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“Room for One More”: The Metaphorics of Physical Space in the Eighteenth-Century Copyright Debate

Simon Stern

Abstract: This article focuses on literary texts and writings by copyright polemicists—those arguing for and against stronger copyright protection—during the eighteenth century. The metaphor of the text as a tract of land has been cited by other commentators on copyright history but has not been examined closely. Working through a series of writings on imitation and derivative use, the article shows how the metaphor seemed initially to provide an ideal basis for demanding stronger copyright protection and for policing piracy and derivative uses more aggressively, but turned out, in some writers’ hands, to offer yet another means of portraying the literary marketplace as endlessly expansive. Henry Fielding, in his literary journalism, insisted that there was always “room for one more” even in a crowded marketplace, and he invoked a series of legal doctrines to defend the practice of inter-commoning and even poaching on a “neighbour” writer’s land. Far from dictating a particular view of the law, the metaphors of copyright are always capable of being revised and reinterpreted to support the writer’s own perspective.

Keywords: copyright law / property / real estate / land / Alexander Pope / Samuel Richardson / William Warburton / Henry Fielding

The study of bookselling is as difficult as the law, and there are as many tricks
in the one as the other.

—Henry Fielding¹

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Absent-minded thinkers are said to be possessed by an idea, preoccupied by their speculations, but can we reverse the terms, confining the thoughts rather than the thinker? In his dissent in *Millar v. Taylor* (1769), Justice Joseph Yates rejects this view: “The occupancy of a thought,” he declares, “would be a new kind of occupancy indeed.” Yates challenges the view that copyright may be seen as a form of property, insisting that no one can appropriate “a set of ideas which have no bounds or marks whatever.”² Others, however, have not agreed that ideas are ineligible for legal protection.³ Perhaps Alan Coren exaggerates the territorial anxiety of the professoriate in his tale of a research team so intent on protecting their Guggenheim grant that they hire a hit man to prevent a rival from discovering whether George Crabbe was “last of the Augustans or first of the Romantics,”⁴ but some may suspect that Coren’s error has more to do with the research budget of even the best-funded humanities projects than with the possessive impulses of their participants. David Lodge contemplates a similar effort, undertaken with all the malice of a hatchet job, when his character Morris Zapp, in *Changing Places*, plans an “utterly exhaustive” commentary on Austen, “examin[ing] the novels from every conceivable angle” so as to foreclose any future research: “After Zapp, the rest would be silence.”⁵ In these stories, academic inquiry belongs to such a limited sphere that any given question generates only one conceivable procedure and answer. Under these straitened circumstances, the rule of publish or perish takes on a new meaning.⁶

Yet many writers show no concern about preemptive effects, instead taking the view that the literary marketplace can accommodate anyone who is not simply making verbatim copies of another’s work. The similarities might instead promote business all around, as Samuel Johnson recognized when he observed that two books on the same subject would “do good to one another”: “Some will buy the one, some the other, and compare them; and so a talk is made about a thing, and the books are sold.”⁷ No doubt Johnson’s view was informed by his exposure to a wide variety of authorial roles and practices in the course of his career as a writer, journalist, editor, and compiler.⁸ Though known for his pragmatism about money as an inducement to write, Johnson also defended the practice of abridgement and was on occasion a silent collaborator on others’ projects.⁹ Notably, despite his reputation as one of the first professional writers,¹⁰ Johnson never tried to collect his writings and to publish them as his *Works*—the defining act of a modern literary career, according to some historians.

The difference between "works" and "writings" roughly corresponds to the difference between a view that gives the writer sole responsibility for a unique invention and a view that places writer and text in a more interactive sphere where others are pursuing similar efforts. The term "works," first used self-reflexively by the intensely proprietary Ben Jonson,¹¹ appeals to a proto-Lockean notion of labor as the basis of textual identity, while also subordinating the creative process to focus attention on the final product, the granite edifice that enshrines the author's reputation. Among eighteenth-century writers, Alexander Pope was particularly concerned about the publication of his works; near the end of his life, he told his would-be biographer, "I *must* make a perfect edition of my works; and then shall have nothing to do but to die."¹² Those who characterize their output more modestly as "writings" emphasize neither the magnitude of their achievement nor the laboriousness of composition, but the residue of continuous activity that inheres in the participial may make the author's industry more salient: the term that declines to classify literary production as labor is also the one to hint that an author's work is never done, that writing continues into the present, as if the imperfect verb has become an imperfect noun still capable of further amendment. "Writings" seem only a step above working drafts that might be rearranged or refashioned without concern for textual integrity; to call something a "work," on the other hand, is to render it inviolable, like a private estate, and it is no coincidence that collected editions often take their series name from the author's residence.¹³

This way of associating a writer's home and collected output suggests a variant on the notion of the "literary estate." The phrase appears to have been first used in the mid-eighteenth century, in *The Adventures of Author* (1767), an anonymous portrayal of the Grub Street end of the literary profession. In one of the novel's many comic confrontations, Folio, a publisher, hurls a bundle of pamphlets into the wind and jokingly tells their author, Hyper, that they have been "published" because "now . . . they are made public enough, without the expence of advertising." Hyper, however, misses the "*bon mot*," because he is "too busy in gathering up . . . his literary estate" as he tries to retrieve the quickly disappearing pamphlets.¹⁴ As the context shows, the phrase is just one more in a series of literalistic jokes about authors and publishers, books and the marketplace. (The characterization of a deceased author's unpublished manuscripts as "literary remains" seems to have developed around the same time.¹⁵) Similarly punning or self-conscious uses continued to appear through

the end of the century and beyond. Thus, for example, in an attack on William Mason for seeking to arrogate Gray's poems by editing them, William Murray wrote in 1777 that Gray "made a present of his poems to the public. And not making a property of them himself, never dreamt that another person was to erect them into a literary estate, to the exclusion of his heirs."¹⁶ In this image, the exclusive property that has been erected against the poet's wishes is a private tract, offensively fenced off against trespassers. Similarly, a few years later Johnson and Steevens could write that Shakespeare's contributions in co-authored plays are so visible that "[i]f they are to be regarded as land-marks to ascertain our author's property, . . . we must . . . adjudge the whole literary estate to him."¹⁷ Not until the latter part of the nineteenth century was a writer's "literary estate" habitually invoked, without the extended metaphors in these examples, as a formula for copyrightable material passed on to heirs.¹⁸ The equation between books and real estate, which today is barely audible in the phrase, seems to have figured prominently in its origins.

Others have discussed the metaphors of real estate in copyright law,¹⁹ but two important points have been overlooked in these accounts. First, although the characterization of a text as an estate has old roots, its frequent and emphatic invocation in the eighteenth century was not an inevitable result of the greater attention focused on rights in texts prompted by the Statute of Anne (1710).²⁰ While perhaps appearing to function as an uncontroversial description, the real-estate metaphor offered the booksellers a means of actively facilitating the view of copyright that met their needs—the view that printing rights should be regarded as a form of property.²¹ This view could plausibly be derived from the Statute of Anne, but was not readily apparent from a reading of the statute.²² The booksellers had good reasons for trying to define the debate over copyright protection in terms that would promote their characterization of the literary marketplace as a limited space, so that they might define the frame in which disputes over copying and imitation would be understood. Second, although the booksellers were largely successful in suggesting that real estate provided a natural analogy for literary ownership, some writers resisted the implication that the literary universe can accommodate only a certain amount of overlap or competition. This contrarian version of the metaphor was by no means the one that prevailed rhetorically, but its use helps to show that even the logic seemingly implicit in the trope did not provide the only way to make sense of it.

The metaphorical association between literary and landed property was already well-established in English legal idiom, which had used the term "estate" since the early seventeenth century in contractual transfers between members of the Stationers' Company, the London guild of printers and booksellers.²³ By the 1660s, the association had become so familiar that one stationer could seek to nullify the royal patent for law books (one of the prime holdings of the Stationers' Company) by revising the conventional image of the proprietary bookseller, arguing that guild members had no special claim to these books because "the Author of every *Manuscript* or *Copy* hath . . . as good right thereunto, as any Man hath to the Estate wherein he has the most absolute property." The monopoly, it was asserted, abridged the rights of both authors and the poorer booksellers, and served to "Disseise them of their Freehold."²⁴ As that example suggests, the vocabulary of real estate came fully stocked with a supply of legal terms and concepts waiting to be exploited; by the eighteenth century, the language of the "estate" and its attendant paraphernalia seemed ripe with promise as a means of elaborating the logic of copyright. These metaphorical possibilities were eagerly developed by the copy-owning booksellers and reinterpreted by their detractors.

Although the world of publishing offers relatively few instances of "market substitutes,"²⁵ the fear of being crowded out has pervaded the debate over literary property since the early eighteenth century, and it provides a way to make sense of the metaphors of physical space that still abounds in current discussions.²⁶ Jessica Litman writes that "[t]he model for [copyright] is real property. We cast the author's rights in the mold of exclusive rights of control. Invasion of these rights is actionable on a strict liability basis, akin to the traditional formulation of trespass to land."²⁷ Similarly, Mark Lemley has observed that "the rhetoric and economic theory of *real* property are increasingly dominating the discourse and conclusions of the very different world of *intellectual* property."²⁸ In what follows, I explore some of the uses and implications of the spatial metaphor in England after the adoption of the Statute of Anne, which provoked a wide array of conjectures, both serious and ironic, about the nature of copyright infringement and the identity of the text. The measure might be called the "copyright reduction act," given that its most controversial clause imposed a twenty-eight-year maximum on a safeguard that had been taken to last in perpetuity under the rules of the Stationers' Company. The Statute of Anne is notable

not because it created a right to prohibit others from printing without authorization, but because it associates the right with the author rather than confining it to the guild, and this gesture is crucial to the double movement by which the act fostered general awareness of the doctrine while abridging its duration.²⁹

This pattern provides a means of reconsidering the history of copyright by reassessing one of its central actors—the proprietary author, who has been cast in variously heroic, tragic, and farcical roles ever since the copyright debate began. Scholarship in this area, tracking the emergence of copyright law and the shift in literary theory that culminated in the Romantic celebration of the unique personality, has argued that textual property and original authorship come into visibility as mutually constitutive terms; as Mark Rose puts it, “The distinguishing mark of the modern author . . . is proprietorship; the author is conceived as the originator and therefore the owner of a special kind of commodity, the work.”³⁰ However, in emphasizing the rise of the solitary, creative genius, critical histories of authorship have tended to bracket competing accounts of the author’s identity and provenance; accordingly, critics have dwelt on those who anticipate the modern proprietary syndrome, while passing over the indifference, ambivalence, and even hostility that other writers displayed toward the protective logic of copyright.³¹ The image of the text as a limited terrain was invoked repeatedly in the course of the copyright debate and remains fundamental to our understanding of copyright—but far from providing a neutral means of adjudicating conflicts over access and restriction, this figuration discounts in advance the very possibility of unhampered access to a domain whose exclusive status associates it with privacy and privation.

I. THE DUAL ECONOMIES OF COPYRIGHT

The real-estate trope is often aligned with an economy of scarcity, a view of literary production and commerce grounded in the logic of an inelastic marketplace.³² Such constraints figure most saliently in arguments against piracy, arguments premised on the assumption that “the sale of a book is . . . confined to a certain number,” so that illicit reprinters are said to resemble squatters: “If a man be not turned out of his house, it may be said, he is not put out of possession; but, if twenty or thirty people are allowed to enter it, and

take up free quarters with his family, he might as well, and sometimes better, be fairly kicked out of doors."³³ As the scope of copyright protection has expanded, these anxieties about cramped space have been applied not only to the verbatim reproduction of texts but to the whole spectrum of imitative writing, from unauthorized sequels to shared plot devices.³⁴

On this view, writers are trapped in a zero-sum economy in which an increased demand for one title translates into a corresponding decline for its competitors, however they are defined. This is the economic logic underlying the language of "literary theft" and "plagiarism" (from *plagiarius*, "kidnapper, slave-stealer"). These terms, often applied to various forms of imitation other than verbatim reproduction, treat copying as a form of seizure, an abduction of the author's brainchild.³⁵ Talk of misappropriation and pilfering suggests that texts are diminished through copying, as if the novelist who "borrows" a plot has removed something from the book, leaving it incomplete. To the opponents of perpetual copyright, the metaphor of literary "theft" was worthy only of scorn; these commentators joked about invading "*lettered Property*" by "stealing [an] Old Woman's Gingerbread *Letters*," and wondered whether readers might be restrained from "conveying" the doctrine of a book to those who had not purchased it.³⁶ In both cases, immaterial goods are sardonically imagined as having a physical form that would make them capable of exclusive possession. Although the gingerbread joke trivializes the issue, the pun on conveyance as description and expropriation usefully captures one of the paradoxes of copyright, allowing the press of ideas to carry a force that is at once physical and mental.

Posed against this economy of scarcity is one of abundance, in which plots, characters, and techniques circulate freely without any threat of depletion. This view of the literary economy may be discerned in the etymology of "copy," from *copia*, "transcript, duplicate" (an extension of the word's root sense, "copiousness, plenty"); analogously, "author" derives from *augere*, "augment, increase." Here the author is a principle of multiplication, not merely recycling the resources in the literary commons but expanding their range, so that each use enlarges the stock of the trade. Prevalent in Renaissance theories of authorship as amplification, and invention through imitation,³⁷ the economy of abundance accords with an emphasis on the text's immateriality. To disregard the text's material dimensions is to ignore its only means of depletion, so that any future use becomes a form of increase. This notion, the source of much resistance to copyright in the eighteenth century,

has been translated into the doctrines of “fair use” and the “public domain,” but in neither instance has the idea of abundance survived. Fair uses are “fair,” in large part, because even in what is assumed to be a zero-sum economy, they pose no threat to any potential market for the source text. The public domain consists of material that is not eligible (or is no longer eligible) for copyright protection, so that even under conditions of scarcity, an author may not legitimately monopolize that material. The law of real property offers a parallel in the form of the commons, a shared space whose potential remains theoretically unlimited—though, as we will see, advocates of strong copyright protection in the eighteenth century were ready to predict its demise in the absence of stricter control over subsistence farming.

These two alternative economic models correlate with the two views of “originality” in copyright law. On the one hand, the literary economy may be seen as a world of endlessly recyclable material, forever mutating into new variants “original” enough to distinguish them from their precursors. In that framework, “originality” inheres in every composition other than a direct copy; rather than providing a means of distinguishing among texts to justify protection for a particular subset, it appears coextensive with the very act of writing.³⁸ Conversely, advocates of expansive copyright protection—usually writers determined to cleanse the bookstores of “market substitutes”—use a much stronger notion of “originality” to stand in for their economic concerns. These writers, who consider their own publications to display a high degree of novelty, seek to police the efforts of others who would exploit these innovations. In light of that contrast, “originality” simply devolves into a pair of antithetical views on how writing takes place and how it circulates—and those views help to inform the high- and low-protectionist positions in copyright law.³⁹

The contrast between these two positions and the economic beliefs that underwrite each one would be rehearsed repeatedly as the copyright debate wore on and the opposing sides attempted to specify—or dismantle—the text’s basic components. The dispute over the metaphysics of literary property can hardly be explained by reference to the language of the 1710 act itself, which says nothing about plagiarism and very little about property, instead focusing on the printing of “Books and other Writings, without the Consent of [their] Authors or Proprietors.”⁴⁰ This formulation ranks authors and proprietors equally, but the act was passed at the behest of the

latter, the London booksellers who controlled the publishing industry. They acquired manuscripts according to the same principles that govern the modern “work for hire” doctrine, generally refusing to publish any book unless they could purchase the “copy” outright, without any offer of royalties. Before the Statute of Anne, the booksellers had limited the registration privilege to company members, effectually preventing most authors from owning copies in the first place. That system ended in 1695, when Parliament allowed the Licensing Act to lapse, destroying the printing monopoly. The result was that book piracy, formerly practiced surreptitiously by a few daring printers, rose dramatically.⁴¹

In the following years, the booksellers repeatedly petitioned for a return to registration, belatedly switching tactics after a series of failures. Initially, they emphasized the rising tide of seditious pamphlets, making dire but ineffectual predictions about the future of unlicensed printing.⁴² Then, in his 1704 *Essay on the Regulation of the Press*, Defoe proposed a return to the formalities of licensing and suggested that books should be required to carry the author’s name—a policy, he noted, that would also discourage piracy. He added that if writers were liable for sedition, then conversely their property in nonseditious works should be secured by law: “[I]f an Author has not the right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit, ’twould be very hard the Law should pretend to punish him for it.”⁴³ The booksellers, who had already shown some awareness of the author’s utility in promoting their own ends,⁴⁴ quickly took up this argument, rehearsing it in their next campaign to reinstate their lost powers, in 1707. That attempt failed, but a similar petition succeeded in 1709, producing the Statute of Anne and incidentally turning Defoe into one of the unacknowledged legislators of his day.⁴⁵ In one of the many ironic cruxes punctuating the history of copyright, the booksellers appropriated Defoe’s argument for authorial rights as a means of securing literary property for themselves, raiding his *Essay* for the terms that would, they insisted, help to protect writers against unscrupulous marauders.

Although the booksellers were initially the primary beneficiaries of the statute, as they had expected, its limited term of copyright protection suggests that other concerns—involving the rights of authors and the reading public—were also at stake in the legislation. Books that had already been published were to receive twenty-one years of copyright protection. For new books, the statute provided that after fourteen years, “the sole Right

of printing or disposing of Copies shall return to the Authors . . . if they are then living, for another Term of fourteen Years.”⁴⁶ The two-term arrangement relies on but significantly revises the patent regulations, which provided for a single fourteen-year term.⁴⁷ The booksellers, opposed to such a fundamental reduction of their power, petitioned against the term limit as the bill was working its way through Parliament, and later, when confronted with this problem in court, they glossed over the fifteen lawless years preceding the Act and explained that the drafters had never intended to undermine the copies’ durability, but had only meant to impose stricter penalties for piracy within the specified time frames. The proprietary author was invoked repeatedly by both the proponents and critics of copyright as the debate picked up steam, but this elusive figure was rarely to be seen in the literary marketplace.

II. THE TRAGEDY OF THE COMMONS

It was the booksellers’ demand for perpetual protection, the effort to preserve the text as securely as a tract of land, that ignited the pamphlet debate, which lasted from the mid-1730s until 1774, when the House of Lords finally upheld the statutory limit in *Donaldson v. Becket*, condemning the booksellers’ efforts at “monopoly.” Known as “the battle of the booksellers,”⁴⁸ the conflict pitted the leading members of the London publishing industry against their rivals in Glasgow and Edinburgh, where the Statute of Anne did not apply. The debate also included the less established English booksellers, whose inability to invest in copies excluded them from the most profitable activities in the trade. The conflict turned not over the provisions of the Statute of Anne but over the wealthier booksellers’ efforts to maximize its protections by widening its scope beyond a prohibition on piracy and extending its duration beyond twenty-eight years.

As to the scope of copyright protection, the courts generally construed the statute narrowly.⁴⁹ In 1761, for example, the Lord Chancellor refused to sanction a magazine editor for reprinting the text of Johnson’s *Rasselas* verbatim, except for the author’s “moral reflections.”⁵⁰ A satire on the contemporary literary scene, published a few years later, urbanely defends writers against the charge of theft by insisting that most of them “never stole any thing except lines and sentences, which by the bye is not made penal as

yet by any statute."⁵¹ Although the publishers had little success in claiming a broader scope of protection than the literal terms of the statute afforded, this did not spare them from their critics' mockery; for example, a gastronomically inclined writer objected to their claim to a sole "licence to utter, vend, print, pirate, abridge, hash, fritter, part or parcel."⁵² As with the line about the legality of stealing, the joke's most obvious implication is that copyright had not even begun to limit writers' access to plots, themes, and ideas; the subtler implication, however, is that the law actually encouraged such partial takings by protecting any text so long as it could be distinguished from its neighbors.⁵³ By limiting its attention to piracy, the Statute of Anne promoted a literary culture fueled in part by imitative writing.

The term of copyright protection was a more contentious matter, and provided the main ground on which the battle of the booksellers was fought. The controversy began in earnest only in the mid-1730s. The booksellers who petitioned for copyright legislation had spoken of their common-law rights, but those suggestions were not incorporated into the statute,⁵⁴ and during the first two decades following its passage, while all books received blanket protection, the booksellers had no need to spell out a comprehensive theory of copyright. In 1731, the protection afforded to "old" books was due to expire. The booksellers, however, continued to operate as if their rights were still in force, preferring to remain quiet until forced to act.⁵⁵ A seemingly propitious occasion arose in 1735, when Parliament was considering a bill that would offer copyright protection for engravings.

Proposed and supported by the artists themselves as a means of deterring unscrupulous printmakers, the Engraving Copyright Act passed into law without much debate: the artists issued one pamphlet on their own behalf, and their opponents issued none. By contrast, the booksellers' attempt to secure another extension of copyright generated a small flurry of pamphlets, opening with an attack on the bill that ultimately provoked three or four rebuttals. In an unsuccessful attempt to align their cause with the engravers', the booksellers again presented themselves as guardians of authors' rights, but apparently sensing that the mere assertion was insufficient, they also began to cite Lockean property theory and the language of natural rights in their pamphlets. Although the legislation failed, the booksellers' tactics set the terms for the future of the debate; as John Feather observes, "After 1735, it was never again entirely possible to exclude some consideration of the rights of authors when copyright law was under discussion."⁵⁶

This period, then, witnessed an acceleration of the copyright debate and an increasing reliance on the metaphors of real estate. Cited by the booksellers throughout the 1735 altercation, the imagery of estates, fields, trees, and plants burgeoned in the growing mass of treatises and legal decisions, reaching its height in 1774, when the House of Lords finally ruled against perpetual copyright. Before 1710, the metaphor had remained compatible with a vision of abundance, an emphasis on the rich profusion of the author's mind. After the Statute of Anne, the idea of a physically limited space provided one of the essential grounds for pursuing the real-estate metaphor.

For an example of land that produces abundance, we need look no further than a 1706 letter in which Alexander Pope invokes the language of engraftment as he considers the protocols of authorial imitation. Consulting the poet William Walsh on the permissibility of borrowing, Pope offers his own justification in a passage that anticipates his couplet in the "Essay on Criticism" about common knowledge transposed into the elegant cadences of the consummate stylist ("True Wit is Nature to Advantage drest, / What oft was Thought, but ne'er so well Express").⁵⁷ In the letter to Walsh, Pope writes,

I wou'd beg your opinion . . . how far the liberty of *Borrowing* may extend? I have defended it sometimes by saying that it seems not so much the Perfection of Sense, to say things that have *never* been said before, as to express those *best* that have been said *oftenest*, and that Writers in the case of borrowing from others, are like Trees which of themselves wou'd produce only one sort of Fruit, but by being grafted upon others, may yield variety. A mutual commerce makes Poetry flourish: but then Poets like Merchants, shou'd repay with something of their own what they take from others: not like Pyrates make prize of all they meet.⁵⁸

Pope draws on an economy of abundance, emblemized here by a literary orchard whose variety guarantees that authors will always have more fruit to pluck, more produce to cultivate, so long as they continue to intermix their stock. Pope formulates his analogy in explicitly financial terms. He allows himself to conceive of a landscape devastated by "Pirates," whose ravages would ruin the victims and destroy the orchard according to the metaphor of "theft." Yet Pope prefers to dwell on the growth economy fueled by tradesmen-poets whose "mutual commerce" not only recirculates but multiplies their resources. Later Pope would ironically salute the inflationary

effects of “paper-credit,” with its hallucinatory ability to translate dearth into excess,⁵⁹ but in this mercantilist allegory he describes an admirable luxuriance born of intermixture, a profusion that grows by leaps and yet stays within reasonable bounds. Far from insisting that piratical impoverishment is inevitable, Pope suggests that poets might simply choose otherwise, might opt for recompense instead of theft. The vocabulary of mutual exchange and repayment, of course, can hardly betoken a process of direct, one-to-one reciprocation between individual writers; rather, Pope seems to imagine a common literary fund open to all applicants on the condition that they respond in turn with their own contributions.

In a frequently cited *Tatler* essay, written in 1709 to elicit support for the upcoming legislation, Addison uses a similar image, describing the productivity of an “ingenious Drole” whose “Brain, which was his Estate, had as regular and different Produce as other Men’s Land.”⁶⁰ For Addison, this vision of nature’s bounty is a thing of the past: the drole *had* an estate in his brain, but paradoxically there was no need to characterize it as exclusive property in those days, because everyone respected his right to claim it as his own. The lapse of the Licensing Act in 1695 seems to be the key event: “Before men had come up to this bare-faced impudence [of open piracy], it was an Estate to have a Competency of Understanding.”⁶¹ Addison’s vision differs from Pope’s in focusing on a single writer’s productive potential, rather than imagining a literary field in which writers practice a kind of collaborative crop rotation that replenishes the commons. Perhaps that focus makes it easier for Addison to move from nostalgia for the days when property rights were tacitly respected, to an endorsement of an explicit property regime. Because of the pirates’ ravages, Addison contends that the produce *should* be protected as property: as he puts it, the inventive figure who is capable of such “good Husbandry” should have some “Property in what he is willing to produce.”⁶² Endorsing the new legislation, Addison presents an ambiguous view of the economy of abundance, treating it as if it were already susceptible to “no trespassing” signs, even though it has the virtue of not *requiring* such signs. Perhaps the pirates in this description are the same ones Pope had preferred to ignore, but for Addison, it seems that literary abundance is best understood in terms of individual produce, not as part of a growth economy that writers can share in. Writers are entitled to the produce of their own estates, and whether they participate in a wider, mutual commerce involving other writers is left unexplored, perhaps because

that subject would raise uncomfortable questions about the legitimacy of the writer's claim to sole responsibility for the goods he calls his own.

If Addison wavers uneasily between two views of literary production, describing an endlessly generative mind whose capacity is sapped because of the limited market for its produce, he points toward a view of scarcity that would become much more prevalent in the pamphlet debate. When the booksellers sought, in 1735, to extend the term of copyright for another seven years,⁶³ they met with an angry response in a broadside titled *A Letter to a Member of Parliament, Concerning the Bill Now Depending in the House of Commons*, the only attack on the booksellers' position to appear during this first effort to amend the copyright statute.⁶⁴ The broadside begins by predicting that the proposed legislation "will greatly cramp" the diffusion of knowledge and will "notoriously invade the natural Rights of Mankind." If the Statute of Anne guards authors' rights within acceptable bounds, the booksellers' bill would go too far, "establishing a perpetual Monopoly."⁶⁵ After the expiry of the twenty-eight year term of protection, books may be sold for less, "render[ing] the Knowledge contained in them more diffusive"; if the term is extended, books "will be sold at higher Prices, and consequently be confined to a small Number."⁶⁶ In short, the extension of copyright would erode the commons, turning the statute's temporary prohibition on unauthorized reprinting into a permanent right that would "invade" others' rights. This account draws on a metaphoric of physical space, but only hints at the real-estate analogy, which was much more prominent in the booksellers' responses.

The booksellers invoked the language of real estate to argue that writers are entitled to a proprietary claim even stronger than the right by occupation that Locke had defended. The first of the booksellers' many articulations of this view appears in a pamphlet fashioning itself as a defense of authors' rights, titled *A Letter from an Author to a Member of Parliament, Occasioned by a Late Letter Concerning the Bill Now Depending in the House of Commons* (1735).⁶⁷ The pamphlet asserts that an author "may be said to create, rather than to discover or plant his Land; and it cannot be said, that an Author's Work was ever common, as the Earth originally was."⁶⁸ Though ostensibly marshaled to justify the extension of copyright for another seven years, this argument sounds more like a call for perpetual protection, and during the next forty years the same view would be rehearsed repeatedly for exactly that purpose.⁶⁹ Of course, the difference between creation and mere possession

also distinguishes authors from booksellers, nullifying the argument from creation *ex nihilo* by reminding us that although inventions can be assigned to others, the inventor’s status itself cannot.

Extending the metaphor, the booksellers also denied that a prohibition against piracy could fuel a full-scale enclosure movement:

The Field of Knowledge is large enough for all the World to find Ground in it to plant and improve. Let every Body do it; let them be encouraged and protected in so doing; let them write and print on the same Subject: But let them not lazily borrow that individual Work, which is the Produce of another’s Labours.⁷⁰

In the infinitely abundant and expansible “Field of Knowledge,” the booksellers strive to disavow some of the spatial implications of the agricultural metaphor; as their bill worked its way through Parliament, the booksellers published several more pamphlets, repeating arguments and even whole paragraphs from each other, but this vision of a boundless field appears only once.⁷¹ Yet despite this emphasis on the inexhaustible abundance of the literary economy, the *Letter from an Author* undermines its own argument, invoking the technicalities of land law to argue that copyright “is a Monopoly in no other sense, than any Man’s Estate is so. . . . If a Cottager, who has a Right of Common in the Waste of a Manor, should offer to build or plant upon it, those Improvements would belong to the Lord of the Manor.”⁷² The metaphor now drives the argument rather than illustrating it: logically, the “improvements” must refer to literary refurbishments such as sequels and abridgments—permissible forms of recycling whose legality had never been questioned. Anticipating the modern doctrine of fair use, this account treats a publication that “build[s] . . . upon” the source text as an illegitimate effort to occupy the same ground, depriving the “Lord of the Manor” of what is rightly his. At a time when piracy was the only actionable form of infringement, this analogy offers to expand the law’s scope in precisely the way that the booksellers’ opponents feared. Erasing the difference between the landlord’s property and the commoner’s improvements, between the source text and any contiguous projects in the field of knowledge, the *Letter* proposes to import the doctrine of landlords’ rights into the realm of copyright, reintroducing the threat of enclosure and legally induced scarcity that the earlier passage had sought to dispatch.

Having contemplated the expansion first of the literary terrain and then of the proprietary claim, the *Letter from an Author* goes on to reaffirm the inflexibility of the literary marketplace. The prospect of limited-term copyright evokes the specter of a landscape ravaged by freeloaders: “The laying of all Copies open, is such an Expedient to make Books cheap, as the allowing of Cattle to be fed upon every Body’s Land, would be to make Cattle so.”⁷³ The commons, plentiful though it may appear, has a finite amount of space with little room for latecomers. This vision of a desolate territory that will finally afford no occupancy at all reappears in another of the booksellers’ pamphlets from the same period, which insists that limiting the term of copyright protection is certain to “make the Purchase of [authors’] Copies sink, like the Value of Estates that have a Flaw in their Title.”⁷⁴ It seems that perpetual protection is the only acceptable solution, because even the prospect of common literary property, twenty-eight years in the future, threatens to depopulate the marketplace now. Likewise, in the booksellers’ hands, the analogy between books and livestock proceeds by reducing the term of copyright to zero, as if any temporal limit at all constitutes an immediate threat, “the laying of all Copies open.” The world described by the booksellers is one driven by scarcity, in which the commons cannot help to create a sustainable publishing marketplace, but instead will ensure that all writers are ultimately driven out of the market.⁷⁵

Over the next forty years, commentators on literary property continued to grapple with the problem of materiality. Booksellers intent on observing the letter of the law could dwell on the boundaries of the statute and the marketplace, and hence Robert Baldwin, in an advertisement from the early 1750s, announces his intention to reprint several out-of-copyright books, explaining that “as I take the Materials that other Persons have purchased, I can build much cheaper than those who have built and paid great Prices for them; it being well known that most of the present Proprietors of old Copies, have bought them as dear as Freehold Land.”⁷⁶ Baldwin’s reminder about the benefits of recycling may evoke the plenitude of the abundant economy, but at the same time, his vision of a lumber-gathering expedition on someone else’s freehold occupies a metaphorical register bordering on the dire idiom that Kenrick uses to describe the unfortunate copyholder who finds dozens of unwanted guests in his house and wishes that he had simply been “fairly kicked out of doors.”⁷⁷

At the same time, critics of perpetuity persisted in detailing the impoverishing effects of enclosure, alleging that the copy-owning booksellers "grudged to others the Gleanings of a Harvest by which they had been enriched,"⁷⁸ and mocking the real-estate trope through a satirically literal application of its premise, by which the 1710 act becomes "*An Act for the Encouragement of PLANTING, by vesting THE SHOOTS OF HEDGES and BRANCHES OF TREES, IN THE PLANTERS, during the Times therein mentioned.*"⁷⁹ In reducing the literary text to purely material form, this latter summation underlines the creeping threat of privatization; by returning to the original ground of Lockean appropriation—here portrayed as a field dense with privately owned trees and undergrowth—the parody creates an agricultural equivalent for the overweening claims by which the booksellers would translate the statute's limited protection into a perpetual right.

As the dispute continued, the opposition to perpetuity intensified into an opposition to copyright altogether. In the early 1760s, for example, one pamphleteer insisted that English law recognized only those forms of incorporeal property that could be derived from a material base; thus "Estovers, Advowsons, and Rights of Common" require woods, churches, and manors—and so property in texts, "if it exists at all, must necessarily partake of the Nature and Qualities of a corporeal Property! A strange Phænomenon!" The commentator then turns bard as he finds himself "forced to exercise a Poetical Faculty in giving Limbs and Features to this airy Phantom."⁸⁰ The mock surprise underwrites a hostility toward the very concept of literary property, here dismissed as entirely oxymoronic in an idiom only slightly more facetious than the tone Justice Yates would adopt seven years later. Where the 1735 *Letter to a Member of Parliament* remained content to attack the doctrine of perpetuity while endorsing a limited term of protection, the later phase of the debate marks an increasing insistence on two radically opposed extremes—an utterly enclosed market or an utterly unregulated one—as if the only antidote to the economy of scarcity were one of pure abundance. Just as the dispute over the term limit yields alternative arguments either for perpetual protection or for none at all, the argument about the literary economy morphs into similarly extreme positions.

Further, whereas the booksellers' debate opened by focusing on the economic conflict among members of the trade, later commentators would begin to emphasize the roles of the author and reader. Extending the logic of his attack on the curiously hybrid nature of literary property, the essayist who

marveled at this “strange phenomenon” went on to describe its singularly brief half-life. The establishment of property in writing, he suggested, would underwrite a raid on manuscripts in general: “Creditors would ravish from Dramatic Writers their half-formed Tragedies, from Clergymen their pious Discourses, the Spiritual Food of their respective Flocks.”⁸¹ Indigent writers and their hungry audience find their provisions drastically reduced in this account, as if the very recognition of this new form of property, even in its nascent state, would bring about a major shift in the allocation of literary resources. Far from establishing authors as proprietors, the new doctrine serves in effect to impoverish them. Later critics would probe the boundaries of copyright to suggest that its prohibitions would impose constraints on readers as well—Yates, for example, would ask whether all forms of transcription were illegal, and Lord Camden, in 1774, would suggest that loaning books might be proscribed.⁸²

The “new kind of occupancy” in ideas seemed to have no logical limit, extending its reach into every avenue of the literary marketplace and beyond. Like the pun about the “conveyance” of a thought, the embargo on loaning books confines the reader even as it confines the content of the book. The booksellers, of course, never sought to justify such radical incursions in the name of the proprietary author, and among writers themselves, even the more limited forms of proprietorship met with considerable resistance. Before addressing that critique, however, I would like to consider a pair of writers who enthusiastically embraced the new doctrine in a fashion that responds to the question of the reader’s place, imagining a kind of literary occupation in which the author is endowed with seemingly unlimited potential.

III. MARGINAL OCCUPATIONS

During the same period in which the booksellers’ pamphlet wars were heating up, William Warburton and Samuel Richardson took up the question of copyright protection, advancing its implications far beyond the limits that the booksellers were claiming. Warburton, Pope’s literary executor, seems to have been the first figure outside of the bookselling industry to defend the doctrine of perpetual copyright when he published *A Letter from an Author . . . Concerning Literary Property* in 1747.⁸³ There he follows the Lockean argument based

on the author's labor. By contrast, when he came to publish his edition of Pope's posthumous *Works* in 1751, Warburton took a more aggressive stance, combining the roles of editor and predator in a prefatory warning to the poet's enemies: "Together with his Works, he hath bequeathed me his DUNCES. So that as the property is transferred, I could wish they would now let his memory alone."⁸⁴ Pope's entire Grub Street demonology, it seems, is part and parcel of his literary estate, implanted in the grounds that made Warburton "one of the richest landlords of literary property in the century."⁸⁵ Fettered to the lines of the *Dunciad*, entailed in the copyright, the dunces find their own freedom constrained by this literary executor-cum-executioner.

Equally remarkable is Richardson's outraged response to the booksellers who brought out an unauthorized sequel to *Pamela* in 1741. At a time when expansions of others' stories were commonplace, Richardson saw this "spurious Continuation" as an infringement of "his Right to his *own Plan*" and advertised that he was "actually continuing the Work himself, from Materials, that, perhaps, but for such a notorious Invasion of his Plan, he should not have published."⁸⁶ Richardson treats the novel's underlying conception as a material quantity, capable of dissipation and recovery. The intensification of the copyright debate at mid-century seems to have provided the conceptual background for Richardson's high-handed view of authorial rights, scarcely even intelligible within the terms of contemporary law. To be sure, Warburton and Richardson both represent extreme instances—Warburton's massive inheritance derives from Pope's own proprietary zeal, unmatched in his day, whereas Richardson, a printer by trade, was unusually sensitive to criticism and to the economics of the publishing marketplace. Yet however exceptional their claims, these writers dramatize a familiar problem in copyright doctrine, a problem implicit in the dispute over how to define infringement but explicit in much of the eighteenth-century debate: they show how the expansion of authors' rights may threaten to diminish the reader's rights.

That conflict would resurface when Richardson's third novel, *The History of Sir Charles Grandison* (1753), was reprinted without authorization in Dublin, outside the geographical bounds of the English copyright statute. Styling himself "the Editor and Sole Proprietor of this new Work (*New* in every sense of the Word)," Richardson decries "the INVASION of his PROPERTY" and gives equal weight to every component of the book: "[N]ever was Work more the Property of any Man, than *this* is his. The Copy never was in any

other Hand: He borrows not from any Author: The Paper, the Printing, entirely at his own Expence.”⁸⁷ The equation of plot and paper flies in the face of the emerging copyright doctrine, which distinguished the book’s material and ideational aspects in order to reserve the latter to the author;⁸⁸ Richardson, almost certainly aware of this development, stresses the enormity of the theft by aligning the intellectual and material property as if both parts were equally depletable—as if meddling with the plot of his new work involved the same kind of theft as piracy. Seeking to discredit the Dublin booksellers for their “Attempt to possess themselves of [the author’s] whole Property,”⁸⁹ Richardson stresses the indivisible nature of the property in question and, in consequence, suggests once again that the author comes to own the work at the reader’s expense. His power struggle finds its fullest exemplification in *Clarissa* (1747–48), whose margins he peppered with pointing hands and a mass of ever-accumulating footnotes that wrest interpretive control away from the reader, hammering home the author’s own perspective. That Lovelace annotates *Clarissa*’s letters in precisely the same manner helps to display the power of the editorial hand, and to suggest that the fiction of editorship actually strengthens Richardson’s control in a way that mere authorship could not. Casting himself as the text’s first and most privileged reader, Richardson occupies the space between producer and consumer—he preoccupies the text in order to manage its reception.

Warburton, too, exploited the editorial apparatus of ownership, ushering the reader through Pope’s *Works* with rows upon rows of footnotes that often occupy more space than the poems themselves. Nor does the editor limit himself to playing chaperone in the lower margin; in the frontispiece, his own profile basks in the light of center stage, displacing Pope’s into the chiaroscuro above. In his expansive editorial role, Warburton restages the dilemma posed a decade earlier in Pope’s most famous legal victory, which established the principle that letters qualify for protection as manuscript property—a ruling that begins, at the same time, to complicate the relationship between writer and reader. In *Pope v. Curll* (1741), Lord Hardwicke ruled that the recipient of a letter is not free to publish it without the author’s consent, because the recipient can claim only “the property of the paper” and therefore has “at most . . . a joint property with the writer.”⁹⁰ Hardwicke, then, at least provisionally entertains the possibility that readers may come to own a share in the material they read. As if to emphasize the limited space in which such a principle might operate, Warburton covers

Pope’s *Works* with his own copious editorial hand, forestalling any claims on reader’s part. Even more elaborately than Richardson, the editor fills up the margins, arrogating the text to himself according to the principle of first occupancy.

Warburton’s apprehensive strategy takes on a somewhat different cast in the hands of William Blackstone, who would reaffirm this sense of competition over the text’s limited terrain when he represented one of London’s leading booksellers in *Tonson v. Collins* (1762).⁹¹ Seeking to defend Jacob Tonson’s claim to perpetual copyright in the *Spectator*, whose statutory term of protection had expired,⁹² Blackstone frames his argument as if he were speaking for Addison, here cast as an exasperated landlord coping with presumptuous visitors. In relying on the claim of the author as creator, rather than the bookseller’s right by purchase, Blackstone exposes the tortuous logic implicit in such reasoning. Although he observes Hardwicke’s distinction between the text’s material and immaterial components, Blackstone imagines a much more direct confrontation between author and reader, and seems to award the author some part of the material property as well. Criticizing the argument by Joseph Yates, as opposing counsel, that publication destroys any private property interest, Blackstone explains,

He [i.e., Yates] says, a book, when published, is a gift to the public, like land thrown into a highway. It may be so, where the author conceals himself, and gives no indicia to distinguish his property. The title, the utterance, the vending, are sufficient indicia here. In such a case, it is more like making a way through a man’s own private grounds, which he may stop at pleasure; he may give out a number of keys, by publishing a number of copies; but no man, who receives a key, has thereby a right to forge others, and sell them to other people.⁹³

Taken at face value, Blackstone’s analogy credits the writer with more control than even the Romantic theory of authorial genius would allow. By “publishing a number of copies,” the author gives out so many “keys” to his “own private grounds”; the act of reading is thus likened to “making a way through [the author’s] grounds,” so that piracy becomes an invasion of privacy, a means of trespassing into the author’s sanctum. Yet in this litigation it is Tonson, not Addison, who claims the exclusive right to give out the keys by multiplying copies of the *Spectator*; by conflating the roles of

author and publisher, Blackstone suggests that even after publication, the text remains a private estate from which the author might eject visitors “at pleasure.” The logic by which Blackstone strives to delineate a legal right of property that survives publication—and that serves the author’s interest rather than the bookseller’s—leads ultimately to a vision of absolute interpretive dominion, as if the disgruntled author might simply confiscate his book from those who will not abide by his demands.

In the event, the court exercised its own power to terminate lawsuits “at pleasure.” The legal action was dismissed as “collusive” when it emerged that Tonson, eager to try a test case, had promised to indemnify Benjamin Collins against any liability imposed by the court’s decision. Because the two parties had arranged the case in such a way as to escape the zero-sum logic that typically underwrites such actions, their agreement was understood as a form of collaboration—what one commentator called “a sort of amicable suit”⁹⁴—whose geniality removed them from the law’s conceptual framework and hence from its purview. Just as Addison’s praise for the “ingenious drole” and his abundant intellect cannot be accommodated in this argument, so that the essayist must instead be represented as a protective landlord, similarly the courts define their field of operation in terms of scarcity and competition, expelling those who do not conform to the adversarial premise. The practical effect of the typical copyright transaction at this time was to give authors a very limited tenure in their own writings, but the emerging justifications for copyright also allowed for an imaginary version of literary ownership in which authors—or editors—could inhabit the text so completely as to leave little room for any independent claim to occupy its imaginative space. As we have already seen from Pope’s example, however, the metaphor of physical space need not move from fixed bounds to competition over limited resources, and articulations of this more optimistic view continued to appear while the copyright debate was approaching its peak.

IV. A PLACE IN COVENT GARDEN: HENRY FIELDING’S LIMITED ECONOMY

In January 1752, Henry Fielding launched the *Covent-Garden Journal*, the last major literary project he was to publish during his lifetime. Writing as a seasoned professional in the first issue, he breezily praises his own goods while

groaning about the excessive "Multitude" of periodical essayists already flooding the market with their "small Parcels,"⁹⁵ and he underscores the significance of the *Journal's* locale by drawing on the language of the physical marketplace. Fielding begins by likening the throng of ephemeral journals to the meat stalls of Leadenhall Market, observing that "Consumers" will use both commodities for the same ends, since "there are certainly as many B-ms in the World as there are mouths."⁹⁶ The conceit applies just as readily to Covent Garden's huge fruit and vegetable market, a block away from Fielding's home and office on Bow Street, but he adduces this commercial glut only to press forward his claim to a share of the business: "Pray, Gentlemen, make Room for me; —I am but one. Certainly you may make Room for one more."⁹⁷ But no sooner has he pushed his way into the crowd than he shifts ground, wondering if the market can accommodate so many and dismissing his competitors with the same parodic *hauteur* that he displays in *Tom Jones*: "I do not in the least question, but that some of my cotemporary Authors will immediately, on my Appearance, have the Modesty to retire, and leave me sufficient Elbow Room in the World."⁹⁸ The plea for accommodation has given way to the imperious tones of Blackstone's landlord, eager to clear out the riffraff. Finally, Fielding resolves the disparity by rejecting the premise that writers must inevitably jostle each other in a confined space. Too many in the profession, he says, behave "like mere Mechanics," competing to sell identical wares—but any competent writer can stake out a new plot. Turning his back on the crowd, Fielding declares, "[I]t is not my Intention to encroach on the Business now carried on by my Cotemporaries, nor to deal in any of those Wares which they at present vend to the Public."⁹⁹ Unlike Covent Garden, the literary marketplace apparently knows no fixed bounds.

Yet instead of abandoning the analogy between literary and agricultural commerce, Fielding keeps circling around this theme, now exposing the narrow scope of the Grub Street imagination. Where we might expect to see him crowing about his diligent search for a new vein of knowledge, he prefers to taunt his competitors by making the task look effortless. The list of proprietary "Title[s]" already claimed includes only a few items, most notably "that spacious Field . . . called the Land of DULLNESS."¹⁰⁰ Once again, Fielding parcels out literary tracts in terms of physical space, this time elaborating the metaphor even more facetiously through an appeal to the law of real property, which will, he hopes, excuse him for "accidentally . . . straying

in the said Field,” because “we Wits have, by Prescription, a Right of Common there *per Cause de Vicinage*, as the Law calls it.”¹⁰¹ Citing the formula for the right to pasture cattle on a neighbor’s land, if the two adjoining estates have allowed each other that privilege “from time immemorial,”¹⁰² Fielding acknowledges that wits and hacks must both survive by stealing each other’s material, providing fodder for each other’s stock; his reference to the presiding spirit of the *Dunciad* recalls the Warburtonian legacy of duncehood, with the significant difference that Fielding specifies a property right that seems to exist precisely in order to be invaded.

The legal claim confirms an association already implicit in his choice of address: along with its produce, Covent Garden was famous for its prostitutes, also known in contemporary slang as “hacks,” and indeed, the *Journal’s* “Covent Garden” section, featured at the end of each issue, often included news of bawds and prostitutes tried in Fielding’s Bow Street court. Presented as an otiose, pedantically literal-minded application of the spatial metaphor, Fielding’s joke reveals his indebtedness to the distasteful wares already circulating in the marketplace; their promiscuous commerce, far from crowding him out, creates a place for his response. Pressed to its logical conclusion, the real-estate analogy would not only explode his vaunted independence, but would also reduce his own territory from an unmarked, unlimited expanse to a relatively circumscribed, if imperfectly enclosed, Field of Wit—and once endowed with a local habitation and a name, his alternative to Grub Street loses its sense of infinite potential and becomes yet one more commercial property. The absurdly strained legalese allows Fielding to have it both ways: fascinated and appalled by the topographical conceit, he keeps spinning out reasons for abiding by its logic, always undercutting them at the same time. Significantly, however, he never describes the free, open space that should supply an alternative. His only concrete images of the literary marketplace, no matter how ironically charged, emphasize the problems of confinement and overcrowding; somewhere on the heights of Parnassus there may be room to breathe, but the mortals in Covent Garden cannot envision any such release.

In this richly ambivalent introduction to his paper, Fielding seems to ridicule the very notion of literary property, here exemplified entirely by products he intends to avoid. Besides dullness, he includes party politics and “personal Slander and Scurrility”¹⁰³ among the goods to be retained by

the hacks; only fleetingly, and by implication, does wit itself become a form of property. He reaffirms the same skeptical attitude in the *Journal's* fourth issue, which lists his conditions for peace with the "Republic of Grub Street."¹⁰⁴ In concluding the "Paper War" he has been waging since the journal's commencement (yet another elaboration of the spatial metaphor, this time more comic than ironic), Fielding stipulates that the Grub Street writers will retain "sole and undoubted Property" in "all Kinds of Scurrility, personal Abuse, and other the known Wares of Billingsgate";¹⁰⁵ nevertheless, as with his requisition of the duncely produce next door, the crude reference to "B-ms" in the opening essay has already indicated his determination to make free with any scurrility he may require. The notion of a derelict property belonging to nobody figures often in Fielding's literary jurisprudence, but in this instance he also strives to capitalize on the opportunity, carrying off his abuse even while professing to spurn it. Fielding even hints at the irresistible appeal of such scandalous material when he observes that "the Public will buy the same Scurrility a hundred times over"¹⁰⁶—a tribute to the magical powers of the abundant economy if there ever was one.

In the treaty that ostensibly excludes him from such sordid takings, Fielding makes no complementary attempt to engross the more respectable literary assets to himself, but he does insist that the Grub Street hacks may not peddle their offensive wares under his name. Even as he disparages any claim to literary property, portraying it as an untenable monopoly on worthless material, Fielding strives to preserve control over his reputation. Alternating between these two poles, he ignores the very limited scope of copyright law, whose restriction to piracy meant that imitations were permissible almost everywhere except in the minds of a few contemporary writers. If his opponents' ludicrous pretensions to legal title exceed any conceivable statutory basis, Fielding's defense of reputation requires no grounding in the law of literary property, resting instead on principles associated with libel.¹⁰⁷ Consistently misrepresenting the object of copyright, Fielding identifies its demands with the inflated, contemptible, self-serving claims of the hacks whose trivial and barely distinguishable writings he blames for producing a drug on the market in the first place. The two issues that occupy him throughout both essays—the constricted economy and the claim to legal ownership—seem to represent different aspects of the same basic problem.

V. AUTHORS AND ORIGINS

Fielding's distrust of proprietary claims may appear surprising to modern readers, accustomed to copyright as a basic tool of literary commerce and control, but such skepticism was not unusual in the eighteenth century. The distinction between a text's material and ideational aspects seemed fraught with ambiguities; one commentator found it "about as intelligible, as if one should state JOHN to be the OWNER of the CARCASE and LIMBS of the HORSE, and THOMAS the OWNER of his COLOUR, his SHAPE, SPEED, and METTLE."¹⁰⁸ Despite his legal training, Henry Fielding never commented so explicitly on copyright law, but this kind of folk wisdom comes close to the tone of his more farcical pontifications. Even in the absence of any direct statement, Fielding's plays and novels often reflect on the dilemmas that copyright generates, and his engagements with these problems help to clarify certain aspects of the contemporaneous debate and of the philosophy of copyright more generally.

Foremost among these is what Peter Jaszi calls the founding contradiction of copyright law, which seeks both to "promote public disclosure and dissemination of works of 'authorship'" and to "confer on the creators the power to restrict or deny distribution of their works."¹⁰⁹ The same paradox informs Blackstone's impersonation of a jealous literary landlord and Richardson's struggles with his readers and imitators. "Many particular doctrinal constructs," Jaszi adds, "are simply attempts to mediate the basic contradiction between public benefit and private reward. Their instability is guaranteed because the two goals are irreconcilable."¹¹⁰ He finds this contradiction reiterated, for example, in the "idea/expression" dichotomy—the doctrine that copyright protects the language of a text but not the underlying ideas it exemplifies. As many commentators have observed, the boundary between idea and expression is impossible to fix¹¹¹—but just as remarkably, this doctrine ensures that even under a regime intent on rewarding creativity, the text's most aesthetically and commercially valuable aspects may fail to qualify for legal protection.¹¹² The poet who creates a new verse form and the novelist who develops a new twist for a familiar plotline cannot control their inventions, which must be shared with anyone who chooses to use them, like most other elements of the text.

The requirement that authors must inevitably relinquish certain components of their writings provides a kind of legal sanction for the view that

readers somehow "possess" their favorite novels and poems—an especially common perception among literary critics, whose Warburtonian impulses often lead them to arrogate texts (and their attendant dunces) entirely to themselves. As that example suggests, the notion of shared property ultimately proves no more coherent than the idea/expression dichotomy, but at the same time, it recapitulates more directly the paradox inherent in Jaszi's fundamental contradiction—indeed, it simply reformulates his contradiction in terms of property rather than circulation. Just as copyright seeks both to circulate works and to contrive a means of restricting their circulation, it makes the text public while also attempting to reserve the property to the author. The antinomies of diffusion and conservation are woven into the very fabric of copyright law.

Fielding explores this contradiction by exploiting the incoherence of property in writing. In the *Covent-Garden Journal* essay, the title deeds to dullness and scurrility, no matter how unassailable, prove incapable of keeping the interlopers next door from taking the air or the flowers. Fielding's carefully staged concessions and withdrawals may seem designed to explode the very concept of literary property, but as we have seen, his inability to describe an open space where texts can circulate independently suggests that writers are doomed to live on each other's doorsteps, *faute de mieux*. The question then becomes not how to find an alternative space but how to acknowledge and respond to the problem of operating in such a limited sphere. Fielding's solution is to associate his work with an ethos of abundance while simultaneously relying on the habits enforced by an economy of scarcity—habits that often depend on conservation and frugal management. Such managerial diligence reminds us that property involves not only a status but an ongoing relation between the possessor and the possessed, a need for constant maintenance and oversight.

Fielding's meditations on public and private property, controlled and unrestricted circulation, raise a number of questions about the legal and cultural boundaries of copyright. His parodic remarks on intercommoning, for example, revolve around the problem of access to private property—a problem that resurfaces four months later in another issue of the *Covent-Garden Journal*, this time in a disquisition on property and natural law. Quoting from Locke's *Second Treatise*, Fielding bypasses the question of how acquisition occurs, turning immediately to its limits: in his redaction of Locke's proviso, nobody can "acquire to himself a Property to the Prejudice of his Neighbour."

The effort at enclosure fails if it would deprive others of “Room for as good and large a Possession.”¹¹³ Fielding’s bookseller, Andrew Millar, had spent most of the 1740s claiming exclusive ownership of publications such as *Joseph Andrews* in a suit against the Scottish booksellers;¹¹⁴ by contrast, Fielding here seeks to erode the ground of exclusive ownership, and as the essay continues he moves from Locke to Grotius, whose treatment of natural law and property in *De Jure Belli ac Pacis* (1625) explains how common rights may obtain in “those Things which are already become the Property of others.”¹¹⁵ First Fielding adds Grotius’s qualification that “private Property . . . [must] be interpreted so as to depart as little as possible from natural Equity”;¹¹⁶ then he explains that “in the last and greatest Necessity, ‘that old Law of using all Things in common, revives again.’”¹¹⁷ Even in a world ruled by private property, the commons persists, ready to provide an alternative mapping of space and resources.

A similar model informs Fielding’s earlier argument against exclusive possession, directed in that case against the denizens of Grub Street. There, Fielding anticipates the doctrine of fair use, suggesting that a writer may avail himself of his neighbor’s pen without necessarily being guilty of infringement. What Fielding exploits as common ground represents the spoils of his “Paper War,” though to characterize the outcome in such unilateral terms risks missing the point that both sides have succeeded in despoiling each other. Put more generally, the literary feud provides an occasion for each side to exploit the opponent’s productions, to promote business all around by poaching the enemy’s prose and posturings. It appears, in fact, that Fielding undertook the “Paper War” for this very reason, proposing to John Hill of the *London Daily Advertiser* that the two columnists entertain the town—and boost their respective circulations—by professing to attack each other in print.¹¹⁸ The productive possibilities of such feuding must have been obvious at least since the Pope-Curll disputes that began in the 1710s, but whereas Fielding’s suggestion may not have been especially innovative, his appeal to the language of property helps to remind us that such aggressive intercommoning, though perhaps not a case of the “last and greatest necessity,” has often characterized literary feudalism since the eighteenth century, and occasions what is now one of the grounds in United States law for evaluating “fair use”—the exception for parodies.¹¹⁹ Indeed, given the tendency of certain literary factions to establish their own identity by pillorying their rivals, it might not be going too far to say that

with the parody defense, the U.S. Code has created a means of survival for writers who would otherwise find themselves without any resources.

If the "Paper War" provides an alternative justification for the intercommuning that Fielding had elsewhere defended as well-established custom, the joke about enclosing fields that were once left open raises the question of what exactly the proprietors must do to effect such a conversion (while departing as little as possible from natural equity), and how, given all these constraints, anyone could ever validate the charge of infringement. This question proved especially salient for Fielding, who would, just a few weeks after commencing his new paper, find himself accused of drawing on Smollett's *Roderick Random* for the characters of Partridge (in *Tom Jones*) and Mrs. Matthews (in *Amelia*).¹²⁰ The charge appeared in an anonymous pamphlet, possibly by Smollett himself, and Fielding never bothered to respond, having anticipated precisely this contingency in *Tom Jones*, where he remarks, "I have sometimes known a poet in danger of being convicted as a thief, upon much worse evidence than the resemblance of hands hath been held to be in the law."¹²¹ In the dismissive comment on plagiarism, as in his vision of a fold that remains private but nevertheless yields the cud for his own ruminations, Fielding finds something for the author to possess (a subtly conceived character, a province of wit or nonsense) while removing any means of protecting it. Indeed, Fielding's own sense of proprietorship seems to have been confined to his reputation, as he hints in his negotiations with the forces of Grub Street over the exclusive rights to his name. Throughout his career, Fielding objected when he found others' work "fathered" on him,¹²² but as he watched the imitations and extensions of *Tom Jones* proliferate, he said nothing at all. Without claiming to abolish the category of literary property, Fielding reduces its force, evidently restricting it to precisely the same limits as statutory copyright.

Yet if he rejects the account of literary property that would guard the author's characters, themes, and conceptions, Fielding nevertheless retains some part of its linkage between the authorial personality and the text. His affinity with the masters of Dunce Manor, his determination to remain in their vicinity (or vicinage), may reflect the cramped conditions of the literary marketplace, but it also suggests the difficulty of separating these two estates: both sides find themselves compelled to share their resources, and the difference consists entirely in how they use these materials. Fielding may be thought to anticipate Wilde's axiom that "the true artist is known by the

use he makes of what he annexes, and he annexes everything.”¹²³ Wilde’s aestheticism allows him to wave away the problem that Fielding facetiously obfuscates through his citation of legal jargon—the question of how to distinguish fair use from theft—and yet although both writers gravitate toward the conclusion that all use is fair, Fielding at least tacitly associates “borrowing” with a sort of kinship that Wilde never acknowledges. It is their longstanding affiliation, after all, that justifies Fielding’s “Trespass”¹²⁴ into his neighbor’s field, and yet that act also seems to cement their association, as if these continued foragings helped to maintain an interdependence that would otherwise fall away. Indeed, given the uncertain divisions of Fielding’s literary London, one might conclude that any faction could make itself at home wherever it liked, trespassing first and adducing its *cause de vicinage* afterward. Fielding helps to suggest the plausibility of this kind of indiscriminate feudal warfare when, in the lexicon of modern jargon that he published alongside his treaty with Grub Street, he defines “Dulness” as “A Word applied by all Writers to the Wit and Humour of others.”¹²⁵ Casting himself as the Jonathan Wild of Covent Garden, always ready to forage in the next field over, Fielding suggests that neighbors tend to make good fences—and fences tend to establish themselves wherever they like. Where the modern law of fair use focuses mainly on the material which has been copied, and on how the use affects the source, Fielding attends to the copier; the modern doctrine of “transformative use,” designed to license those imitations that alter their sources, takes on a different meaning under the aegis of Fielding’s land law, which hints that users may also find themselves transformed at the same time.

If Warburton and Richardson act out the occupation of the proprietary author, Fielding allows us to question its premise—and he dissevers originality, authorship, and property according to a logic that reveals the productive conflicts among these terms rather than reducing the contradictions of copyright to a dead end. In the principle of *cause de vicinage*, which in effect posits multiple proprietors for the same meager resources, Fielding complicates the presumptive one-to-one relationship between text and author. His reliance on reputation as the basic element of literary property revises the demands of possessive authorship in ways that begin to gesture toward the reader’s occupation. That space would finally come into its own with the reaffirmation of limited-term copyright in 1774 and the establishment of the public domain, and perhaps this kind of occupancy constitutes a new form that is

not complementary but integral to the status of the proprietary author. At the very least, Fielding seems to hold out this possibility at time when the textual terrain was growing increasingly limited.

1. Henry Fielding, *The Author's Farce* (Lincoln: University of Nebraska Press, 1966 [1730]), 32.
2. *Millar v. Taylor*, 98 Eng. Rep. 201, 230, 233 (1769) (Yates J., dissenting).
3. For some recent arguments, see Arthur R. Miller, “Common Law Protection for Products of the Mind: An ‘Idea’ Whose Time Has Come,” 119 *Harvard Law Review* 703 (2006); Kenneth Basin & Tina Rad, “‘I Could Have Been a Fragrance Millionaire’: Toward a Federal Idea Protection Act,” 56 *Journal of the Copyright Society of the U.S.A.* 731 (2009).
4. Alan Coren, “This Don for Hire,” in *The Rhinestone as Big as the Ritz* (London: Robson, 1979), 64.
5. David Lodge, *Changing Places* (London: Secker and Warburg, 1975), 35.
6. For a more extended fictional meditation on this theme, see Spider Robinson, “Melancholy Elephants,” in *Melancholy Elephants* (New York: Tor, 1985), 6–19; and the discussion in Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca, NY: Cornell University Press, 2003), 201–7.
7. Johnson was responding to a query from Boswell: “Both Sir John Hawkins’s and Dr. Burney’s History of Musick had then been advertised. I asked if this was not unlucky: would they not hurt one another?” James Boswell, *Journal of a Tour to the Hebrides*, ed. Allan Wendt (Boston: Houghton Mifflin, 1965), 162.
8. Martha Woodmansee, “On the Author Effect: Recovering Collectivity,” in Martha Woodmansee & Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1994), 17–24; Robert DeMaria Jr. & Gwin J. Kolb, “Johnson’s Dictionary and Dictionary Johnson,” 28 *Yearbook of English Studies* 19, 21–22 (1998). For discussions of this perspective on authorship in relation to current practices of writing, see, e.g., Julie E. Cohen, “Creativity and Culture in Copyright Theory,” 40 *U.C. Davis Law Review* 1151, 1163 (2007); Candace Spigelman, “Habits of Mind: Historical Configurations of Textual Ownership in Peer Writing Groups,” 49 *College Composition and Communication* 234, 235–37 (1998).
9. See, e.g., Thomas M. Curley, “Johnson’s Secret Collaboration,” in *The Unknown Samuel Johnson*, eds. John J. Burke & Donald Kay (Madison: University of Wisconsin Press, 1983), 91–112.
10. Lawrence Lipking, *Samuel Johnson: The Life of an Author* (Cambridge, MA: Harvard University Press, 1998), 9.
11. Joseph Loewenstein, *Ben Jonson and Possessive Authorship* (Cambridge: Cambridge University Press, 2002), 182–207; Alan B. Farmer, “Print Culture and Reading Practices,” in *Ben Jonson in Context*, ed. Julie Sanders (Cambridge: Cambridge University Press, 2010), 192–200; Douglas A. Brooks, *From Playhouse to Printing House: Drama and Authorship in Early Modern England* (Cambridge: Cambridge University Press, 2000), 104–39; Laurie Ellinghausen, *Labor and Writing in Early Modern England, 1567–1667* (Aldershot, UK: Ashgate, 2008), 63–92; Lynn S. Meskill, “Ben Jonson’s 1616 Folio: A Revolution in Print?,” 14 *Études Épistémè* 177 (2008).
12. Joseph Spence, *Anecdotes, Observations, and Characters, of Books and Men, Collected from the Conversation of Mr. Pope, and Other Eminent Persons of his Time*, ed. Samuel Weller Singer (London: Carpenter, 1820), 295–96. As one critic has observed, Pope “believed that his works would be his monument.” Morris R. Brownell, “Pope’s Art of Dying,” 20 *Studies in English Literature 1500–1900*, 407, 408 (1980). Not only did Pope select a biographer (Spence), but he also chose William Warburton as his literary executor and editor (see below, section III), and Lord Bolingbroke as custodian of his manuscripts. These efforts at posthumous control, however, were largely unavailing. See *id.*

13. E.g., the Twickenham edition of Pope's poems, 10 vols. (New Haven, CT: Yale University Press, 1953–67); the Eversley edition of Kingsley's novels, 11 vols. (London: Macmillan, 1881); the Swanston edition of Stevenson's works, 25 vols. (London: Chatto & Windus, 1911–12).
14. Anon., *The Adventures of Author, Written by Himself and a Friend*, 2 vols. (London: Robinson & Roberts, 1767), 1:68.
15. See, e.g., Thomas Warton, *The Life and Literary Remains of Ralph Bathurst, M.D.* (London: Dodsley, 1761); Anon., Review of *The Works of Dr. Jonathan Swift*, vols. 13–14, in *St. James's Chronicle or the British Evening Post* (London), no. 233 (Aug. 14, 1762), p. 2, col. 2 ("our Readers [will be] curious to know what Addition hath been lately made to the literary Remains of so admired an Author"); Foote Gower, *A Sketch of the Materials for a New and Compleat History of Cheshire: With Some Short Accounts of the Characteristic Genius and Manners of Its Inhabitants*, 2nd ed. (Chester: Lawton, 1773), 57 (an antiquarian writer's "*Literary-Remains* [concerning the town of Namptwich] are as complete as we could possibly have wished"); Edward Thompson, ed., *The Poems and Miscellaneous Compositions of Paul Whitehead; With Explanatory Notes on His Writings, and His Life* (Dublin: Price, 1777), 9 (describing "the Editor's . . . motive for collecting the literary remains of Mr. WHITEHEAD").
16. [John Murray], *A Letter to W[illiam] Mason . . . Concerning His Edition of Mr. Gray's Poems and the Practices of the Booksellers, by a Bookseller* (London: Murray, 1777), 13.
17. Samuel Johnson & George Steevens, *Supplement to the Edition of Shakspeare's Plays Published in 1778*, 2 vols. (London: Bathurst, 1780), 2:170. Similarly self-conscious usages persisted through the nineteenth century; see, e.g., "Mr. James, the Novelist" [anonymous review of G. P. R. James, *The Step-Mother*], 10 *Littell's Living Age* 49 (1846) ("the acreage of [James's] literary estate is now very considerable"); Mrs. Grenville Murray, "The Heiress," in *The Keepsake 1857*, ed. Marguerite A. Power (London: Bogue, 1857), 252 (the "ancient custom" that requires storytellers "to furnish a moral" is "a kind of feudal tenure by which a literary estate is held").
18. As early as 1837, Robert Southey used the phrase in this sense in a letter about the pending copyright legislation, which would have provided for sixty years of protection: "[I]t is mortifying to reflect how little the benefit will be in proportion to the desert. Voltaire's works would, perhaps for ever, form the best literary estate in France; Lord Byron's, for another generation, in England." John Wood Warter, ed., *Selections from the Letters of Robert Southey*, 4 vols. (London: Longman, 1856), 4:511 (letter of May 29, 1837).
19. Mark Rose, "Copyright and Its Metaphors," 50 *U.C.L.A. Law Review* 1, 6–8 (2002); William St. Clair, "Metaphors of Intellectual Property," in *Privilege and Property: Essays on the History of Copyright*, eds. Ronan Deazley et al. (Cambridge: Open Book, 2010), 391–92; Patricia Loughlan, "Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property," 28 *Sydney Law Review* 211, 220–24 (2006).
20. 8 Anne c. 19 (1710).
21. Throughout this essay, I use the word "bookseller" in its eighteenth-century sense, to identify what today would be called a publisher. On the booksellers' role in the passage of the 1710 act, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), 31–48; John Feather, "The Book Trade in Politics: The Making of the Copyright Act of 1710," 8 *Publishing History* 19 (1980).
22. For further discussion of the statute's avoidance of a property rights framework, see Simon Stern, "From Author's Right to Property Right," 62 *University of Toronto Law Journal* 29 (2012).
23. John Feather, "From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries," in *The Construction of Authorship: Textual Appropriation in Law and Literature*, eds. Martha Woodmansee & Peter Jaszi (Durham, NC: Duke University Press, 1994), 197–98.
24. Richard Atkyns, *The Case of the Booksellers and Printers Stated; with Answers to the Objections of the Patentees* (London, 1666).

25. Kate O’Neill, “Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication,” 89 *California Law Review* 369, 402 (2001).
26. Linda L. Berger, “The Lady, or the Tiger?: A Field Guide to Metaphor and Narrative,” 50 *Washburn Law Journal* 275, 279 (2011); David Fagundes, “Property Rhetoric and the Public Domain,” 94 *Minnesota Law Review* 652, 669–73 (2010); Bill D. Herman, “Breaking and Entering My Own Computer: The Contest of Copyright Metaphors,” 13 *Communication Law and Policy* 231, 245–46 (2008); William Patry, “Metaphors and Moral Panics in Copyright,” 2008 *Intellectual Property Quarterly* 1, 3; Shyamkrishna Balganesh, “Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass,” 12 *Michigan Telecommunications and Technology Law Review* 265 (2006).
27. Jessica Litman, “The Public Domain,” 39 *Emory Law Journal* 965, 971 (1990) (footnotes omitted).
28. Mark Lemley, “Romantic Authorship and the Rhetoric of Property,” 75 *Texas Law Review* 873, 895 (1997).
29. See Lyman Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 *Harvard Journal on Legislation* 223, 239 (1966) (“The nature of the copyright act as an antimonopoly statute has been overshadowed because it enabled the author for the first time to acquire copyright, and because it was deemed to have created a new form of property, statutory copyright. . . . [But] copyright was not new, and the statute merely placed drastic limitations on an existing concept of copyright.”).
30. Rose, *supra* note 21, at 1. See also *id.* at 91; Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994), 37.
31. Others have argued that the importance of collaborative authorship has been overlooked in the emphasis on the cultural role of the unique, creative author, but claims about the dominance of the proprietary author have provoked less criticism. For challenges to the paradigm of proprietary authorship, see Hilary Jane Englert, “Occupying Works: Animated Objects and Literary Property,” in *The Secret Life of Things*, ed. Mark Blackwell (Cranberry, NJ: Rosemont Publishing, Associated University Presses, 2007), 218–41, 237; Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart, 2004), xxvi.
32. This paragraph and the following two draw on, and revise, the discussion of copyright and literary circulation in Simon Stern, “*Tom Jones* and the Economics of Copyright,” 9 *Eighteenth-Century Fiction* 430, 435–36 (1997).
33. William Kenrick, review of *A Vindication of the Exclusive Right of Authors to Their Own Works*, 27 *Monthly Review* 178, 179 (1762). As Kenrick makes clear, his argument depends on the assumption that every text has a limited market: “Whoever sells the books offered to sale by another, prevents the latter, in effect, from disposing of what he offers to sale. . . . [T]he sale of a book is, in a great measure, confined to a certain number; and if that number be sold by one person, no other person can sell any.” *Id.* at 178–79.
34. David Roh offers a recent example in his discussion of the highly implausible arguments raised against Pia Pera’s retelling of *Lolita* in *Lo’s Diary*: “The lawyers representing the Nabokov estate accused Pera of copyright infringement” and argued that her book “would adversely affect sales of *Lolita* and inflict financial harm on the original.” David Roh, “Two Copyright Case Studies from a Literary Perspective,” 22 *Law and Literature* 110, 118 (2010) (footnote omitted).
35. For discussion of “theft” as a metaphor, see St. Clair, *supra* note 19, at 388. A modern variant is the metaphor of “bodily appropriation,” which seems to have emerged first in patent law; see *Wilcox v. Kemp*, 29 F. Cas. 1205, 1207 (C.C.S.D.N.Y. 1870). Not until much later did it begin to appear in copyright law; see *Huie v. National Broadcasting Co.*, 184 F. Supp. 198, 200 (S.D.N.Y. 1960). For recent examples in the context of copyright, see, e.g., *Novak v. Barner Bros. Pictures, LLC*, 387 Fed. Appx. 747, 749 (9th Cir. 2010); *Allen v. Ghoulish Gallery*, 2007 WL 4207923, at *5 (S.D. Cal. 2007).
36. *The Cases of the Appellants and Respondents in the Cause of Literary Property* (London, Bew 1774), A2^f; Ilay Campbell, *Information for Alexander Donaldson and John Wood . . . against John Hinton*

- (Edinburgh, 1773), 11 (“The author may avail himself as much as he pleases of the property of his manuscript; but it is denied that he has any *property* in the ideas thereby conveyed”). As for the gingerbread joke, perhaps its oddest feature is its implicit slur not only on the *agents* of copyright law but also on its *object*—a slur that seems inappropriate in an argument intended to increase the circulation of books.
37. G. W. Pigman III, “Versions of Imitation in the Renaissance,” 11 *Renaissance Quarterly* 1 (1980); Stephen Orgel, “The Renaissance Artist as Plagiarist,” 48 *English Literary History* 476 (1981); Harold Ogden White, *Plagiarism and Imitation during the English Renaissance* (Cambridge, MA: Harvard University Press, 1935); Terence Cave, *The Cornucopian Text: Problems of Writing in the French Renaissance* (Oxford: Clarendon Press, 1979).
 38. Hence Francis Hargrave could write in 1774 that “there is such an infinite variety in the modes of thinking and writing . . . that a literary work *really* original, like the human face, will always have some singularities . . . to fix and establish its identity; and to assert the contrary . . . would be . . . opposite to reason and universal experience.” Francis Hargrave, *An Argument in Defence of Literary Property*, 2nd ed. (London: Otridge, 1774), 7. Some have read the reference to “*really* original” works as demonstrating a concern with aesthetic creativity, but as the analogy to the human face shows, Hargrave is concerned with independent vs. non-independent creation, not with a distinction involving degrees of ingenuity. According to his analogy, identical twins could be regarded as copies, and would not be “*really* original.” For a recent discussion, see Mario Biagioli, “Genius against Copyright: Revisiting Fichte’s ‘Proof of the Illegality of Reprinting,’” 86 *Notre Dame Law Review* 101 (2011).
 39. Patent law, by contrast, requires proof of originality as a precondition for registration in the first place, and hence this branch of intellectual property relies more consistently on a high-protectionist means of regulation.
 40. 8 Anne c. 19, I.
 41. On the events leading to the lapse of the Licensing Act, resulting in part from antimonopolistic sentiment, see John Feather, *Publishing, Piracy, and Politics: An Historical Study of Copyright in Britain* (London: Mansell, 1994), 50; Rose, *supra* note 21, at 32–33; and Raymond Astbury, “The Renewal of the Licensing Act in 1693 and Its Lapse in 1695,” 33 *The Library* 296 (1978).
 42. Feather, *supra* note 21; Deazley, *supra* note 31, at 10–29; Rose, *supra* note 21, at 34–35.
 43. Daniel Defoe, *An Essay on the Regulation of the Press* (London, 1704), 21. Ironically, Defoe published the essay anonymously, and even the printer failed to identify himself on the title page. This pamphlet has been discussed by many historians of copyright and the book trade; see, e.g., Rose, *supra* note 21, at 34–36; Feather, *supra* note 21, at 29–30; and Feather, *supra* note 41, at 55–56.
 44. Henry Parker, *To the High Court of Parliament, the Humble Remonstrance of the Company of Stationers* (London, 1643), sig. A4^r (arguing for exclusive ownership among guild members because “[m]any men[']s studies carry no other profit or recompence with them, but the benefit of their Copies; and if this be taken away, many Pieces of great worth and excellence will be strangled in the womb, or never conceived at all for the future”).
 45. For the 1707 petition, see 15 *Journals of the House of Commons* 313 (Feb. 26, 1707).
 46. 8 Anne c. 19, sec. XI.
 47. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765–69) 2:407.
 48. Augustine Birrell, *Seven Lectures on the Law and History of Copyright* (London: Cassell, 1899), 99; see also Gwyn Walters, “The Booksellers in 1759 and 1774: The Battle for Literary Property,” 29 *The Library* 287 (1974).
 49. For a recent discussion, see Ronan Deazley, “The Statute of Anne and the Great Abridgment Swindle,” 47 *Houston Law Review* 793 (2010).
 50. *Dodsley v. Kinnersley*, 27 Eng. Rep. 270 (1761).

51. Archibald Campbell, *The Sale of Authors: A Dialogue, in Imitation of Lucian's Sale of Philosophers* (London, 1767), 5.
52. [Samuel Patterson], *Joineriana: Or the Book of Scraps* (London: Johnson, 1772), 173.
53. Thus, for example, Nicholas Seager notes that in the first continuation of Defoe's *Roxana*, published in 1740, “the publisher . . . was exploiting the loophole in copyright law, which meant that partial reproduction of another work was not considered unlawful.” Nicholas Seager, “Prudence and Plagiarism in the 1740 Continuation of Defoe's *Roxana*,” 10 *The Library* 357, 370 (2009).
54. On the drafters' failure to adopt those suggestions, see Stern, *supra* note 22.
55. There were occasional provocations during this period. For example, Robert Walker initiated an early skirmish in the “battle of booksellers” by reprinting Shakespeare's plays in 1734–35. See “The Tonson-Walker Quarrel” in H. L. Ford, *Shakespeare 1700–1740: A Collection of the Editions and Separate Plays* (Oxford: Oxford University Press, 1935), 40–45; Giles E. Dawson, “Robert Walker's editions of Shakespeare,” in *Studies the English Renaissance Drama*, eds. Josephine W. Bennett et al. (New York: New York University Press, 1959), 58–81; Don-John Dugas, *Marketing the Bard: Shakespeare in Performance and Print, 1660–1740* (Columbia: University of Missouri Press, 2006), 215–16, 220–32.
56. Feather, *supra* note 41, at 74.
57. Alexander Pope, “An Essay on Criticism,” in *The Poems of Alexander Pope*, ed. John Butt (London: Routledge, 1963), 153.
58. *The Correspondence of Alexander Pope*, ed. George Sherburn, 5 vols. (Oxford: Clarendon Press, 1956), 1:19 (letter of July 2, 1706). For a recent discussion, see Richard Terry, “Pope and Plagiarism,” 100 *Modern Language Review* 593, 594 (2005).
59. Alexander Pope, “Epistle III: To Allen Lord Bathurst,” in *The Poems of Alexander Pope*, *supra* note 57, at 574.
60. Joseph Addison, *The Tatler*, ed. Donald F. Bond, 3 vols. (Oxford: Clarendon Press 1987), 2:120 (no. 101, Dec. 1, 1709). For more on Addison's essay, see Rose, *supra* note 21, at 40–41; Richmond P. Bond, “The Pirate and the Tatler,” 18 *The Library* 257, 261–62 (1963). An especially valuable discussion of Addison's involvement in the pending legislation may be found in Thomas B. Morris Jr., “The Origins of the Statute of Anne,” 12 *Copyright Law Symposium* 222, 254–58 (1963). Just a few years earlier, Ned Ward had offered a somewhat different account of writing as property when he attacked the literary pirate as a “Drone,” possessed of “the Soul of a *Shoplifter* disguis'd in the Body of a *Typographer*.” Ned Ward, *The London Terræ-Filius: Or, The Satyrical Reformer. Being Drolling Reflections on the Vices and Vanities of Both Sexes* (London, 1708), 6:28–29 (quoted in Bond, *supra*, at 258).
61. Addison, *supra* note 60, at 2:121.
62. *Id.* at 2:120, 121.
63. They also sought to extend the initial term of protection to twenty-one years. *An Act for the Better Encouragement of Learning, and for the More Effectual Securing the Copies of Printed Books to the Authors or Purchasers of Such Copies, during the Times Therein Mentioned* (London, 1735), 2 (Bodl. shelfmark MS. Carte 114 (397)).
64. *A Letter to a Member of Parliament Concerning the Bill Now Depending in the House of Commons, for Making More Effectual an Act in the 8th Year of the Reign of Queen Anne, Entitled, An Act for the Encouragement of Learning* (London, 1735). I have not cited page numbers for this broadside, which is printed on one side only. It was apparently published after the bill was introduced in the House in the House of Commons, on March 3, and before the booksellers responded, on April 17; see *infra* note 67.
65. *Id.*
66. *Id.*
67. *A Letter from an Author to a Member of Parliament, Occasioned by a Late Letter Concerning the Bill Now Depending in the House of Commons, for the Encouragement of Learning, &c.* (London, April 17, 1735);

for further discussion of this pamphlet, see Rose, *supra* note 21, at 54–57. It was followed a week later by *A Second Letter from an Author to a Member of Parliament, Containing Some Further Remarks on a Late Letter Concerning the Bill Now depending in the House of Commons, for the Encouragement of Learning, &c.* (London, April 23, 1735).

68. *A Letter from an Author*, *supra* note 67, at 1.
69. See, e.g., William Warburton, *A Letter from an Author to a Member of Parliament, Concerning Literary Property* (London: Knapton, 1747), 2; Samuel Richardson, *The Case of Samuel Richardson, of London, Printer, with Regard to the Invasion of His Property in the History of Sir Charles Grandison* (London: Richardson, 1753), 2–3; *A Vindication of the Exclusive Right of Authors to Their Own Works* (London: Griffiths, 1762), 4; William Enfield, *Observations on Literary Property* (London: Johnson, 1774), 19–20; Hargrave, *supra* note 38, at 35–36.
70. *A Letter from an Author*, *supra* note 67, at 2.
71. See, e.g., *The Case of Authors and Proprietors of Books* (London, 1735), which reprints several paragraphs from *A Letter from an Author* and *A Second Letter from an Author*, *supra* note 67.
72. *A Letter from an Author*, *supra* note 67, at 2.
73. *Id.* at 3.
74. *The Case of Authors and Proprietors of Books*, *supra* note 71, at 3.
75. The booksellers would address that danger in its starkest terms when confronted in 1774 with the loss of perpetual copyright and the sovereign control that accompanied it. “The Copy-holder,” they declared,

like the lord of a soil, is sensible that his emolument must be estimated by the cultivation, and therefore pays a sum of money to have every edition, or fresh crop of his literary acres improved to the utmost advantage, whereas the freebooter, like a tenant at will, considers only his temporary interest, and . . . cares not how he plays upon the easiness of the community. (*General Observations on the Expediency of Granting Relief in Literary Property* (London, 1774), 2).

It is difficult to maintain such a neat distinction between the prudential landlord-farmers of the literary soil and their freebooting parasites, determined to seize whatever they can lay their hands on; after all, the booksellers themselves might just as plausibly be characterized as subsistence farmers bent on exploiting their resources to the fullest for a minimal investment. Payments for improved and corrected editions varied widely, occasionally involving lavish sums but often carrying little or no remuneration according to the terms of a contract that had specifically included such revisions as one of the author’s duties.

76. The advertisement appears on a page removed from a newspaper and mounted in Bodl. shelfmark 40 × 136 Jur. (this page, itself unnumbered, is bound between nos. 14 and 15).
77. See *supra* text accompanying note 33.
78. John Maclaurin, Lord Dreghorn, *Considerations on the Nature and Origin of Literary Property, Wherein That Species of Property is Clearly Proved to Subsist No Longer than for the Terms Fixed by the Statute 8vo Ann.* (Edinburgh: Donaldson, 1767), 13.
79. *The Cases of the Appellants and Respondents*, *supra* note 36, at 22. The extended metaphor appears in the argument of Sir John Dalrymple, counsel for the Edinburgh booksellers in *Donaldson v. Beckett*; following this introduction, Dalrymple offers a two-and-a-half page, clause-by-clause repetition of the terms of the original statute, with strategic rephrasings throughout.
80. Anon., *An Enquiry into the Nature and Origin of Literary Property* (London, Flexney 1762), 3, 2. On the pamphlet’s authorship, see Donald Nichol, “Warburton (Not!) on Copyright,” 19 *British Journal for Eighteenth-Century Studies* 71 (1996).
81. *An Enquiry*, *supra* note 80, at 34–35.

82. As Yates explained, “[The buyer] may not lend it, if he is not to print it; because it will entrench upon the author’s profits. . . . I don’t see that he would have a right to copy the book . . . for, printing is only a method of transcription.” *Millar v. Taylor*, *supra* note 2, at 234. Camden, opposing the argument for common law copyright in 1774, asked rhetorically, “[C]an the purchaser lend his Book to his Friend? Can he let it out for Hire as the circulating Libraries do? . . . (Every Thing of this Kind, in a Degree, prejudices the Author’s Sale of the Impression).” *The Cases of the Appellants and Respondents*, *supra* note 36, at 52.
83. Warburton, *supra* note 69.
84. William Warburton, “Advertisement,” in *The Works of Alexander Pope, Esq.*, ed. William Warburton, 9 vols. (London: Knapton, 1751), 1:xii.
85. Nichol, *supra* note 80, at 72.
86. Samuel Richardson, “Advertisement,” *Daily Gazetteer*, May 7 and 30, 1741, quoted in T. C. Duncan Eaves & Ben D. Kimpel, *Samuel Richardson: A Biography* (Oxford: Clarendon Press, 1971), 135, 137. For other discussions of Richardson’s irate response to this perceived abuse of his characters and ideas, see Tom Keymer & Peter Sabor, *Pamela in the Marketplace: Literary Controversy and Print Culture in Eighteenth-Century Britain and Ireland* (Cambridge: Cambridge University Press, 2006), 50–82; Lisa Maruca, *The Work of Print: Authorship and the English Text Trades, 1660–1760* (Seattle: University of Washington Press, 2008), 138–40; Elizabeth Judge, “Kidnapped and Counterfeit Characters: Eighteenth-Century Fan Fiction, Copyright Law, and the Custody of Fictional Characters,” in *Originality and Intellectual Property in the French and English Enlightenment*, ed. Reginald McGinnis (London: Routledge, 2009), 36–41.
87. Richardson, *supra* note 69, at 2, 3. For other discussions of this episode, see Adrian Johns, *Piracy: the Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2010), 151–55; Leah Price, *The Anthology and the Rise of the Novel: From Richardson to George Eliot* (Cambridge: Cambridge University Press, 2003), 37–38; Judge, *supra* note 86, at 30; Donatella Montini, “Owning the Text, Disowning the Hand: *Sir Charles Grandison*, the Epistolary Novel, and Copyright,” in *The Economy Principle in English: Linguistic, Literary, and Cultural Perspectives*, eds. Giovanni Iamartino et al. (Milan: UNICOPLI, 2002), 376–84.
88. *Pope v. Curl*, 26 Eng. Rep. 608 (Ch. 1741).
89. Richardson, *supra* note 69, at 3.
90. *Pope v. Curl*, *supra* note 88, at 608.
91. *Tonson v. Collins*, 96 Eng. Rep. 180 (1762).
92. Addison died in 1719; thus under the Statute of Anne, his essays were not eligible for a second term of protection. On Addison’s experience with piracy, and his role in advocating for copyright protection, see Bond, *supra* note 60, and Morris, *supra* note 60. Steele lived until 1729, three years into the second fourteen-year term, which expired in 1740. For more on the copyright of the *Spectator* (which netted Addison and Steele the sum of £11150), see G. F. Papali, *Jacob Tonson, Publisher* (Auckland: Tonson Publishing House, 1968), 40–41. The contract included the requirement, typical in its day, that the bookseller and his heirs would retain the copyright “for ever.”
93. *Tonson v. Collins*, *supra* note 91, at 188.
94. Thomas Noon Talford, *Three Speeches Delivered to the House of Commons in Favour of a Measure for an Extension of Copyright* (London: Moxon, 1840), 3.
95. Henry Fielding, *The Covent-Garden Journal and A Plan of the Universal Register-Office*, ed. Bertrand A Goldgar (Middletown, CT: Wesleyan University Press, 1988), 13 (no. 1, Jan. 4, 1752).
96. *Id.* at 14.
97. *Id.*
98. *Id.*
99. *Id.* at 15.
100. *Id.*

101. *Id.* at 16.
102. See, e.g., Blackstone, *supra* note 47, at 2:33.
103. Fielding, *Covent-Garden Journal*, *supra* note 95, at 15.
104. *Id.* at 39.
105. *Id.* at 39–40.
106. Henry Fielding, *The Jacobite's Journals and Related Writings*, ed. W. B. Coley (Middletown, CT, 1975), 302 (no. 27, June 4, 1748).
107. Indeed, Fielding often invokes the law of defamation to protect literary reputation; in *Tom Jones*, for example, he observes that “[t]he slander of a book is, in truth, the slander of the author.” Henry Fielding, *Tom Jones*, eds. John Bender & Simon Stern (Oxford: Oxford University Press, 1996), 494. See also Fielding’s essay on libel, slander, and reputation in *Covent-Garden Journal*, *supra* note 95, at 99 (Feb. 18, 1752), and the discussion of the libelous implications of writing and reading novels as thinly disguised references to real people, in Sarah Fielding’s preface to her novel *The History of the Countess of Dellwyn* (London: Millar, 1759).
108. *The Cases of the Appellants and Respondents*, *supra* note 36, at 4.
109. Peter Jaszi, “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship,’” 1991/2 *Duke Law Journal* 455, 463 (1991).
110. *Id.*
111. See, e.g., *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Nobody has ever been able fix that boundary, and nobody can”).
112. Consider, for example, Raymond Chandler’s complaint that “the courts have a very primitive attitude on plagiarism. . . . Someday an enlightened jurist of the type of Curtis Bok or Learned Hand may announce that plagiarism of style is the most nefarious of all forms of plagiarism and the shabbiest.” Frank MacShane, ed., *Selected Letters of Raymond Chandler* (New York: Columbia University Press, 1981), 352 (letter to F. H. Hose, Sept. 16, 1953).
113. John Locke, *Two Treatises of Government*, II.v, §36, cited in Fielding, *Covent-Garden Journal*, *supra* note 95, at 227 (issue no. 39, May 16, 1752).
114. The dispute, reported as *Midwinter v. Hamilton* and as *Millar v. Kincaid* at different stages of its progression, lasted from 1743 to 1751. Deazley, *supra* note 31, at 115–32; Warren McDougal, “Gavin Hamilton, Bookseller in Edinburgh,” 1 *British Journal for Eighteenth-Century Studies* 1, 7–9 (1978).
115. Fielding, *Covent-Garden Journal*, *supra* note 95, at 228 (quoting Grotius).
116. *Id.*, giving Fielding’s own translation of Hugo Grotius, *De Jure Belli ac Pacis*, II.ii.6; Fielding had a copy in his collection of treatises on natural law. See *id.* at 228 n.1.
117. *Id.* at 228.
118. For more on the “Paper War,” see Bertrand Goldgar, “Introduction” to Fielding, *Covent-Garden Journal*, *supra* note 95, at xxxvi–xxxix; Betty Rizzo, “Notes on the War between Henry Fielding and John Hill, 1752–53,” 7 *The Library* 338 (1985).
119. See 17 U.S.C. § 107.
120. *A Faithful Narrative of the Base and Inhuman Arts that were Lately Practised upon the Brain of Habbakuk Hilding, Justice, Dealer, and Chapman* (London: Sharp, 1752), 20.
121. Fielding, *Tom Jones*, *supra* note 106, at 454.
122. See, e.g., Henry Fielding’s preface to the second edition of Sarah Fielding’s *David Simple* (London: Millar, 1744); as well as his *Tom Jones*, *supra* note 106, at 809 (Bk. 18, ch. 1); *Covent-Garden Journal* 41 (May 23, 1752), *supra* note 95, at 235.
123. Oscar Wilde, “*Olivia* at the Lyceum,” 1 *Dramatic Review* 278 (1885); for further discussion, see Saint-Amour, *supra* note 6, at 133.
124. Fielding, *Covent-Garden Journal*, *supra* note 95, at 16.
125. *Id.* at 36 (issue no. 4, Jan. 14, 1752).