOB TONSON KIT-CAT PUBLISHER (1971).

54 *See* Brit. Lib. Add MS 38729 at 110-11.

55 *Id.*

56 *Id.* at 112.

Temple in London. After his father died, Somerville moved back home and devoted himself to the family estate in Warwickshire, where he wrote poetry, including *Hobbinol*. *Hobbinol* is a blank-verse burlesque poem inspired by the rural games motif of Homer, Virgil, and Milton.

Somerville assigned a copyright interest in *Hobbinol* to bookseller John Stagg.[57] Stagg was an English bookseller who did business in London's Westminster Hall from around 1716 to 1746.[58] In 1740, Stagg assigned an interest in *Hobbinol* to bookseller William Bowyer. Bowyer was an English bookseller known as William Bowyer "the younger" because he took over his father William Bowyer's publishing business.[59] Bower the younger, who studied at St. John's College, University of Cambridge, has been called the most learned bookseller of the eighteenth century.[60]

The copyright assignment contract between Stagg and Bowyer can be found in the A.N.L. Munby papers of the Cambridge University Library.[61] My transcription of the assignment is as follows:

> Apr. 28, 1740
> Redc [Received] of Mr. William Bowyer Printer twenty one pounds, in consideration of which I am and do hereby assign over [insertion of words: to him and his assigns] forever, all Acts of Parliament to the contrary in any wise notwithstanding, one Half of the Copy of a Poem called HOBBINOL or *The Rural Games*, the whole being assigned to me by the author Mr. Somerville.
> [signature] Mr. Stagg
> Wit
> Mr. Stevens

Perhaps the most remarkable thing about the assignment contract for *Hobbinol* is how unremarkable it is. As book historian Peter Lindenbaum has noted, we can learn the most about the British publishing industry in

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[57] Buying and selling fractional shares of copyright was standard practice. It allowed publishers to share the cost (and therefore the risk) of publication. *See* RAVEN THE BUSINESS OF BOOKS, *supra* note 16, at 43-44, 89-90.

[58] *See* HENRY R. PLOMER, DICTIONARY OF THE PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND, AND IRELAND FROM 1668–1725, at 280 (1922) [hereinafter PLOMER, DICTIONARY OF PRINTERS AND BOOKSELLERS 1668–1725].

[59] *Id.* at 44-45. *See also* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 164.

[60] PLOMER, DICTIONARY OF PRINTERS AND BOOKSELLERS 1668-1725, *supra* note 58, at 45.

[61] Munby Archive Add 8226, Cambridge University Library. I am very grateful to Kate Faulkner of the Squire Law Library, University of Cambridge, and Frank Bowles of the Manuscripts Reading Room, Cambridge University Library, for directing me to the A.N.L. Munby papers. The Stagg-Bowyer assignment contract is tucked into the front of the John Nichols copyright share account book in the Munby Archive. JOHN NICHOLS, PURCHASE AND DISPOSAL OF COPYRIGHTS c. 1769–1815. Munby Archive Add 8226, Cambridge University Library.

the pre-modern copyright era by looking at its most unremarkable transactions.[62] Indeed, the account book of Bowyer's printing business from 1699 to 1777 shows hundreds of transactions like the *Hobbinol* transaction.[63] Similarly, the Upcott Collection contains documents evidencing hundreds of similar copyright assignment contracts between booksellers.[64] Further, significantly, the Stationers' Register shows hundreds of entries for transfers of copyrights between booksellers.[65]

Copyrights were a significant tradeable asset. Shares of copyrights were bought and sold at regular copyright auctions at several London taverns and coffeehouses.[66] Booksellers regularly bought and sold rights in a wide variety of works with vastly different market values.[67] For example, they bought and sold rights in valuable literary works by venerable authors, such as John Milton and Alexander Pope, but also rights in less valuable literary works by less famous authors, such as William Somerville.

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62 *See* Lindenbaum, *Mysteries of the Trade*, *supra* note 12, at 50.

63 *See The Bower Ledgers: The Printing Accounts of William Bower Father and Son, with a Checklist of Bowyer Printing 1699-1777* (Keith Maslan & John Lancaster eds., 1991). Bowyer apprenticed John Nichols, whose account book in the A.N.L. Munby papers contains the Stagg to Bowyer assignment agreement for *Hobbinol*. *See* NICHOLS, *supra* note 61. John Nichols was a leading bookseller and author in his time. Nichols became Bowyer's successor in the publishing business. *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 164. Nichols' account book, like Bowyer's account book, shows evidence of dozens of copyright assignment transactions between booksellers.

64 *See* Brit. Lib., Add MS 38730. The Upcott Collection Volume III contains manuscripts of many relatively brief contracts like the Stagg-Bowyer assignment, but also several elaborate assignment contracts, *see id.* at 24, 33, 59, 89, 118, 123, 172; *see also* Lindenbaum *New Evidence*, *supra* note 18, at 264 (reproduction of a 10 Aug. 1687 assignment contract between the executor for Samuel Simmonds and Edward Vize for John Milton's essay entitled *Judgement of Martin Bucer Regarding Divorce*).

65 *See, e.g.*, Lindenbaum *Mysteries of the Trade*, *supra* note 12, at 17 n.11 (describing the entry for Simmons's transfer to Alymer for Milton's *Paradise Lost*).

66 *See* Belanger, *Booksellers' Trade Sales, 1718–1768*, *supra* note 19; Belanger, Booksellers' Sales of Copyrights: Aspects of the London Book Trade 1718–1768, *supra* note 22); Cyprian Blagden, *Booksellers' Trade Sales, 1718–1768*, *supra* note 22. Copyright share auctions took place at the Queen's Head Tavern in Paternoster Row, Queen's Arms Tavern in St. Paul's Churchyard, and the Globe Tavern in Fleet Street. *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 128, 230; *see also* Brit. Lib. Add MS 38730 at 17, 22, 48, 71, 72, 80, 93, 96, 109, 111, 130, 151, 168, 203 (Globe Tavern transactions); 13, 18, 19, 39, 40, 42, 43, 45, 49, 50, 52, 57, 69, 88, 100, 102, 106, 118, 147, 152, 163, 164, 165, 175, 204 (Queen's Arms Tavern transactions); 35, 115 (London Coffeehouse transactions); 9, 77 (Rose Tavern transactions).

67 *See* Michael J. Suarez, *The Worldliness of Print*, *in* 5 CAMBRIDGE HISTORY OF THE BOOK, *supra* note 24, at 22-23.

Booksellers acquired rights in serious scholarly works such as Sir Edward Coke's *Institutes of English Law*,[68] but they also acquired rights in satirical poems, such as Somerville's *Hobbinol*.[69]

The format of the Stagg-Bowyer contract document can help us form a mental picture of the volume of these copyright assignment transactions. The document is folded into quarters, the contract's text facing inward. The exposed outside of the folded paper has browned significantly more than the inside which contains the contract's text. Written horizontally across the outside of the document on the top of the folded paper is the notation:

> Mr Stagg's
> assignment of
> the Half of Mr
> Somerville's Hobbinol.

The document's form, together with this notation, indicates that Bowyer filed the contract along with many others like it for later retrieval and review.[70] Documents in the Upcott Collection indicate that other booksellers had similar methods of organizing their large collection of copyright assignment documents.[71] We can picture hundreds of similarly folded and labeled copyright assignment contracts carefully organized in pigeonholes or neatly stacked on the desks or shelves of hundreds of British booksellers.

One feature of the Stagg-Bowyer contact document indicates how much booksellers cared about the re-assignability of copyrights that they acquired. The document contains the text of a present assignment of the copyright: "I am and do hereby assign over . . . ." So far, so good. Yet the document also contains an insertion: "to him *and his assigns*" (emphasis added). Someone must have realized that something important had been left out of the document, hence the insertion. Clearly, the parties wanted

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[68] *See* University of Leeds Special Collections, Documents related to the property of the Harris and Turner families, YAS/DD 148/83 and YAS/DD 148/88. I discuss these documents in more detail, *infra*.

[69] As Somerville puts it in his Preface to *Hobbinol*: "If any Person should want a Key to this Poem, his Curiosity shall be gratified; I shall in plain Words tell him, 'It is a Satire against the Luxury, the Pride, the Wantonness, and quarrelsome Temper of the middling Sort of People.'"

[70] Perhaps the underlining in the notation "Mr *Somerville's* Hobbinol" indicates that Bowyer organized his contracts alphabetically by author last name.

[71] The Upcott Collection shows evidence that this method was used by booksellers John Nourse (*see* Brit. Lib. Add MS 38729 at 20, 22, 24, 25, 27, 31-32, 58, 75, 89, 91, 93, 95, 102, 104, 135, 196; Brit. Lib. Add MS 38730 at 89, 172); John Watts (*see* Brit. Lib. Add MS 38728 at 45, 115, 151-152, 155, 200, 206, 210), Thomas Lowndes (*see* Brit. Lib. Add MS 38730 at 24, 33, 133, 163, 165, 175, 204); Jacob Tonson (*see* Brit. Lib. Add MS 38729 at 110, 111, 112); and Thomas Osborne (*see* Brit. Lib. Add MS 38729 at 140).

to make absolutely certain that the contract gave rights in *Hobbinol* to both Bowyer *and* Bowyer's assigns.

Copyright assignment wording like the wording inserted in the Stagg-Bowyer contract also can be found in many documents in the Upcott Collection. A good example is a contract dated November 24, 1762, between London booksellers Samuel Hooper and John Nourse[72] for two French-English dictionaries and a grammar book. The contract provides that Hooper:

> Hath Bargained and Sold and by these presents Doth Bargain" . . . "one half part of his Right and Interest in and to the Three Following **Books or Copyes thereof**" . . . "To Hold and Enjoy . . . unto said John Nourse **his Exors Admnors Assigns to his and their own use forever.**[73]

Another good example can be found in an April 26, 1759 assignment contract between Catherine Lintot and Thomas Lowndes:[74]

> Know allmen by these presents that I Catherine Lintot Administrator of Henry Lintot Esq deceased . . . have bargained, sold, assigned, transferred, and set over and by these presents Do assign and set over my right, title, Interest, and Claim, and demand in and to the abovementioned **shares of Copies and right of printing the said Books**. To have and to Hold the said **shares of Copies and right of printing** unto the said Thomas Lowndes his **Executors, Administrators and assigns forever.**[75]

Henry Lintot took over his father Bernard's[76] bookshop in 1736, and Henry's widow, Catherine, ran the business until at least 1775.[77] Sometimes widows of booksellers simply sold off copyrights for cash, but in other cases they continued to buy and sell copyrights as part their operation of an ongoing publishing business.[78]

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72 Nourse tended to publish scholarly works and was a leading dealer in foreign books. *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 160.

73 Brit. Lib. Add MS 38730 at 89 (emphasis added). Another good example is a June 1, 1765, assignment contract between London booksellers Jonathan Scott and John Nourse, see *id.* at 172; *see also* Lindenbaum, *New Evidence*, *supra* note 18, at 264 (assignment contract between stationers Edward Vize and Joseph Watts containing "further assignment" language).

74 Thomas Lowndes (1719–84) was a publisher in London's Fleet Street area for over thirty years. He was immortalized as Briggs the bookseller in Frances Burney's 1782 novel *Cecilia*. In addition to being a notable publisher of plays, music, and directories, Lowndes founded one of the earliest and most extensive commercial lending libraries. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 163.

75 Brit. Lib. Add MS 38730 at 118 (emphasis added).

76 Bernard Lintot was often a rival of Jacob Tonson in the publication of literary works and is perhaps best known for publishing the works of Alexander Pope. *See* 33 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 947-48 (2004).

77 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 186-87.

78 *Id.* at 38, 72-73, 162-63. It was common for widows of booksellers, like Catherine Lintot, to operate the family publishing business. For example, following her husband Thomas Cooper's death in 1743, Mary Cooper ran the leading trade pub-

In some Upcott Collection documents, a further assignment is noted on the initial assignment contract. For instance, a February 1, 1759 contract that had assigned copyrights from Thomas Bettesworth, following his death, to Thomas Lowndes notes: "Sold half of this Share to Woodgate and Brookes."[79] This notation stands out particularly because the full-page assignment contract is written in lovely handwriting while the brief note indicating the further assignment is written in decidedly inelegant handwriting (presumably Lowndes').[80]

C. *Invigorating the Marketplace of Ideas*

What does the *Hobbinol* assignment contract (and all the others like it) teach us about contract and copyright in the pre-modern era? Copyright assignments between booksellers kept the market brimming with works of all types. If an author became politically unpopular,[81] or if a bookseller fell on hard times,[82] went out of business[83] or died,[84] then works of authorship (and the ideas expressed therein) carried on because

lisher in London until her own death in 1761. *Id.* at 172. After her husband Thomas Longman's death in 1755, Mary Longman ran the publishing business until her own death in 1762. *Id.* at 179; and Elizabeth Tonson ran Jacob Tonson's publishing business after his death and before it was taken over by her son Richard. *Id.* at 191. We see evidence of this in the Upcott Collection. *See* Brit. Lib. Add MS 38730 at 175 (assignment contract from Ann Shuckbrugh to Thomas Lowndes). Other women, such as Abigail Baldwin, Rebecca Burleigh, Sarah Malthus, and Elizabeth Carnan, were prominent publishers in the pre-modern copyright era. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 172, 183.

79 Brit. Lib. Add MS 38730 at 24; *see also id.* at 33, 42, 50 (evidence on single document of initial assignment of copyrights to Thomas Lowndes, acknowledgement of receipt of funds by assignor, and further assignment of copyrights by Lowndes).

80 *See id.* at 24.

81 *See* Lindenbaum, *Milton's Contract*, *supra* note 18, at 452-53; Lindenbaum, *Mysteries of the Trade*, *supra* note 12, at 188 (observing that John Milton may have used relatively obscure publisher Samuel Simmons to publish *Paradise Lost* rather than his more successful but royalist printer Humphrey Moseley who had previously published his *Poems of Mr. John Milton*, after Milton fell out of political favor because of his Republican beliefs, which led to a brief imprisonment and the condemning of some of his works to be burned).

82 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 97-100.

83 "The accumulation of great fortunes [in publishing] mirrored unprecedented numbers of bankruptcies." *Id.* at 135. We see evidence of this in the Upcott Collection. *See* Brit. Lib. Add MS 38730 at 9 (copyrights bought by John Nourse from the Estate of Francis Logan who is identified as a "Bankrupt"); *id.* at 105 (copyrights bought by Thomas Lowndes "the aforementioned copies and shares of copies being the effects of Mr George Hearsley, Bankrupt, and sold by virtue of his admission of Bankruptcy"); *id.* at 153-61 (In the Matter of James Rivington in which publishers Jacob Tonson, Andrew Millar, and Thomas Wright are referred to as "Assignees" of the Estate).

assignment contracts gave them continued commercial vitality.[85] If one bookseller ran out of ideas or resources or the will for commercializing a work,[86] then another publisher could have a go at it.[87]

Booksellers kept works alive in a wide variety of ways.[88] A poem, for example, might first be published as an individual standalone work. Next, the poem might be published with corrections, revisions, or additional verses. Then a new version might be published in a new format, using different typefaces,[89] sizes and quality of paper, and methods of binding. A publisher in Cambridge, Oxford, or Edinburgh[90] might partner with a publisher in London to reach a larger market for the poem. A preface or commendation by someone notable[91] might be added, or some beautiful illustrations. Useful annotations or commentary might also be added to a new version of the poem.

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84 *See, e.g.*, *id.* at 118 (assignment contract between Catherine Lintot and Thomas Lowndes).

85 *See Booksellers' Trade Sales, 1769–1821*, *supra* note 22, at 246-47 (reasons for copyright sales were: "Death, Leaving Off Trade, Bankruptcy, Settlement of a Family Account, Breaking up of a Partnership, and Raising Money").

86 Publishers risked imprisonment, mutilation, and execution for the books they published. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 120.

87 Sometimes, in addition to assigning copyrights, this meant trading book stock inventory. *See* DAVID MCKITTERICK, 2 A HISTORY OF THE CAMBRIDGE UNIVERSITY PRESS: SCHOLARSHIP AND COMMERCE, at 152 (2002) [hereinafter MCKITTERICK, 2 HISTORY OF CAMBRIDGE UNIVERSITY PRESS] ("[T]wo Thirds, if not three Fourths of those [books] you put off are exchanged among yourselves for others, which would have not Sale at all, were they not thus push'd and dispersed abroad by members of your Society, whose particular interest it is so to render Copies that lie in Obscurity more universal." (quoting a 1738 letter to the society of booksellers). *See also* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 238.

88 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 94-95, 208, 223-39, 250-56 (re-packaging of the text in various ways became increasingly important to the work's continued success in the market).

89 Sometimes, however, the publisher boasted of going back to the original look and feel of the First Edition. *See* Advertisement for the 1850 Fourth Edition of George Herbert's *The Temple and Other Poems*, at x. "Herbert's *Temple* was exceptional for Cambridge Press . . . in that it established the printed appearance of a group of poems whose visual form was essential . . . it was arguably one of the most typographically influential of all Cambridge books during this period. Its duodecimo format became the established one, into the eighteenth century." MCKITTERICK, 2 HISTORY OF CAMBRIDGE UNIVERSITY PRESS, *supra* note 87, at 175.

90 *See generally* DEAZLEY, *supra* note 30. One of the most famous publishers of the era, Andrew Millar, came to London from Edinburgh, as did other notable publishers. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 158-59.

91 *See* Lindenbaum, *Milton's Contract*, *supra* note 18, at 451.

Then, the poem might be published together with another poem by the same author on a related topic,[92] followed by publication of a collection of several of the author's poems. A revised collection of the original set of poems might be published, subtracting some but adding others.[93] A biography of the author (especially if the author had died) might be added to a new edition of the collected poems. Next, the poem might be published in an anthology of poems by several authors.[94] Perhaps, publication of the poem in the anthology[95] would lead to discovery of the poem by new audiences or a new generation of readers, which might lead to its republication on a standalone basis or stimulate interest in the author's works of prose.[96]

Whatever the method of keeping a work alive, assignment contracts helped make it possible.[97] In perhaps the most famous historical example, the rights to publish John Milton's *Paradise Lost* were transferred from Samuel Simmons to Brabazon Aylmer, and eventually to Jacob Tonson in whose hands the poem became a best seller and entered the canon of great English literature.[98] Consequently, these assignment contracts advanced an important goal of copyright: the continuous spread of information and ideas.[99]

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92 *Hobbinol* is often combined with Somerville's more popular poem on a similar rural games theme, *The Chase*. The Nichols ledger reveals that he acquired, via Bowyer, rights in *The Chase*. *See* NICHOLS, *supra* note 61.

93 *See, e.g.*, POEMS OF MR. JOHN MILTON, BOTH ENGLISH AND LATIN (which differs from the 1673 collection entitled, *Poems etc. on several occasions by Mr. John Milton, both English and Latin, composed at several times*); Advertisement for the 1850 Fourth Edition of George Herbert's *The Temple and Other English Poems*, which describes the poems that had been added to the new edition, at viii-x.

94 *See* ST. CLAIR, THE READING NATION, *supra* note 24, at 66-83.

95 *See, e.g.*, Samuel Johnson, THE WORKS OF ENGLISH POETS (Samuel Johnson ed., London, H. Hughes 1779).

96 *See* Lindenbaum, *Mysteries of the Trade*, *supra* note 12, at 253 (describing how the success of John Milton's *Paradise Lost* poem stimulated interest in his works of prose and, then, the corresponding assignments of copyrights transferred between publishers holding rights in Milton's works of prose).

97 More generally, as discussed *infra*, contracts gave booksellers the legal tool for business model innovation for works of authorship. One business model innovation was the subscription arrangement. *See generally* Sarah Clapp, *The Beginnings of Subscription Publishing in the Seventeenth Century*, 29 MOD. PHIL. 199 (1931); F.J. G. ROBINSON & P.J. WALIS, BOOK SUBSCRIPTION LISTS: A REVISED GUIDE (1975); PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 227-32; *see also* Lindenbaum, *Milton's Contract*, *supra* note 18, at 448 (describing several subscription arrangements). However, subscription editions played a relatively small part in the book trade as a whole. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 316.

98 *See* Peter Lindenbaum, *Dispatches from the Archives*, 36 MILTON Q. 46 (2002).

99 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 45 (the ultimate goal of publishing is to spread ideas and knowledge). "The book trade advanced as a

IV. BRINGING WORKS WITH NO COMMERCIAL VALUE INTO THE MARKETPLACE OF IDEAS IN THE PRE-MODERN ERA

Most works of authorship do not have significant commercial value. That was true in the pre-modern copyright era and that is true today in the modern information age.[100] Then and now, writers of poetry and prose struggle to scratch out a living from their intellectual work.[101] Given this reality, the question of whether copyright law changes the balance of power between authors and publishers for the purposes of receiving remuneration for copyrighted works is not the most pressing question in the vast majority of cases.[102]

That is not to say, of course, that works with no commercial value have no value. On the contrary, many important works, and indeed some of the most important works, do not have commercial value.[103] From a societal point of view, we want and need these works published so they can enrich the marketplace of ideas.[104] The tools of the information age have given authors the ability to publish cheaply and pervasively. This easy access to the marketplace of ideas is the signature development of the information age.[105]

In the pre-modern era of copyright, however, access to the marketplace of ideas for authors was not cheap or easy.[106] Book publishing was capital intensive: it required printing presses, ink, paper, binding materials, and printing and binding expertise.[107] Once a book was printed, the au-

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trade in argument, in knowledge, in belief, in instruction, and in entertainment." RAVEN, PUBLISHING BUSINESS, *supra* note 29, at 33. The copyright law that evolved in continental Europe did not treat copyrights as freely marketable goods but instead placed certain limitations on alienability, including limitations on further transfer of copyrights. These limitations arose from the view that literary and artistic works are inalienable extensions of the author's personality. *See generally* Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993).

100 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 230.

101 *See* PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 99-100; RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 90-91.

102 *See* MCKITTERICK, 2 HISTORY OF CAMBRIDGE UNIVERSITY PRESS, *supra* note 87, at 151-53.

103 *See id.* at 152-153.

104 *See* O'Rourke, *supra* note 16, at 456.

105 *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (1999); Jeffrey A. Trachtenberg, *Amazon Rewrites Publishing by Pushing Its Own Books*, WALL ST. J., Jan. 17, 2019, at A1, A8.

106 *See* PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 99; RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 299-300, 306-15.

107 *See* MCKITTERICK, 2 HISTORY OF CAMBRIDGE UNIVERSITY PRESS, *supra* note 87, at 152-53, 160.

thor needed access to distribution and sales channels.[108] The things that can be accomplished now with an inexpensive computer, free software, and Internet access, then took hundreds of hours of work and a significant financial investment.[109] Thus, contracts for publishing books[110] provided a critical entry point for authors who wanted to disseminate their ideas widely.

When an author assigned his or her copyright to a bookseller, the bookseller paid and arranged for publication of the author's work, as discussed previously. However, James Raven calls it a "truth easily overlooked" that much of the publication of books resulted from the financing of authors rather than booksellers.[111] Sometimes the author had a patron to pay for printing expenses. The queen, king, noble, a wealthy merchant, the church, or a university might pay for printing.[112] For instance, the Cambridge University Press and the Oxford University Press printed scholarly works paid for by a college of the university.[113] Churches and devout patrons paid for the printing of sermons and other religious works.

Contracts for printing books looked relatively straightforward.[114] They described the terms and conditions for materials (paper, ink, binding), book size (folio, quarto, octavo), illustrations (if any), proofreading obligations, and the quantity of books to be printed. Many contracts specified that the author would receive a certain number of book copies and

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108 *See* ST. CLAIR, THE READING NATION, *supra* note 24, at 36-42.

109 *See* James Raven, *The Book as a Commodity*, *in* 5 CAMBRIDGE HISTORY OF THE BOOK, *supra* note 24, at 102-04; *see also* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 12, 18-21 (2010) (comparing the role of distributors of copyrighted works in pre-modern and modern times).

110 Although this article focuses on books, the same holds true for pamphlets, newspapers, and other texts.

111 RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 317; MCKITTERICK, 2 HISTORY OF CAMBRIDGE UNIVERSITY PRESS, *supra* note 87, at 160. That said, a few authors such as David Hume, William Blackstone, and James Boswell did become commercially successful by self-publishing at least for a time. *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 242; Bently & Ginsburg, *supra* note 10, at 1498-99.

112 *See* PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 100. In fact, receiving the assistance of a patron was often preferred to receiving payment from a publisher because it was seen as being more honorable (as well as being more consistent and reliable). *Id.*

113 *See generally* HISTORY OF THE OXFORD UNIVERSITY PRESS (Simon Eliot ed. 2013); DAVID MCKITTERICK, 1 A HISTORY OF THE CAMBRIDGE UNIVERSITY PRESS: PRINTING AND THE BOOK TRADE IN CAMBRIDGE (1992).

114 *See generally* ST. CLAIR, THE READING NATION, *supra* note 24, at 177-85 (describing the aspects of book manufacturing).

these author-copies were often considered part of the author's remuneration.[115]

Scholars have debated what remuneration paid via copies of books says about the balance of power between authors and booksellers[116] and whether receiving copies rather than royalties was fair compensation to the author.[117] This is an important issue to be sure, but there is another important issue at work: how these author-copies relate to the author's access to the marketplace of ideas.[118]

To understand this point, it is important to re-state the basic distinction between booksellers and printers in the pre-modern era of copyright. Printers manufactured books; booksellers brought books to the marketplace. For books with significant commercial value, booksellers paid for paper and printing and arranged for distribution.[119] If the author received book copies as remuneration, the author also participated in distribution by selling these copies. As such, the author's distribution modestly augmented the bookseller's distribution and amplified the work's impact on the marketplace of ideas.

For books with no commercial value, however, the burden fell largely on the author to instigate publication and arrange for distribution,[120] utilizing the author's network of friends, colleagues, and patrons.[121] We can envision the author-as-publisher role on a sliding scale: for works of great commercial value the author's role as publisher was relatively insignificant, but for works of no commercial value the author's role as publisher was absolutely critical.[122]

In the modern information age, we take it for granted that virtually any author of any work can access the marketplace of ideas. Anyone can blog or post or share his or her sense or nonsense. In the pre-modern era

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115 *See* McKitterick, 2 History of Cambridge University Press, *supra* note 87, at 152-53, 159-160.

116 *See* Plant, The English Book Trade, *supra* note 24, at 218-19 (publishers gave authors copies to share the commercial risk); Curtin, *Transactional Origins*, *supra* note 11, at 193-96 (discussing various implications of providing copies to authors, including risk sharing).

117 *See* Lindenbaum, *Milton's Contract*, *supra* note 18, at 439-54; Lindenbaum, *New Evidence*, *supra* note 18, at 250-61.

118 For most authors, the objective "was to pass on ideas to as many other people as possible." Plant, The English Book Trade, *supra* note 24, at 100.

119 *See* Raven, The Business of Books, *supra* note 16, at 122 (authors relied on the imagination and indulgence of their publishers).

120 *See* McKitterick, 2 History of Cambridge University Press, *supra* note 87, at 151, 160.

121 *See* Raven, The Business of Books, *supra* note 16, at 317; Plant, The English Book Trade, *supra* note 24, at 100.

122 *See* Raven, The Business of Books, *supra* note 16, at 230.

of copyright, it was not so simple.[123] Without publishing contracts and author distribution, works with no commercial value would not reach the mass market.

V. *CHARITY COPIES: EVIDENCE OF BENEFICIAL PRICE DISCRIMINATION IN PRE-MODERN COPYRIGHT CONTRACTS*

In the modern information economy, software developers use contracts to offer users a variety of information products at a variety of price points. Distribution licensing, for example, allows software developers to offer the same software to business users at one price, home users for a lower price, academic users for yet a lower price, and charitable organizations for free.[124] Economists call this "price discrimination."[125] Price discrimination is enforced in the marketplace using contracts between the software developer and its distributors as well as end user licenses.[126]

Even though we associate price discrimination with modern software licensing, we see evidence of its use in pre-modern copyright contracting. In the pre-modern era, many booksellers distributed works on religious or moral topics. For example, in his article on bookseller Brabazon Alymer, Peter Lindenbaum points out that Alymer tended to publish works on certain religious and moral causes.[127] In doing so, Alymer frequently advertised not only his prices for single copies of books but also cheaper prices "to those who are so Charitable as to give away numbers."[128] Lindenbaum concludes that this was common practice for publishers of religious and moral works.[129]

What legal tool did publishers of religious works use to make this sort of charity-copy price discrimination work? The answer has to be contract. Normally, once a copy of a work is sold, the purchaser is free to re-sell the

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123 "Toil, envy, want, the patron and the jail" were the prospects of authors. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 223 (quoting Samuel Johnson in 1744).

124 *See* Robert W. Gomulkiewicz, *Federal Circuit's Licensing Law Jurisprudence: Its Nature and Influence*, 84 WASH. L. REV. 199, 208 (2009).

125 "Discrimination" normally has a negative connotation, but in this case discrimination has a positive connotation because consumers benefit from lower prices.

126 *See, e.g.*, Apple Inc. v. Psystar Corp., 658 F.3d 1150 (9th Cir. 2011) (end user); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (end user); Adobe Sys., Inc. v. Stargate Software, Inc., 216 F. Supp. 2d 1051 (N.D. Cal. 2002) (distributor); Adobe Sys., Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086 (N.D. Cal. 2000) (distributor); Microsoft Corp. v. Grey Comput., Inc., 910 F. Supp. 1077 (D. Md. 1995) (distributor); Microsoft Corp. v. Harmony Computs. & Elecs., Inc., 846 F. Supp. 208 (E.D.N.Y. 1994) (distributor).

127 Lindenbaum, *Mysteries of the Trade*, *supra* note 12, at 37-38.

128 *Id.* at 38.

129 *Id.* at 38 n.16.

copy to anyone at any price. This is known as a first sale or an exhaustion of the copyright.[130] Consequently, at least as far as copyright law is concerned, anyone could purchase low-priced copies intended for charity and, instead, sell those copies to anyone else at market price.[131] The way to make price discrimination stick, therefore, is by using a contract.[132] Booksellers used a variety of devices to maintain the price discrimination for charitable distribution, including membership agreements,[133] subscription agreements,[134] and distribution agreements.[135] All of these devices involved some variety of contracting.

VI. CONTRACTS IN THE SHADOW OF THE PUBLIC DOMAIN AND OF LETTERS PATENT FOR LAW BOOKS

Drawing on archival sources, this Section uses two case studies to explore the importance of contracts in the face of the ability to exclude copying at both ends of the spectrum: on the one end, where no legal right to exclude existed due to lapsed copyright protection, and on the other end, where a potentially strong right to exclude existed based on letters patent for law books.

A. The Public Domain: John Milton's Poetical Works in 1801

John Nichols was one of the leading British booksellers in the late eighteenth and early nineteenth century.[136] The Nichols copyright account book is in the A.N.L Munby papers of the Cambridge University Library.[137] One particularly striking feature of the Nichols account book is a notation about John Milton's Poetical Works — striking not only because of its historical interest (many consider Milton to be one of England's greatest authors, most famous for his epic poem *Paradise Lost*[138]), but also because of what it teaches us about the importance of contracts for distributing works of authorship.

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130 *See* Robert W. Gomulkiewicz, *Is the License Still the Product?*, 60 ARIZ. L. REV. 425 (2018) [hereinafter Gomulkiewicz, *License Still the Product*].

131 *See generally* Tomás Gómez-Arostegui, Patent and Copyright Exhaustion Circa 1800 (2017), *at* http://ssrn.com/abstract=2905847.

132 Societal customs and norms may also have been at work.

133 *See* Scott Mandelbrote, *The Publishing and Distribution of Religious Books by Voluntary Associations: from the Society for Promoting Christian Knowledge to the British and Foreign Bible Society*, *in* 5 CAMBRIDGE HISTORY OF THE BOOK, *supra* note 24, at 618.

134 *See id.* at 627-28.

135 *See id.* at 623-24

136 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 164.

137 *See* NICHOLS, *supra* note 61.

138 *See* WILLIAM HAYLEY, LIFE OF MILTON IN THREE PARTS (London, Cadell & Davies 1796).

My transcription of the notation adjacent to the entry *Milton's Poetical Works* is as follows:

> At a meeting of the Booksellers, Jan. 21, 1801, it was stated that this Work [Milton's Poetical Works] was not the property of any particular Booksellers, having been long given up. A new Edition issue was proposed, agreed to, and subscribed for and Mr Davies accordingly put our names down for a 20th [share]—Paid a sum June 15, 1803 for Paper of 25 l(?)[139]—by Note at 2 months due Aug. 18, 1803.[140]

Later, Nichols records under the heading *Milton's Poetical Works*:

> 1/20th
> Rec' this share
> in 1803

At first blush, the absence of copyright protection would seem to be a boon for Milton's poetical works. These poems were in the public domain, royalty free for the taking. However, in practical reality, if everyone could publish the poems, then booksellers needed to calculate carefully before making the investment to publish. As the notation in the Nichols account book illustrates, booksellers sometimes addressed the economic realities of publishing a work or an edition of a work by forming a joint venture, spelling out who would invest in publication and how much.[141] As Hugh Amory has explained, such bookseller partnerships competed against cheap editions by creating "a luxury product, competing on quality instead of price."[142] Consequently, agreements among booksellers, such as the agreement referenced in the Nichols account book,[143] contributed to the continuing vitality of works out of copyright, such as Milton's poems.[144]

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139 This may be a reference to so-called *royal paper* which measured 25x20 inches.

140 Munby Archive Add 8226, at tab M1, Cambridge University Library.

141 *See* Hugh Amory, "De Facto *Copyright*"? *Fielding's* Works *in Partnership, 1769–1821*, 17 EIGHTEENTH CENTURY STUDIES 449 (1984). Some scholars argue that these partnerships, called "congers," resulted in a de facto copyright, which produced the downsides of monopolies, but Hugh Amory's scholarship points out the positive attributes of the partnerships and expresses skepticism about the de facto copyright label and the extent of the concerns expressed by other scholars. *See id.* at 453-55, 458, 466-68 (reviewing the literature on de facto copyright, especially the views of Graham Pollard and Terry Belanger).

142 *Id.* at 465. The bookseller partnerships distinguished their editions with engraved plates or royal paper and occupied "the upper end of the market for the same profit at a lower volume." *Id.* at 468.

143 I have not located a formal contract documenting the joint venture agreement referenced in the Nichols account book.

144 A bookseller joint venture likely also contributed to the vitality of Milton's works of prose. Nichols records the following in reference to Milton's prose works: "This work has since been allotted to new Partners of which Mr Nichols now holds 1/20th Share." Munby Archive Add 8226, at tab Y26, Cambridge University Library.

B. *Letters Patent for Law Books: Sir Edward Coke's* Institutes of the Laws of England

Sir Edward Coke has been called the oracle of English law.[145] He served as Queen Elizabeth I's Attorney General and as Chief Justice of the Court of Commons Pleas and of the King's Bench.[146] However, he is perhaps best known for authoring two legal texts: *The Reports*[147] and *The Institutes of the Laws of England.*[148] *The Reports* are Coke's accounts of and commentary on nearly 600 cases in the English courts.[149] Coke published the first three *Reports* around 1600 and the next eight *Reports* between 1603 and 1615. The last two *Reports* were published after Coke's death in 1634.

The *Institutes* is Coke's treatise, which draws principles from cases in the *Reports*, written to instruct students in English law.[150] This treatise and the *Reports* provided the core instructional texts for English and North American law students well into the nineteenth century and are still considered some of the most authoritative sources of English law.[151] The treatise is in 4 parts, organized by categories of law. The first part covers real property law and is framed as Coke's commentary on Littleton's *Treatise on Tenures.*[152] The second part provides Coke's commentary on the *Magna Carta* and certain other important English and medieval stat-

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145 *See* HASTINGS LYON & HERMAN BLOCK, EDWARD COKE: ORACLE OF THE LAW (1929) [hereinafter LYON & BLOCK, EDWARD COKE]; CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 516 (1956) [hereinafter DRINKER BOWEN, THE LION] (referring to Coke as a great oracle of the law).

146 *See* DRINKER BOWEN, THE LION, *supra* note 145, at 77-89, 277-90, 338-41. Even though the Chief Justice of King's Bench is known in common parlance as the Chief Justice of England, Coke would have preferred to remain as Chief Justice of Common Pleas. *Id.* at 340-341.

147 Other lawyers also wrote reports, such as Plowden and Dyer, but Coke's reports are so venerable that they are known simply as *The Reports. Id.* at 72. *See generally* Theodore F.T. Plucknett, *The Genesis of Coke's Reports*, 27 CORNELL L.Q. 190 (1942).

148 JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 149 (1997) [hereinafter HOSTETTLER, SIR EDWARD COKE].

149 DRINKER BOWEN, THE LION, *supra* note 145, at 72, 505-07; HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 149-50, 159.

150 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 159. The word "institute" is used in the sense of a text intended to institute (i.e., instruct) students in the knowledge of the law. *Id. See also* THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (Savoy, E. Nutt et al. 2d ed. 1724).

151 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 149; DRINKER BOWEN, THE LION, *supra* note 145, at 72.

152 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 160-64; LYON & BLOCK, EDWARD COKE, *supra* note 145, at 346-48.

utes.[153] The third part covers criminal law and the fourth the jurisdiction of English courts.[154]

Although we now think of Coke as the lion of English law, he was dismissed from the King's Bench when he fell out of favor with King James I.[155] Coke then devoted his energy to serving in Parliament (including work on the monumental Right of Petition legislation) until his retirement in 1629 when King Charles I dissolved Parliament.[156] Coke used his retirement to write the final three parts of the *Institutes*.

As Coke was on his deathbed in 1634, the Privy Council of King Charles I ordered the search of Coke's house and law chambers. More than fifty manuscripts were seized, including manuscripts of the four *Institutes* and manuscript notes for his last two *Reports*.[157] The King suppressed publication of Parts II, III, and IV of the *Institutes* because he believed publication could undermine his royal prerogative.[158] Consequently, these volumes of the *Institutes* were not published until after a 1641 act of Parliament[159] ordered the return of Coke's papers to Sir Robert Coke, Edward's son and heir, and gave Robert Coke a copyright to publish the *Institutes*.[160] Robert Coke delegated publication to third parties and Part II was published in 1642 and Parts III and IV in 1644.[161]

By 1668, John Turner, Esq., came to hold certain printing rights in Parts II, III, and IV of Coke's *Institutes*. Born in Kirkleatham, York, and educated at Sidney Sussex College, University of Cambridge, Turner entered the Middle Temple in 1634 and was called to the bar in 1639. He became Recorder (official town counsel) of York in 1662 and was made a

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153 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 171-90; LYON & BLOCK, EDWARD COKE, *supra* note 145, at 348.

154 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 191-202; LYON & BLOCK, EDWARD COKE, *supra* note 145, at 349-50 .

155 *See* DRINKER BOWEN, THE LION, *supra* note 145, at 370-90. *See generally* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003).

156 *See* DRINKER BOWEN, THE LION, *supra* note 145, at 435-504.

157 *See* J.H. Baker, *Coke's Note-books and the Sources of His Reports*, 30 CAMBRIDGE L.J. 30, 78-80 (1972) [hereinafter Baker, *Coke's Note-books*].

158 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 202; DRINKER BOWEN, THE LION, *supra* note 145, at 516. The first volume of the *Institutes*, published in 1628, was the only volume published during Coke's lifetime. HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 160-64; LYON & BLOCK, EDWARD COKE, *supra* note 145, at 346.

159 HOSTETTLER, SIR EDWARD COKE, *supra* note 148, at 202; DRINKER BOWEN, THE LION, *supra* note 145, at 533-34.

160 *See* Baker, *Coke's Note-books*, *supra* note 157, at 80.

161 *See* W.A. Atkinson, *The Printing of Coke's Institutes*, 162 THE LAW TIMES 435 (1929).

Serjeant-at-Law by King Charles II in 1669.[162] Turner had a large house in London's upscale Salisbury Court, but in 1669 he and his family went to live in Yorkshire.[163]

On June 23, 1668, Turner entered into a contract with booksellers Thomas Irving and Thomas Basset,[164] granting them permission to print 11,000 copies of Parts II, III, and IV of Coke's *Institutes*.[165] For their part, Irving and Basset agreed to pay Turner two £100 installments, one due on November 26, 1668, and one due on May 26, 1669.[166] However, there was a serious complication to this arrangement that the parties needed to address at this time: Richard and Edward Atkins held letters patent to publish books on the laws of England.[167] We see this concern implicit in the fourth article of the contract:

> Fourthly, by colour of Letters Patent made by the late King James of famous memory to John Moore deceased and by King Charles the Second to Richard and Edward Atkins Esq. [insert: by the said Richard and Edward Atkins] and other persons to have the sole power of printing all books concerning the common laws of England . . . .[168]

Letters patent were monopolies granted by the crown to a person to control a certain good or service. Sometimes the crown granted patents to encourage inventive activity or promote the development of a certain industry, but other times they were granted to reward courtiers.[169] For in-

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162 *See* THE COURT-REGISTER AND STATEMAN'S REMEMBRANCER 149 (London, R. Gosling 1733). A *Serjeant-at-Law* was an elite barrister, appointed by the King or Queen, who had the exclusive right to plead cases at the bar of the Court of Common Pleas and, upon appointment, became eligible to serve as a judge. *See* DRINKER BOWEN, THE LION, *supra* note 145, at 62. Some sources list John Turner as a *King's* Serjeant-at-Law which would make him a legal advisor to King Charles II. *See* L&M Companion entry for Turner, John and Jane, THE DIARY OF SAMUEL PEPYS, https://www.pepysdiary.com/encyclopedia/1858/ [https://perma.cc/GRQ6-5TDB] (last visited Dec. 17, 2018) [hereinafter THE DIARY OF SAMUEL PEPYS].

163 *See* THE DIARY OF SAMUEL PEPYS, *supra* note 162.

164 Thomas Basset was known as a publisher of law books, especially the *Catalogue of Law Books*. One of the most famous London stationers, Jacob Tonson, apprenticed with Basset. *See* PLOMER, DICTIONARY OF PRINTERS AND BOOKSELLERS, *supra* note 58, at 16.

165 University of Leeds Special Collections, YAS/DD148/83. I am deeply grateful to Kirsty McHugh, Curator of the Murray Archive and Publishers' Collection, National Library of Scotland, for directing me to these Turner documents in the University of Leeds Special Collections.

166 *Id.*

167 *Id.*

168 *Id.*

169 *See generally* JOAN THIRSK, THE DEVELOPMENT OF A CONSUMER SOCIETY IN EARLY MODERN ENGLAND 52-59, 94-95 (1978); LINDA LEVY PECK, CONSUMING SPLENDOR: SOCIETY AND CULTURE IN SEVENTEENTH CENTURY ENGLAND 136-37 (2005); DEBORAH E. HARKNESS, THE JEWELL HOUSE: ELIZABETHAN LONDON

stance, the famous Elizabethan courtier Sir Walter Raleigh held a patent for playing cards.[170]

Granting a printing monopoly for law books began with King Edward VI.[171] In January of 1618, John More, Esq. (also spelled "Moore")[172] acquired a forty year[173] patent right from King James I to print all books that concerned the English common law.[174] John More likely gained this particular patent from the crown by being the highest bidder for the patent right.[175] This reveals another important reason why the crown sometimes granted patents—to raise revenue outside of Parliament's subsidies. Then, More assigned his patent right[176] to Miles Fletcher for an annual payment of £60 and one third of Fletcher's profits.

John More died in 1638, leaving his annuity from the law book patent to his daughter Martha who was married to Richard Atkins (also spelled "Atkyns").[177] When Fletcher attempted to evade payment of the annuity, Martha and Richard Atkins sued him in the Court of Chancery to recover the payments.[178] Following the restoration of King Charles II after the

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AND THE SCIENTIFIC REVOLUTION 150-54 (2007); PAUL SLACK, THE INVENTION OF IMPROVEMENT: INFORMATION AND MATERIAL PROGRESS IN SEVENTEENTH CENTURY ENGLAND 57, 230, 236-38 (2015). In particular, patents were used to foster and reward loyalty to the crown. PLANT, THE ENGLISH BOOK TRADE, *supra* note 24, at 102; *see* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 66-68 (the crown granted certain individuals the copyrights for certain types of books).

170 RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 75.

171 *See generally* J.A. Baker, *English Law Books and Legal Publishing*, *in* 4 CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN 474-503 (John Barnard and D.F McKenzie eds., 2002).

172 *See* PLOMER, DICTIONARY OF THE PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND AND IRELAND FROM 1641–1667, *supra* note 58, at 131-32.

173 Copyrights for books obtained by registering them on the Stationer Company's ledger were essentially perpetual before the Statute of Anne but patents granted by the crown tended to be for a certain term of years. RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 75.

174 *Id.*

175 *Id.*

176 It was common practice for royal patent holders to assign or lease their rights to others. *See id.* at 75-77; *see also* Wilfrid Prest, *Law Books*, 5 CAMBRIDGE HISTORY OF THE BOOK, *supra* note 24, at 803 (describing how Richard Strahan acquired a one-half interest in the law book patent in 1762 from Samuel Richardson's widow and that Thomas Beever published as an assignee of Richard and Edward Atkins' law book patent).

177 *See* PLOMER, DICTIONARY OF PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND AND IRELAND FROM 1668–1725, *supra* note 58, at 131-32. *See also* Stationers v. Patentees 124 ENG. REP. 842-44 (C.P. 1666) (addressing the Atkins law book patent).

178 Not only did Fletcher refuse to pay Martha and Richard Atkins their annuity, he attempted to procure superseding rights from More's son; and Fletcher also

English civil war, Atkins ultimately prevailed in the litigation, receiving a decree against Fletcher for payments in arrears.[179] Richard Atkins and Sir Edward Atkins, who served as a Member of Parliament and Chief Baron of the Exchequer, continued to control the patent for law books during the reign of Charles II.[180]

Undoubtedly booksellers Irving and Basset feared that Richard and Edward Atkins might interfere with or reduce the value of the rights that they received from Turner.[181] The parties used two contractual techniques to address the issue. First, Turner agreed that there would be an abatement of the payments to Irving and Basset in the event Richard or Edward Atkins produced a rival edition of the *Institutes* before Basset or Irving; and second, Turner agreed to "keep" Irving and Basset "harmless and indemnified" in the event the Richard or Edward Atkins sued under color of their patent.[182]

Then, on July 20, 1677, Turner assigned[183] all of his printing rights in the *Institutes* to Thomas Basset for £150.[184] Basset went on to successfully publish Coke's *Institutes,*[185] which, of course, became one of the most important and successful works on English law.[186] Given his assignment of rights for a flat fee, Turner did not get to share in the ongoing revenues associated with Basset's publishing success. Why would Turner assign his rights in such a valuable work to Basset?

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made an oral assignment of his rights to the Company of Stationers for a cash payment, but refused to carry out the assignment following the Atkins victory in the Court of Chancery. *See* PLOMER, DICTIONARY OF PRINTERS AND BOOKSELLERS WHO WERE AT WORK IN ENGLAND, SCOTLAND AND IRELAND FROM 1668–1725, *supra* note 58, at 131-32.

179 *See id.* at 8-9 (citing the bill of complaint in *Stationers v. Fletcher*, C9/31/126, no. 1 (Ch. 1664)).

180 *See* ALEX MARSHALL, THE SURPRISING DESIGN OF MARKET ECONOMIES 81-82 (2012).

181 The contract also refers to possible interference by "other persons," which may be a reference to Martha Atkins or to licensees of Richard or Edward Atkins.

182 University of Leeds Special Collections, YAS/DD148/83.

183 Turner and Basset used an Indenture for this transaction rather than Articles of Agreement as Turner, Basset, and Irving used in the prior transaction. *Compare* University of Leeds Special Collections, YAS/DD148/83 *with* YAS/DD148/88. Indentures were sealed deeds. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 35-36 (1987) (discussing use of indentures).

184 University of Leeds Special Collections, YAS/DD148/88.

185 Thomas Basset is listed as a publisher of the Fourth Edition (1669–71) and the publisher of the Sixth Edition (1680–84) of Parts II, III, and IV the *Institutes*.

186 DRINKER BOWEN, THE LION, *supra* note 145, at 509 (noting that through three centuries the treatise was reissued many times and that the first American edition was based on the sixteenth London edition).

Turner used contracting to structure his involvement in publishing the *Institutes* in a thoughtful manner. When he lived in London and was engaged with the legal community there, it made sense for him to have some active involvement in the publishing process in partnership with booksellers Irving and Basset. However, once he moved to Yorkshire, Turner probably wanted to exit the publishing business altogether, leaving all publishing burdens to Basset.[187] Then, as today, an assignment of rights is a logical form of contractual transaction to accomplish this business outcome.[188] To put it another way, the legal right to print the *Institutes* was important, to be sure, but the contracts used by Turner and Basset to commercialize Coke's works were just as important to right-sizing the business relationship for the interests both parties.

C. General Observations and Conclusions

Potential publishers of Milton's poetry and Coke's treatise faced copyright uncertainty at opposite ends of the spectrum: for John Nichols, the absence of a strong legal monopoly in Milton's poetry and, for Thomas Basset, the presence of a potentially strong legal monopoly (letters patent) in Coke's *Institutes*.

Given nonexistent copyright protection, Nichols surely had the right to publish Milton's poems but he questioned whether publication would make sound business sense. The risks of slow selling books were real with many spectacular failures in the pre-modern era of copyright.[189] Faced with this business reality, Nichols and other booksellers used contracting to create a business framework that allowed them to profit from publication. Booksellers often formed syndicates to share investments and spread risks.[190] These contractual frameworks helped encourage booksellers to publish or re-publish works and thus help invigorate them in the marketplace of ideas.

Thomas Basset faced two significant obstacles to publishing the *Institutes*: Turner's rights and the Atkins' rights. Basset could not move forward from a business point of view unless he surmounted these obstacles. Basset gained freedom to operate using contracts, first by structuring a

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187 In addition, the flat fee paid by Basset to Turner was significant, the equivalent of around $20,000 in today's dollars.

188 *See* ROBERT W. GOMULKIEWICZ, XUAN-THAO NGUYEN & DANIELLE CONWAY, LICENSING INTELLECTUAL PROPERTY: LAW & APPLICATION 19 (4th ed. 2018) (providing an overview of assignments of rights); RAYMOND T. NIMMER & JEFF C. DODD, MODERN LICENSING § 5:3 (2017); Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 831 (3d Cir. 2011).

189 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 18, at 97-100. *See also* O'Rourke, *supra* note 8, at 438.

190 *See* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 126.

license contract with John Turner that granted Basset license rights but hedged against devaluation of those license rights; and then by acquiring Turner's rights via an assignment contract but at a price that made sense given that Basset might have to contend with the Atkins' law book patent. We know that Basset was ultimately successful because he is listed as a publisher of the Fourth Edition (1669–71) and the Sixth Edition (1680–84) of Parts II, III, and IV of the *Institutes*. Consequently, Basset played an important role in spreading Sir Edward Coke's ideas in Great Britain and, ultimately, to the fledgling United States of America.

The lesson to be learned from the contractual relationships revealed in the John Nichols account book and the John Turner contract documents is that, before and after the Statute of Anne, contracting mattered as much as copyrighting. The absence or presence of copyright protection played an important role to be sure, because the contracts operated against a backdrop of assumptions about the strength of propriety rights.[191] Regardless of the strength of proprietary rights, however, the parties used contracts to right-size the balance of rights and bring works of authorship to the marketplace of ideas.

VII. MODERN APPLICATIONS AND POLICY IMPLICATIONS

A. Software License Contracts

Uncertainty about copyright protection for works of authorship continues in the modern information age. Legal protection for software provides a good illustration. The U.S. Copyright Office initially expressed doubt about whether software could be registered due to its utilitarian nature.[192] In 1974, Congress established a commission to study whether copyright should protect software[193] and, in 1980, Congress amended the Copyright Act to add a definition of "computer program" and allow for certain archival copies and adaptations of software.[194]

However, Congress's action did not end the debate about the copyrightability of software.[195] In 1982, Franklin Computer challenged the copyrightability of Apple Computer's operating system software in

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191 For a modern example, *see* Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright After* Tasini, 53 CASE W. RES. L. REV. 605 (2003).

192 *See* ROBERT W. GOMULKIEWICZ, SOFTWARE LAW AND ITS APPLICATION 15 (2d ed. 2018).

193 National Commission on New Technological Uses of Copyright Works, commonly known as "CONTU." *Id.*

194 *See* H.R. REP. NO. 1307, 96th Cong., 2d Sess. 23, *reprinted in* 1980 U.S.C.C.A.N. 6460, 6482.

195 *See* Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Readable Programs in Machine Readable Form*, 1984 DUKE L.J. 663 (1984).

federal court.[196] The Third Circuit ruled that software source code, object code, and visual displays could be protected by copyright.[197] However, the *Apple v. Franklin* decision did not end questions about software copyrights either. Other cases challenging copyright protection for software followed,[198] with important issues about copyright protection for software still alive and well today in the *Oracle v. Google* case.[199]

How did the software industry respond to the uncertainty about copyright protection? Software publishers used the same legal tool as booksellers in the pre-modern copyright era: contracts. For example, commercial software publishers began using end user license agreements ("EULAs") to bring their products to market using a variety of creative business models.[200] Software publishers used EULAs to right-size business relationships in the face of potentially weak copyright protection.[201]

The "free software" movement began using license contracts such as the General Public License ("GPL") to limit distribution of licensed software to only those who agree to "share alike."[202] The GPL is a contract used to right-size business relationships in the face of potentially strong copyright (and patent) protection for software.[203] So, whether the concern is too much or too little protection from copyright, contracting plays a critical role in the modern information age just as it did in the pre-modern era of copyright.[204]

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196 Apple Comput. Inc. v. Franklin Comput. Corp. 714 F.2d 1240 (3d Cir. 1983).

197 *Id.*

198 *See, e.g.*, Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986); Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992); Gates Rubber Co. v. Bando Chem. Indus., Ltd, 9 F.3d 823 (10th Cir. 1993); Lotus Development Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995).

199 Oracle Am., Inc. v. Google Inc., 750 F.3d 1339 (Fed. Cir. 2014).

200 *See* Adobe Sys. Inc. v. Christenson, 809 F.3d 1071, 1080 (9th Cir. 2015); Apple, Inc. v. Psystar Corp., 658 F.3d 1150 (9th Cir. 2011); MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928 (9th Cir 2010); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); *see also* Gomulkiewicz, *License Is the Product*, *supra* note 5.

201 *See* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996).

202 *See* David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241 (2001); Robert W. Gomulkiewicz, *Debugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75 (2002); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563.

203 *See* David McGowan, *The Tory Anarchism of F/OSS Licensing*, 78 U. CHI. L. REV. 207 (2011); Greg R. Vetter, *Commercial Free and Open Source Software: Knowledge Production, Hybrid Appropriability & Patents*, 77 FORDHAM L. REV. 2087 (2009); Robert W. Gomulkiewicz, *General Public License 3.0: Hacking the Free Software Movement's Constitution*, 40 HOUS. L. REV. 1015 (2005).

204 *See* Curtin, *Hackers and Humanists*, *supra* note 11.

B. The First Sale Debate

Under the U.S. Copyright Act's first sale doctrine, a copyright holder's exclusive right to distribute copies ends for any given copy after the owner's sale of that copy.[205] As codified in § 109(a) of the Copyright Act, the "owner of a particular copy" may sell or dispose of the copy without the copyright holder's permission.[206] The first sale doctrine only applies to *owners* of copies; it does apply to a person who possesses a copy without owning it.[207] However, many commentators have urged an expansive application of the first sale privilege[208] and the Supreme Court's recent decision in *Impression Products v. Lexmark*[209] potentially points in that direction.[210] An expansive view of the first sale doctrine could affect both distribution contracts for software and various end user pricing models.[211]

However, lessons learned from the pre-modern era of copyright can provide valuable lessons for the modern information age. At one level, the free transferability of copyrights often proved invaluable in bringing books to market in the pre-modern era, as explored in Section III. However, at a deeper level, we see that authors and consumers of books benefited the most when publishers could use contracts to right-size the ways and means of bringing books to market, especially in the contracts between publishers and in the downstream aspects of author-publisher contracts. Ultimately, flexible contracting practices best served the policy goal of a robust marketplace of ideas through the pervasive distribution of books of many types.[212]

Fortunately, the United States Copyright Act allows modern copyright holders to use a variety transaction models.[213] This flexibility is pre-

205 *See* Gomulkiewicz & Williamson, *supra* note 201, at 350-51.
206 17 U.S.C. § 109(a) (2018).
207 *See* Gomulkiewicz, *License Still the Product*, *supra* note 130.
208 *See, e.g.*, AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP (2016); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741 (2015); Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887 (2010); John A. Rothschild, *The Incredible Shrinking First Sale Rule: Are Software Resale Limits Lawful?*, 57 RUTGERS L. REV. 1 (2004).
209 Impression Products, Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523 (2017).
210 *See* Gomulkiewicz, *License Still the Product*, *supra* note 130.
211 *Id.*
212 *See* David McGowan, *The Unfallen Sky*, 51 HOUS. L. REV. 337, 373-74 (2013) (highlighting the risk of mandatory rules that limit freedom to choose approaches that suit particular business needs). *See also* PERZANOWSKI & SCHULTZ, *supra* note 208, at 169 (extolling the benefits of first sale transactions but, ultimately, emphasizing the importance of meaningful choice in transaction models).
213 *See* 17 U.S.C. §§ 109(b)(1)(a), (d), 203 (2018) (referring to exclusive and non-exclusive grants of a transfer or license of a copyright or any right under a copy-

scient. By leaving room for business model innovation, Congress has supported the innovative contracting practices used in modern software licensing just as English copyright law supported pre-modern book selling practices.[214]

VIII. CONCLUSION

Scholars have shed valuable light on modern copyright law by exploring the history of copyright protection, especially developments in Great Britain before and after passage of the 1710 Statute of Anne.[215] Scholars have also begun to appreciate the fundamental role that contracts played in the copyright equation. This article contributes to that understanding by showing that the network of contracts between British booksellers and the related downstream aspects of author-bookseller contracts formed the legal infrastructure for the mass distribution of works of authorship. Thus, contracts advanced one of the fundamental goals of copyright: the spread of ideas and information throughout society. Indeed, contracts were particularly critical when the strength of copyright protection was particularly uncertain.

Yet the importance of contracts did not end with the pre-modern era of copyright. Contracts continue to matter as much as copyrights in the modern information economy. Contracts give copyrights vitality. By enabling the sharing of ideas and information, contracts foster both technological and business model innovation. This insight is valuable for today's judges and lawmakers who will make decisions about innovation policy, including the scope of copyright law's first sale doctrine and the enforceability of software license agreements.

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right); *see also id.* § 204 (referring to transferring ownership and licensing); Quality King Distribs., Inc. v. L'anza Reserch Int'l, Inc., 523 U.S. 135, 146-47 (1998) (referring to bailment, consignment, and licensing).

214 Pre-modern commentators complained about British booksellers and their business practices, *see* RAVEN, THE BUSINESS OF BOOKS, *supra* note 16, at 6, 351, just as modern commentators complain about American software licensors; *see also* Gomulkiewicz, *Getting Serious*, *supra* note 14, at 687-88. Modern commentators also complain about powerful booksellers. *See* David Steitfeld, *Sellers in Amazon's Bookstore Feel Beaten up by Counterfeit Wild West*, SEATTLE TIMES, June 24, 2019, at A1, A4.

215 *See, e.g.*, Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247 (2010).