1. Locke's (own) literary property

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...[I]t costs, as I have already told you,
not a little pains and patience to be at any rate an author.
(John Locke)²

INTRODUCTION

In May of 1689, when John Locke negotiated a contract for the publication of his *Essay Concerning Human Understanding*, he had no way of knowing that he would become one of the most influential philosophers of the emerging modern era.³ At the age of 56 he had published very little and even less under his own name.⁴ At that moment, he was at a threshold, having just that February returned to England from exile in Holland after the downfall and death of his long-time patron, the Earl of Shaftesbury.⁵ Though his return to favor under William and Mary seemed secure, the anxieties engendered by his own close brush with prosecution for treason under James II remained fresh. His correspondence from Holland had been full of pseudonyms and references veiled by initials, discretions meant to shield the privacy of his

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² Letter from John Locke to Benjamin Furly (January 19, 1688), in 3 THE CORRESPONDENCE OF JOHN LOCKE, 330, 331 (E.S. De Beer ed., 1978) [hereinafter CORRESPONDENCE].

³ On Locke's influence, see Hans Aarsleff, *Locke's Influence*, in THE CAMBRIDGE COMPANION TO JOHN LOCKE 252 (Vere Chappell ed., 1994).

⁴ W.M. SPELMAN, JOHN LOCKE 25 (1997).

⁵ MAURICE CRANSTON, JOHN LOCKE 312 (1979). For a summary of the events that sent Locke into exile, see J.R. Milton, *Locke's Life and Times*, in THE CAMBRIDGE COMPANION TO JOHN LOCKE 5, 13 (Vere Chappell ed., 1994).

opinions and associations.⁶ The very idea of publishing his work in England must have required a shifting of gears. Nonetheless, within a year of his return, three of Locke's major works appeared in print, the *Essay Concerning Human Understanding*, the *Two Treatises of Government*, and *A Letter Concerning Toleration*.⁷ Of those, only the *Essay* was signed. Locke was apparently so anxious to maintain the secret of his authorship of the *Two Treatises* that he destroyed all of the correspondence and documentation related to its printing.⁸ The contract for the first edition of the *Essay*, however, has survived, along with a handful of other agreements regarding rights to the works he published in the final years of his life.⁹ These documents provide a unique opportunity to observe how one of the great theorists of property rights and epistemology, not to mention the economic and monetary policy of his time, managed the rights to print his own works. How, if at all, was philosophical theory translated into commercial practice in Locke's case?

This chapter explores the relationship between Locke's philosophical views regarding property and his actual commercial dealings with publishers, as evidenced by the series of transactional documents that have survived in the Lovelace Collection of Locke's papers at the Bodleian Library. It builds on prior work in which I have argued that in the agreements between publishers and authors of the seventeenth and early eighteenth centuries, we can find evidence of an emerging sense of author's copyright prior to the passage of

⁶ Locke's name had appeared on a list of English conspirators that James II sought to extradite from Holland in 1685, and a warrant was put out for his arrest. Locke then spent some time in hiding at the houses of friends and associates, variously using the pseudonyms "Dr. van der Linden," "Lamy," or "Dr. Lynne." CRANSTON, *supra* note 5, 253–56. For an example of a secretive letter, see Letter from John Locke to Edward Clarke (June 22, 1688), in CORRESPONDENCE, *supra* note 2, at 471–72, in which Locke refers to James Tyrell as "Mr. Oakley," to Mrs. Rabsy Smithsby as "Mr. R. S." and to the Earl of Pembroke as "N. F." (perhaps for "noble friend"). For his relative security after returning to London, see CRANSTON, *supra* note 5, at 316.

⁷ SPELMAN, *supra* note 4, at 25.

⁸ CRANSTON, *supra* note 5, at 318.

⁹ There are seven contracts in the collection, all preserved in Bodleian Library Locke MS b.1. The contracts have previously been described and analyzed in the work of Peter Lindenbaum, see Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century, II: Brabazon Aylmer and the Mysteries of the Trade*, 3 THE LIBRARY 32, 57 (2002), and Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations*, 17 THE LIBRARY 250, 262 (1995). The contract for the *Essay* is discussed and partially reprinted in CRANSTON, *supra* note 5, at 318. There is further information on the compensation Locke received from publishers in his account books, partially reprinted in Lord King, 2 THE LIFE OF JOHN LOCKE 50–51 (1830).

the Statute of Anne.¹⁰ One interest of this chapter is in understanding if and how theory informed Locke's practice. But perhaps more importantly, these transactions provide a case study in how a sophisticated author of the day, who was demonstrably well informed on both the theoretical ideas and the economic realities at play in the market, managed his literary property. In these agreements, Locke and his publishers deployed a diverse set of transactional tools that give dimension to the way they conceived of the "sole right of and in the Copy." I will also argue that the agreements reflect a set of concerns that we can also see in Locke's theory. In them, there is a link between labor and compensation. Across Locke's commercial decisions, we can see a balance struck between the author's personal, reputational desire to control his work and the needs of the public good.

There are several issues complicating the endeavor of understanding the relationship between Locke's theory and practice. The first issue is how to understand what Locke's theory of literary "property" actually was. While Locke did not address the issue directly in the *Two Treatises on Government*, there have been a number of important interpretations of Locke's philosophy of property rights as applied to rights in expressive works, or in what we would today term copyrightable subject matter, by modern legal scholars, including Wendy Gordon, Justin Hughes, Alfred Yen, and others.¹¹ This literature is rich and complex, as is, for that matter, critical interpretation of Locke's views on the origins and justification of physical property rights. Not all scholars agree that Locke's philosophical ideas regarding physical property rights do justify a natural right to intellectual property¹² and not all scholars agree that we should even look to Locke's ideas for justification at all.¹³

In addition to the modern applications of Locke's philosophical views on physical property to intangible property, we also know a good deal about Locke's views on the actual legal status of literary property in his own time. During his life, Locke expressed his opinions on the Licensing Act of 1662, which he thought harmful in a variety of ways, and regarding the stationers'

¹⁰ Rebecca Schoff Curtin, *The Transactional Origins of Authors' Copyright*, 40 COLUM. J.L. & ARTS 175 (2016).

¹¹ See e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEORGETOWN LAW JOURNAL 287 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517 (1990); but see Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munser, ed. 2001).

¹² Shiffrin, *supra* note 11, at 141.

¹³ Carys Craig, *Locke, Labour, and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law*, 28 QUEEN'S L.J. 1 (2002).

monopoly on the printing of ancient classical works, which he thought deleterious and absurd.¹⁴ He corresponded with friends at some length about these issues as they came before Parliament in the 1690s. He provided comments on the proposed renewal of the Licensing Act of 1662, in a document known as the *Memorandum of 1694*,¹⁵ and, in a later manuscript, made proposals for securing authors' rights to their works in a draft bill sent to him in March of 1695, in the hand of his friend John Freke.¹⁶ Legal scholars and book historians have found these texts to be fertile ground for unpacking Locke's understanding of literary property and how those views might relate to his larger philosophical corpus.¹⁷

I have used the word "property" in the context of "literary property" because Locke used the word himself in these discussions, but I do not think its use is determinative of the scope of the rights in question.¹⁸ (Locke also used the word "priviledg" when proposing legislative language for authors' rights

¹⁴ Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 THE LIBRARY 296, 304–15 (1978); RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775) 1–10 (2004); Justin Hughes, *Locke's 1694 Memorandum (And More Incomplete Copyright Historiographies)*, 27 CARDOZO ARTS & ENT. L.J. 555 (2010); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT, 32–33 (1993).

¹⁵ Preserved as Bodleian Lib. MS Locke b.4, ff. 75–6; reprinted in 5 CORRESPONDENCE, *supra* note 2, at 785–91; reprinted (with an introductory essay) in Hughes, *supra* note 14, from 1 Lord Peter King, THE LIFE OF JOHN LOCKE 375 (London, Henry Colburn, 1830).

¹⁶ Preserved as Bodleian Lib. MS Locke b.4, f. 78; reprinted in 5 CORRESPONDENCE, *supra* note 2, at 795–96; proposals discussed in Hughes, *supra* note 14, at 559–60. *The Memorandum of 1694*, a summary of the draft bill, and Locke's comments on it were gathered and reprinted with the title *Liberty of the Press*, in LOCKE: POLITICAL ESSAYS 329–39 (Mark Goldie ed., 1997).

¹⁷ Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2006); Astbury, *supra* note 14, at 308; DEAZLEY, *supra* note 14, at 10, 142; Hughes, *supra* note 14, at 557–63; Shiffrin, *supra* note 11, at 154–56.

¹⁸ Use of the word "property" in the copyright context has engendered controversy in contemporary scholarship, but it was not unusual in the eighteenth century, see Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008–20 (2006); on the limits of what Locke's use of the word can tell us, see Jordan Peterson, *Lockean Property and Literary Works*, 14 LEGAL THEORY, 257, 272–73 (2008); Shiffrin, *supra* note 11, at 154–56. But see, Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 502 (2003) (arguing that historically the deployment of a literary property construct is better understood in the context of privatization or "devolution of the sovereign's role in cultural production," 389–90); Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH. & INTELL. PROP. 578 (2012) (arguing that literary property is a legal concept distinct from copyright, which "safeguards an author's creative interests and expectations against the

and the word “monopoly” when discussing the powers of members of the Stationers’ Company to claim exclusive rights to print works.)¹⁹ Even among early proponents of the existence of a common law right of authors in their literary works, questions as to its scope and duration persisted well into the eighteenth century, and beyond.²⁰ Given the multivalent forms of “property” understood in Locke’s time, use of the word only begs the question as to the nature, extent and limitations of the rights involved.²¹

To complicate matters further, the *Memorandum of 1694* and the discussions of the book trade in Locke’s correspondence were deployed at a highly political moment and were undeniably calculated to influence real deliberations ongoing in Parliament. Seana Shiffrin’s caution not to “make too much of these brief, political remarks on their own” is reasonable, even as she saw parallels between Locke’s political comments and his philosophical views.²² Yet, an eminent editor of Locke’s works has asserted that Locke’s early political writing

reveals a Locke whose sense of the political was more practical than might be deduced from the theoretical abstractions of the *Two Treatises*, for he frequently addressed constitutional, administrative and policy matters. “True politics,” he told

rest of society, including printers and publishers who purchased the right to print the manuscript,” 531).

¹⁹ For use of the word “priviledg,” see Locke’s comments to the draft bill sent to him by John Freke, 5 CORRESPONDENCE, *supra* note 2, at 796; on Locke’s multiple uses of the word “monopoly,” see Lewis Hyde, *Frames from the Framers: How America’s Revolutionaries Imagined Intellectual Property*, 11, available at http://web.mit.edu/writing/2011/June/June_Arg_Hyde2005.pdf (arguing that Locke’s “framing issue was monopoly privilege, not property rights”), but see Hughes, *supra* note 14 at 560–63 (arguing that Locke distinguishes between the “monopoly” held by the stationers in the printing of Classical authors and the “‘property’ belonging to authors,” 562).

²⁰ Tomas Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 20–21 (2014) (noting the questions posed to the judges in *Donaldson v. Becket* and the differences of opinion among them); Lionel Bently, *A Few Remarks on Copyright at Common Law in 1774*, 23, 24–25, 27–28, in *What is the Point of Copyright History?: Reflections on Copyright at Common Law in 1774*, CREATE Working Paper 2016/4 (2016), available at <https://www.create.ac.uk/publications/what-is-the-point-of-copyright-history-reflections-on-copyright-at-common-law-in-1774-by-h-tomas-gomez-arostegui/> (arguing that “after *Donaldson*, what remained was a plethora of divergent views as to the position at common law before 1710, and with respect to protection of books both before and after publication,” 24).

²¹ Hyde, *supra* note 19 (analyzing different conceptions of property rights used as metaphor for intellectual property, including leaseholds, common stock, and allodial estates).

²² Shiffrin, *supra* note 11, at 155.

Lady Peterborough, "I look on as a part of moral philosophy, which is nothing but the art of conducting men right in society."²³

So it seems that Locke himself saw a link between politics and philosophy. This chapter draws parallels between Locke's contemporary political commentary on the Licensing Act and the ways in which some modern legal scholars have understood Locke's philosophy to apply to literary property, which together give some fundamental principles as to what Locke might have thought "an author's property in his copy" meant, or at least, what it should have meant. The first section of the chapter surveys some of this literature and highlights a number of aspects of Locke's theory that are relevant to or consistent with the transactional drafting tools at work in the contracts that have survived.

Assuming that we can establish a working definition of Locke's theory, the next problem is determining what the relationship between his theory and praxis was, and we have to consider the possibility that Locke's theory had no influence on his practical commercial transactions. As scholars concerned with other elements of Locke's theories have come to confront, the relationship between Locke's philosophy and his real-life commercial and political dealings can be fraught. Scholars have now long noted the tension between Locke's liberalism and his involvement with the slave trade.²⁴ On the one hand, in the opening of the *Two Treatises*, Locke wrote: "Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that tis hardly to be conceived, that an Englishman ... Should plead for it."²⁵ On the other hand, in his professional life, Locke played a role in the drafting of the Fundamental Constitutions of Carolina, which gave slaveholders "absolute power and authority" over African slaves,

²³ Mark Goldie, *Introduction*, in LOCKE: POLITICAL ESSAYS xi, xiii (Mark Goldie, ed. 1997).

²⁴ Holly Brewer, *Slavery-entangled Philosophy*, AEON, September 2018, available at <https://aeon.co/essays/does-lockes-entanglement-with-slavery-undermine-his-philosophy> (noting these facts but resolving the tension by attributing the genesis of the slave trade in the absolute monarchy that Locke resisted); Brad Hinshelwood, *The Carolinian Context of John Locke's Theory of Slavery*, 41 POLITICAL THEORY 562 (2013) (arguing that actual circumstances of Native American slavery in the context of conflict with native peoples in the Carolina colony may have motivated Locke to argue that "just-war slavery" is legitimate, but tensions between his rejection of other forms of slavery and his investments in African slavery remain, 581–83); David Armitage, *John Locke, Carolina, and the "Two Treatises of Government,"* 32 POLITICAL THEORY 602 (2004) (arguing that critiques of the "complicity of Lockean liberalism with English colonialism" were historically accurate, 620).

²⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 5 (Mark Goldie, ed., 1993); Brewer, *supra* note 24. Though there is also a limited justification of slavery in the state of war in the *Second Treatise* (Hinshelwood, *supra* note 24, at 563).

and he was, for a time, an investor in the Royal African Company.²⁶ In our own political discourse today, the word “transactional” has itself taken something of a beating lately—at best, it is frequently used to mean “concerned only with the cost/benefit analysis of the exchange at hand” but more and more I see it used with a pejorative valence to mean “free of ideology” or, worse, by definition “unprincipled.”²⁷ It must be acknowledged that the founding documents of liberalism are shadowed by the transactional realities in which they were written. That is to say, why should we expect to find Locke’s ideals in his transactions, when we know that, for instance, we cannot find Thomas Jefferson’s theory of equality and inalienable rights for all men in his own actual pursuit of happiness?²⁸ So, there are limits to how much theoretical freight the real transactions can carry. Nonetheless, the documents are compelling, because you cannot do things with ideas that you do not have, and the documents are historical records of what authors and publishers did to bring literary property to the market and thus to readers. The second part of the chapter will read the surviving transactional documents closely and reflect on the relevance of Locke’s political and philosophical views to the commercial practices they reveal.

The final issue is whether enough historical evidence of Locke’s publishing deals has survived to give us a fulsome picture of his commercial practices. There are only seven documents in the Bodleian Library’s collection, and it is not clear that you could even call all of them contracts. Some of them clearly do not cover the complete publication agreement, though I think they all suggest powerful and interesting things about the assumptions of the parties with respect to literary property. Above all, the documents are a strong antidote to the temptation to imagine that Locke’s writing reflects on the market for literary works without ever having been affected by it. That temptation set in as early as Lord Camden’s stirring speech before the House of Lords in

²⁶ Hinshelwood, *supra* note 24, at 563.

²⁷ See e.g., Andra Gillespie, *Trump and the Limits of Transactional Politics*, CNN: OPINION, January 18, 2018, <https://www.cnn.com/2018/01/18/opinions/trump-transactional-politics-problem-gillespie-opinion/index.html>; Caterina Bulgarella, *The Art of Deal Making: Why Ethical Leadership Trumps Transactional Leadership*, FORBES, Jan. 31, 2019, <https://www.forbes.com/sites/caterinabulgarella/2019/01/31/the-art-of-deal-making-why-ethical-leadership-trumps-transactional-leadership/#3c34dc1f2a88>; Cleve W. Stevens, *We Can Survive President Trump’s Soulless Transactional Leadership*, SEATTLE TIMES, August 14, 2017, <https://www.seattletimes.com/opinion/we-can-survive-president-trumps-soulless-transactional-leadership/>.

²⁸ HENRY WIENCEK, *MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES* (2012).

Donaldson v. Becket in 1774. Camden railed against the idea of a perpetual copyright at common law, declaiming that

glory is the reward of science, and those who deserve it, scorn all meaner views. ... It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of a letter press.²⁹

But Locke did traffic with booksellers, and “for so much a sheet” at that, though not merely for economic gain. This chapter concludes that Locke’s commercial practices in the publishing market were consistent with a number of his theoretical principles, and the transactional documents that have survived show how valuable the contractual tools Locke employed were to his emergence as one of the greatest authors of his age.

1. IN THEORY: LABOR, THE COMMONS, AND THE STATIONERS’ COMPANY

Locke’s own entry point in the debate regarding renewal of the Licensing Act was not as an author, but as a reader. His first recorded comments on the issue come in a letter to his close friend Edward Clarke, a member of parliament, in which he focuses on the harm the Act inflicts on scholars and book buyers. The renewal of the Licensing Act involved renewal of the pre-publication censorship system that it regulated, but it also facilitated the ability of the Stationers’ Company to leverage and regulate amongst themselves the exclusive right to print particular works via two separate mechanisms, patents or printing privileges granted to stationers by the Crown and rights claimed through entrance of a work in the Stationers’ Register by the first company member to publish a work. When Locke wrote to Clarke in January of 1693, Locke was disappointed that Parliament had just voted to extend the Licensing Act for an additional year and his chief complaint concerned the Act’s enablement of exclusive rights to print and sell Classical authors via the former mechanism:

I wish you would have some care of Book buyers as well as all of Booke sellers ... who have got a Patent for all or most of the Ancient Latin Authors (by what right or pretence I know not) claime the text to be their and soe will not suffer fairer and

²⁹ THE PARLIAMENTARY REGISTER; OR, HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS [AND OF THE HOUSE OF LORDS] 1000 (London, Printed for J. Almon, 1775–804).

more correct Editions than any thing they print here or with new Comments to be imported ...³⁰

Thus Locke's chief concern was the Act's impact on the public's access to the best possible editions of Latin authors. He goes on to argue that the result is that "these most usefull books are excessively dear to schollers and a monopoly is put into the hands of the company of ignorant and lazy stationers."³¹ The letter contains two examples from Locke's personal experience, anecdotal evidence from his still relatively new connections amongst booksellers, and then finishes the discussion with this proposal:

And particularly I think that clause where printing and importation of any books to which any have a right by Patent is prohibited should be at least thus far restrained, that it should be lawfull for any one to print or import any Latin booke whose author lived above a thousand year since. ... [F]or it is a great oppression upon schollers and what right can any one pretend to have to the writeings of one who lived a thousand years agoe, He that prints them best deserves best and should have the sale of them. ...³²

Locke objects to the harmful effects of a monopoly power in printing these authors' works as a "great oppression upon schollers." Locke seems to object as well on the basis that the stationers have done nothing to deserve the right, partly because they are "ignorant" and "lazy," but also because their connection to the authors who created the works is so attenuated, and "what right can any one pretend to have to the writeings of one who lived a thousand years agoe." Locke explicitly argues that those who work to create the best editions should have the market. He also asked that Clarke speak with two booksellers, including Awnsham Churchill, who was Locke's publisher by that time, because "I believe [he] will be able to shew you other great inconvenys of that act."³³

There are a number of themes in this opening salvo that are picked up in modern applications of Locke's philosophy to copyright. In the plea to have care of book buyers as well as sellers is a value articulated in Wendy Gordon's observation that "[n]atural rights theory ... is necessarily concerned with the rights of the public as well as with the rights of those whose labors create intellectual products."³⁴ From the Lockean rule that all people have a right to

³⁰ Letter from John Locke to Edward Clarke (January 2, 1693 n.s.), in 4 CORRESPONDENCE, *supra* note 2, 614–15.

³¹ *Id.* at 615.

³² *Id.*

³³ *Id.*

³⁴ Gordon, *supra* note 11, at 1535.

take from the common for sustenance, Professor Gordon derives the idea that “people must have access not only to the physical common of which Locke explicitly writes, but also to a common of intangibles. Our common encompasses not only our physical country but our culture as well.”³⁵ This sense of a public entitlement to common heritage seems consistent with Locke’s account of the harm done, the “great oppression,” when scholars cannot obtain accurate editions of the Latin classics, which were the bedrock foundation of learning in his day. In reading Locke’s political comments alongside his philosophy, Lior Zemer has argued insightfully that “a comprehensive Lockean approach to copyright would provide significant recognition for the public role in the making of authorship and art.”³⁶ This observation is borne out by the first points Locke makes in this letter, with the focus on book buyers in the market and on an international, intergenerational group of scholars whose work depends on access both to old texts and new commentaries.

Locke’s questioning of the “lazy” stationers’ right and his assertion that “he that prints them best deserves best” seems a reflection of Locke’s labor theory of property, which is commonly emphasized in modern Lockean justifications of copyright.³⁷ As encapsulated by Alfred Yen, the application of labor theory to modern copyright initially plays out in this way:

Locke’s views on property stemmed from his assumption that persons owned their bodies. They therefore owned the labor of their bodies and, by extension, the product of their labor. This argument seems peculiarly applicable to authorship. An author owns her body, and therefore her mind. When her mind labors, it seems that the resulting work is not just the product of the author’s labor, it is practically an extension of the author herself.³⁸

As Professor Yen notes, the bare extension of this argument to authors’ rights is vulnerable to the criticism that it opens the door to an unlimited scope of such rights. Yet, Yen and others have derived limitations on authors’ rights from Lockean principles of natural law.³⁹ As we will see, it has also been observed that Locke himself eventually proposed a limited author’s right post-publication, but for now it is interesting to note that Locke’s letter implies a lack of justification for the printer’s exclusive rights to print Classical authors for two reasons. First, the printers have not diligently worked to bring out

³⁵ *Id.* at 1556.

³⁶ Zemer, *supra* note 17, at 892.

³⁷ Gordon, *supra* note 11, at 1540.

³⁸ Yen, *supra* note 11, at 546–47.

³⁹ *Id.* at 548–57 (exploring how the concept of possession and the moral consequences of labor provide natural limits to copyright); see also *infra* notes 49–65 and accompanying text.

accurate editions (they have not applied their own labor), and thus lack a justification for their right to exclude others from doing so. Second, the printers are too far removed from the labor of the author to be considered successors to the author's interest (for "what right can any one pretend to have to the writings of one who lived a thousand years ago"?), an issue that returned in Locke's later grappling with drafting appropriate legislation. Professor Hughes notes that there are two possible interpretations of Locke's labor theory of property, one which rewards labor with property rights on "instrumental grounds that we must provide rewards to get labor," and another which rewards labor on normative grounds that "labor should be rewarded."⁴⁰ Interestingly, in the case of the letters patent given to the stationers, Locke seems to object on both grounds—the exclusive rights conferred to the stationers have failed to incentivize the desired work in diligent editing and the stationers can have no moral claim deriving from the work of the authors.

When the Licensing Act approached expiration again in late 1694, Locke prepared a manuscript of notes analyzing and critiquing the Licensing Act.⁴¹ The structure of the text is that Locke copies out a summary of a section of the Act and then follows with commentary on it. As with the initial letter to Clarke, Locke's primary focus is the stationers' monopoly in printing Classical authors. The longest comment is on Section 6, the paragraph prohibiting the printing or importing of books "which any ... persons by force ... of any letters patents have the right priviledg authority or allowance solely to print."⁴² As Justin Hughes has noted, this context of responding to Section 6 of the Licensing Act is important to understanding the import of Locke's commentary.⁴³ This time, Locke augments his criticism with a proposal:

Upon occasion of this instance of the Clasick authors I demand whether if an other act for printing should be made it be not reasonable the noebody should have any peculiar right in any book which has been in print fifty years, but anyone as well as an other might have the liberty to print it for by such titles as these which lie dormant and hinder others many good books come quite to be lost.⁴⁴

⁴⁰ Hughes, *supra* note 11, at 296.

⁴¹ There is disagreement regarding exactly when Locke prepared the manuscript, a copy of which survives in his own hand as Bodleian Lib. MS Locke b. ff. 75–6, and was endorsed by Locke "Printing 94." Astbury concludes that the most likely timeline is for Locke to have sent a copy to Edward Clarke in November or December of 1694. Astbury, *supra* note 14, at 305, n.47.

⁴² Locke, *Appendix, Documents relating to the termination of the Licensing Act*, 1695, 5 CORRESPONDENCE, *supra* note 2, at 786.

⁴³ Hughes, *supra* note 14, at 562.

⁴⁴ Locke, *supra* note 42, at 787.

Up until this point the argument was focused on the stationers' monopoly in printing the Classical authors, but it must surely have occurred to Locke that the issues attending a perpetual right to stationers via letters patent would also be relevant to the perpetual exclusivity claimed via entry in the Stationers' Register.⁴⁵ The proposal of a 50-year limitation, as articulated above, would have applied to all printed texts, posing the problem of how the proposal would affect the commercial transactions of living authors.

By the time of the writing of the *Memorandum*, Locke was familiar with the typical transaction between living authors and their publishers, in which authors sold their "copies" to booksellers, where the sale of the copy both transferred physical possession of the manuscript to the publisher and authorized publication. If it posed a problem for Locke to imagine what impact such a limitation in the duration of booksellers' exclusivity would have on the value of the "copies" sold by authors, he sidestepped it quickly in favor of emphasizing again the inequity in the printing privileges for Latin works:

But be that determined as it will in regard of those Authors who now write and sell their copys to booksellers. This certain is very absurd at first sight that any person or company should now have a title to the printing of the works of Tullie Caesars or Livys who lived soe many ages since. ... nor can there be any reason in nature why I might not print them as well as the Company of Stationers if I thought fit.⁴⁶

The quick turn away from living authors in part just illustrates that the *Memorandum* was a polemic. Locke acknowledged that his readers would be worrying about how living authors got paid, and indeed the issue became an important one in the debates that led to the Statute of Anne, but for now Locke wants those readers to focus on the easy case, the one against perpetual rights in long-dead authors.

Nonetheless, Locke returned to the problem of transactions with living authors in the closing sentences of the *Memorandum*, arguing that: "And for those who purchase copies from Authors that now live and write it may be reasonable to limit their property to a certain number of years after the death of the Author or the first printing of the book as suppose 50 or 70 years."⁴⁷ As has been noted, this prescient proposal anticipates (or perhaps influenced?)

⁴⁵ Locke did write a comment on Section 3 of the Licensing Act, which required entry of works on the Register, but his complaint was that it opened up the opportunity for fraud, because the manuscript, once disclosed to the Company in order to be entered, might be falsely claimed by some stationer other than the one who brought it in for entry. Locke claimed that his own publisher, Awnsham Churchill, could provide an example. *Id.* at 786.

⁴⁶ *Id.* at 787–88.

⁴⁷ *Id.* at 791.

the modern duration of copyright, currently set in the United States at 70 years after the death of the author, with the crucial difference that here “their property” referred to the property of stationers, who had bought “copies” from authors, leaving ambiguous the nature of the “copies” authors were selling.⁴⁸ The word “copy” was used by stationers in their entries in the Stationers’ Register to mean something like “the right to print,” but in Locke’s time it was not clear whether an author’s “copy” could be enforced as a matter of common law after the first publication.⁴⁹ In any event, only stationers were given a legal mechanism for enforcing exclusive rights to print under the Act Locke was criticizing. Locke suggested a solution to that problem later, when his friends John Freke and Edward Clarke sought his guidance on a draft bill to replace the Licensing Act, and, as we will see, Locke addressed the issue with transactional tools in some of his agreements with booksellers.

The *Memorandum of 1694* raises important issues for the application of Locke’s theory to the commercial world of bookselling that he knew. First, Locke was clearly open to limitations on rights in literary property. This is consistent with multiple modern applications of Lockean thought to copyright. For instance, Lior Zemer sees a connection between the *Memorandum*, copyright and Locke’s no-spoliation proviso, which he describes as “an absolute condition set on appropriation,” which “ensures that ‘Nothing’ was made by God to spoil or be destroyed.”⁵⁰ Professor Zemer acknowledges that spoliation in “intellectual goods” is different from that in physical goods, but nonetheless intellectual goods are “perishable” and there is a loss of value, even to the original author, when a work is not shared with others: “For example, the owner deprives himself of the true value of the creation in light of the potential that someone will generate a derivative idea and then the owner would develop his initial creation even further.”⁵¹ This loss of creative exchange, albeit long after the original author is dead, was perhaps what Locke had in mind when he complained that the result of the stationers’ perpetual monopoly in Classical authors was that “many good books come quite to be lost.” As Professor Zemer

⁴⁸ Hughes, *supra* note 14, at 559; see also Zemer, *supra* note 17, at 905.

⁴⁹ For parsing of the use of the word “copy” in Stationers’ Register entries, see Curtin, *supra* note 10, at 183–84, 188. The status of an author’s common-law copyright was eventually taken up in late-eighteenth-century cases, though there has been some disagreement among modern scholars regarding the interpretation of these cases. See H. Tomas Gomez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1 (2014) (arguing that a majority of jurists in the two landmark cases of *Millar* and *Donaldson* “favored an antecedent common-law copyright in authors,” 6).

⁵⁰ Zemer, *supra* note 17, at 921.

⁵¹ *Id.* at 925.

writes, "Locke is aware that in situations of perpetual right in works of authorship, spoilage of social value is inevitable."⁵²

Another Lockean principle that has been used to justify limitations on modern copyright is the "enough and as good" proviso: "For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others."⁵³ Wendy Gordon summarizes its effect in the following way: "If the proviso is satisfied, others are no worse off if they are excluded from the resource the laborer has marked off as her own."⁵⁴ The proviso is central to Professor Gordon's thesis "that creators should have property in their original works, only provided that such grant of property does no harm to other persons' equal abilities to create or draw upon the preexisting cultural matrix and scientific heritage."⁵⁵ From the proviso, Professor Gordon derives the prohibition against owning abstract ideas and a limitation on the duration of copyright, with a compelling account that access to and a right to use a common heritage is crucial to human creativity: "Just as land is necessary for farmers to bring forth fruit (in Locke's imagery), a common of previously-created intangibles is necessary for creators to bring forth new works of the imagination."⁵⁶ In particular, Professor Gordon argues that "too broad a set of intellectual property rights gives one set of persons potential control over how that 'created' reality can be interpreted."⁵⁷ This account resonates deeply with Locke's indignation in the *Memorandum* that "by this Act Scholers are subjected to the power of these dull wretches [the stationers] who doe not soe much as understand Latin whether they shall have any true or good copies of the best ancient Latin authors."⁵⁸

Thus, Locke's proposal of limiting the duration of rights in literary property seems consistent with both the no-spoliation and the enough and as good provisos. In addition, both Professor Gordon and Professor Hughes have seen in Locke's philosophy a requirement that such rights be limited in order to ensure equitable access to the commons from one generation to the next.⁵⁹ Perhaps this is why Locke considered as one possibility a term of the life of the author plus 50 or 70 years, as a rough estimate of granting exclusive control lasting

⁵² *Id.*

⁵³ JOHN LOCKE, TWO TREATISES ON GOVERNMENT, 128 (Book II, Ch. 5, §27) (Mark Goldie, ed., Everyman 1993) (1690).

⁵⁴ Gordon, *supra* note 11, at 1563.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1556.

⁵⁷ *Id.*

⁵⁸ Locke, *supra* note 42, at 787.

⁵⁹ Gordon, *supra* note 11, at 1557; Hughes, *supra* note 11, at 323–25.

no longer than the lifespan of one generation after the author's time, or perhaps one generation's lifespan (50 years), plus the minority of the next generation (an extra 20 years).⁶⁰ It is similar to the term under which property owners are allowed to impose unvested contingent interests under the modern formulation of the Rule Against Perpetuities (RAP).⁶¹ At the time when Locke wrote the *Memorandum*, the common law foundations of the RAP had recently been laid in the Duke of Norfolk's Case, in 1681.⁶² The alternative he proposed, a term of 50 or 70 years running from first publication, ensures that a published work would remain outside the public domain for no longer than roughly one generation's lifespan.

Finally, Locke's repeated allusion to authors selling their copies in the *Memorandum* is a reminder that commerce played a role in his philosophy of property. Professor Gordon notes that "Locke assumes contracts can be made in the state of nature."⁶³ She observes that "the entitlements in intellectual products can nevertheless be transferred: the creator can impose on herself by contract a duty to cease using what she has made, and transfer all her rights and powers over the use of the intangible to someone else."⁶⁴ She characterizes the "power to transfer" as one of the "three crucial entitlements in Locke."⁶⁵ For Professor Hughes, "Locke relies upon the money economy to facilitate" the addition of new physical value to the commons, through "gifts or com-

⁶⁰ While the average life expectancy at birth was low in Locke's time, the figure sometimes seen (35 years) is heavily affected by infant mortality, while "those who survived the early years had a respectable chance of living at least into their late forties." It might be more indicative of Locke's perception of an author's lifespan to note the following statistic: "The average age of death of the nine 17th century archbishops of Canterbury was 73 and the average age of appointment 60." Anne Stott, *Old Age*, EARLY MODERN EUROPE (2011), <http://early-moderneurope.blogspot.com/2011/11/old-age.html>.

⁶¹ John Chipman Gray encapsulated the rule as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JESSE DUKEMINIER ET AL., PROPERTY 285 (7th ed., 2010). Dukeminier notes that "the effect was to permit a donor '[to] provide for all those in his family whom he personally knew and the first generation after them upon attaining majority.'" *Id.*

⁶² George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977). Haskins's account of the ruling in the Duke of Norfolk's case, as a compromise allowing some dead hand control while still preserving freedom to transfer land within a reasonable period of time, seems germane to the balancing of interests between the booksellers' need to profit and the public's need for freer access to ancient texts.

⁶³ Gordon, *supra* note 11, at 1551.

⁶⁴ *Id.*

⁶⁵ *Id.*

merce.”⁶⁶ So, it seems fitting that Locke would have been mindful of the commercial pathways that authors used to publish their works when considering the effects of exclusive rights to print them.

Locke turned to face squarely the issue of authors' rights in their works within a few months of composing the *Memorandum*. In March of 1695, Locke's friends, John Freke and Edward Clarke sent Locke a draft bill for his consideration. Clarke, who was a member of parliament, had presented the bill in the House of Commons earlier that month.⁶⁷ Locke's notes suggesting alterations of the bill have survived. Locke is now focused solely on “secur[ing] the Authors property in his copy, or his to whom he has transferd it.”⁶⁸ As discussed above, under the contemporary legal regime, there was no legal default rule allowing anyone other than a member of the Stationers' Company (or a holder of a printing privilege from the Crown) to enforce an exclusive right to print a work after the first publication, but authors commonly succeeded in controlling (and receiving compensation for) the right to print in the first instance.⁶⁹ This was the “property” authors held in their copy, and could transfer to stationers, but Locke sought to find a way to “secure” those rights to authors (or their assigns) beyond the first publication under a new regime not controlled by the Stationers' Register. Property had become the touchstone issue in debates regarding the replacement of the Licensing Act because, in John Freke's words, “property is a very popular word, which Licencer is not.”⁷⁰ The leap Locke made in his proposals was that authors could be conceived as holding a right to print for a term of years generally, not merely a right of first publication, and in this respect he anticipated the terms of the Statute of Anne.⁷¹ He offered two alternative proposals to extend an author's legal right to control printing beyond the first edition. Interestingly, both proposals explicitly allow that the rights will be transferable, recognizing the role of commerce in the dissemination of works. The first proposed provision was to be appended to an existing clause in the draft that prohibited printers from

⁶⁶ Hughes, *supra* note 11, at 317. However, by contrast, he argues, “intellectual property systems release the added value of a new idea without requiring the property owner's active and intentional introduction of the idea into commerce.” *Id.*

⁶⁷ Astbury, *supra* note 14, at 312.

⁶⁸ Locke, *supra* note 42, at 795.

⁶⁹ This was undoubtedly in part because authors had initial control over physical access to the manuscript, but there is evidence that an author's intangible right to control the first printing was customarily respected and there are examples of the Court of Assistants enforcing such a right where complaints arose. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 68–70 (1968).

⁷⁰ Letter from John Freke and Edward Clarke to John Locke (14 March 1695), 5 CORRESPONDENCE, *supra* note 2, at 291; Astbury, *supra* note 14, at 312.

⁷¹ Astbury, *supra* note 14, at 313.

printing the name of any person as author or publisher of any book without authority in writing for doing so, on penalty of paying a set sum to the person falsely named as author or publisher.⁷² Once a “book, pamphlet, portraicture or paper” has been printed the first time with the name of the author or publisher on it, then it could not be printed again *with or without* the name of the author “without Authority given in writeing by the Author *or somebody intituled by him*” for a term of years after its first publication. In this proposal, the ability for an author to control reprints of the work is triggered when the work is published with identification of someone (the author or the publisher) who would be accountable for its contents.⁷³

The second, alternative, proposal was a provision to be inserted under an existing paragraph in the draft regarding the deposit of books in three designated libraries. Locke added,

And for the better encouragement thereof be it farther enacted that upon delivery of three copys for the use of the said three libraris. A receipt under the hand of the Kings Library Keeper and under the hand of the Vice Chancelor of each university ... who are hereby required to give such receipts, for the said books, shall vest a privilegedg in the Author of the said book his executors administrators and assignes of solely reprinting and publishing the said book for [] years from the first edition thereof.⁷⁴

In the second proposal, the exclusive right to reprint a book for a term of years following the first edition is conditioned on compliance with a deposit requirement. The language is explicitly instrumental—the clause is included for the “better encouragement” of depositing books at the King’s library and those of the Universities.

⁷² The draft copy of the bill sent to Locke was missing the words “author or” before “publisher” in the first part of the clause, but included authors in the clause laying out the remedy. Therefore it seems likely that the omission of authors from the first clause was a transcription error. The copy of the draft bill that was sent to Locke in Freke’s hand is transcribed in *Appendix: Documents relating to the termination of the Licensing Act*, in 5 CORRESPONDENCE, *supra* note 2, at 791–95. Locke recopied the provision and wrote a note in the margin next to the passage: “NB the words as Author are left out in my copy but I suppose are in the bill.” Locke, *supra* note 42, at 795 note b.

⁷³ The draft bill provided that “whosoever shall order his name to be printed to any matter or thing shall be answerable to the Law as if he were the Author of the same nevertheless the Author to be also answerable ...” *Appendix*, in 5 CORRESPONDENCE, *supra* note 2, at 793.

⁷⁴ Locke, *supra* note 42, at 795. The remedy given for violation of the privilege is the “power to seize all copys of the said book reprinted by any other person which by virtue of this act shall be forfeited to the said author his executors administrators and Assignes.” *Id.* at 796.

With these proposals, we come full circle in considering the interaction between Locke's political interventions and his philosophical theory. His strong advocacy for author's rights is consistent with the labor theory of property discussed above. Locke's insight is most powerfully formulated in Professor Gordon's phrase: "all persons have a liberty right to dispose of their efforts."⁷⁵ This liberty right, however, is paired with the liberty right of all persons to use the common and is limited by the no-spoilation proviso and the enough and as good proviso, such that its scope is not absolute and not perpetual.⁷⁶ Professor Gordon's interpretation of these Lockean principles as protective of expressive speech interests is true to the origins of Locke's proposals to limit literary property in the context of rejecting the Licensing Act, in which the registration process used by stationers to police printing rights was yoked with pre-publication censorship. Note that Locke's proposals limit the rights to a term of years and also express them merely as rights to control reprint of the original work. This resonates with Professor Gordon's observation that a derivative work right "would have to be quite narrow" to be justified under Lockean theory, "giving an initial creator control over only those new works by others that significantly interfere with her own plans for the work."⁷⁷ In the conditioning of the second proposal on the donation of books to libraries, Locke displayed the commitment to public benefit and access to knowledge that has been recognized in his theory, for instance, by Professor Zemer: "Locke combines arguments for freedom of expression and social exchange, economic equality, common equity, and recognition of authors' rights."⁷⁸

There was significant connection between Locke's political and philosophical views. Modern scholars have applied Locke's general theory of property to copyright doctrine in ways that are consistent with Locke's writings in the literary property debates of his own day. In the next section of the chapter, I will analyze the relationship between these principles in theory and Locke's commercial practices. Given the principles discussed above, we might expect, for instance, to see compensation tied to labor. We should expect to find a balance struck between the author's desire to control the fruits of his efforts and a commitment to the public benefit. But above all, we should expect to find ingenuity in the deployment of diverse transactional tools as we see Locke learn about the publishing industry in the midst of his own evolution as an author from patronage to proprietorship.

⁷⁵ Gordon, *supra* note 11, at 1542.

⁷⁶ *Id.* at 1542, 1550–51, 1562–65. See also, Zemer, *supra* note 17, at 934–35 (arguing that perpetuity would violate the provisos of the *Second Treatise*).

⁷⁷ Gordon, *id.* at 1608.

⁷⁸ Zemer, *supra* note 17, at 900.

2. IN PRACTICE: LOCKE'S PUBLICATION AGREEMENTS

Locke had been writing for decades before he made any concerted effort to become a published author. As the epigraph to this chapter suggests, Locke discovered that writing and publishing were two different things and navigating the process by which a manuscript was printed and sold to the public was challenging.⁷⁹ This section works through the surviving agreements between Locke and his publishers in roughly chronological order. Discussing the contracts in the order that they were executed shows the development in the range of tools Locke and his publishers used to craft their deals. Locke learned over time, from the first contract in 1689, shortly after he returned to England, to the last surviving one in 1699, just a few years before his death. The contracts span the same time period during which he attempted to influence members of Parliament on the issue of literary property, as discussed above. That experience no doubt resonated in Locke's decisions regarding his own literary property. Professor Lindenbaum has noted that "Locke's contracts of the mid-1690s reflect precisely his stand that authors should have some power in controlling the publication of reprints of their works."⁸⁰ This is certainly true, and there is more to say about how Locke and his advisors engineered that control. However, it is also true that Locke's commercial dealings reflect other principles of scope and limitation in literary property.

2.a Controlling the Text: *An Essay Concerning Human Understanding*

In May of 1689, John Locke and bookseller Thomas Bassett contracted to publish the first complete edition of *An Essay Concerning Human Understanding*. The contract has been described as "complicated," "trade-oriented" and

⁷⁹ The context of the letter to Benjamin Furly was that Locke had gone to Amsterdam to be able to work closely with a printer who was reprinting an abridgement of the *Essay Concerning Human Understanding*, which Locke had originally prepared as a contribution to the serial journal, the *Bibliothèque Universelle*. Locke's plans for the reprint were to privately circulate it himself among his patronage circle in England. CRANSTON, *supra* note 5, at 290–91. He further lamented to his friend, who was working with a medieval manuscript, "I envye your employment in that musty manuscript, which you will easily allow to be a great deale better than to wait here the leisure of drunken workmen [the printers], who have soe great a reverence for the holy-days, that they could not till today quit the Cabarets ... and betake themselves to their profane callings." Letter from John Locke to Benjamin Furly, *supra* note 2, at 330–31.

⁸⁰ Lindenbaum (1995), *supra* note 9, at 262.

“technical.”⁸¹ It is notable for its focus on two issues, a complex formula for calculating Locke's compensation and covenants covering the process by which Locke and Bassett will work together to bring the book through the press. Thomas Bassett was nearing the end of his career. The prominent publisher Jacob Tonson had once been his apprentice and the catalogue of law books for which he was best known had been printed in the 1670s.⁸² Notably, the contract was witnessed by Edward Clarke and John Freke. These were the friends, a member of parliament and a lawyer, respectively, with whom Locke corresponded regarding literary property at the expiration of the Licensing Act. It was John Freke who copied out the draft bill for Locke and Edward Clarke who presented it in Parliament. That they both had a front seat at the dawn of Locke's adventures in London publishing is remarkable. Given that Locke was relatively new to publishing, he may not have negotiated much, and yet we can see some resonance with the issues Locke considered philosophically and politically.

The first issue is an author's right to control his work. The contract frames the deal as a limited authorization to publish the work in a specified time and manner:

Whereas the said John Locke hath composed and written a Boooke or Treatise in English Entituled an Essay concerning Humane Understanding the said John Locke doth grant & Agree to & with the said Thomas Basett that he the said Thomas Basett shall have the same to Print & Publish on ye Times & in the Manner & forme following. That is to say the same shall be Printed on as good Paper & in a volume of the size and Character of the History of the Councill of Trent Printed in English in the yeare 1676. The Printing thereof shall be begun immediately & continued after the rate of at least fower sheets a weeke until the whole booke be Printed.⁸³

The agreement regarding the rate of printing may reflect Locke's dissatisfaction with his experience with the printers of an abridgement of the *Essay* in Amsterdam, in which delays forced him to stay in the city longer than he had wished.⁸⁴ By choosing an exemplar for the format of the printing, Locke received some *ex ante* assurance as to the quality of the finished volume. Locke apparently cared about the caliber of the paper and the presentation of the text, an indication that the agreement is not merely about economic compensation, but also channels the author's reputational concerns. The parties

⁸¹ Lindenbaum (2002), *supra* note 9, at 57.

⁸² Henry Plomer, *Bassett (Thomas)*, in A DICTIONARY OF THE BOOKSELLERS AND PRINTERS WHO WERE AT WORK IN ENGLAND, SCOTLAND, AND IRELAND FROM 1641 TO 1667 16 (1910).

⁸³ Locke MS b.1, f.109.

⁸⁴ CRANSTON, *supra* note 5, at 290–91.

anticipated that there might be disputes during the process and appointed John Freke “umpire ... by whose judgment & Award In the Case they will be concluded.”⁸⁵ That the arbitration of disputes would be adjudged by Locke’s friend is a sign that the negotiations were favorable to the author, or at least, that Bassett was willing to assuage any lingering anxieties on Locke’s part.

Compensation for Locke was tied to how much text he produced. The longer the book, the higher the compensation, at a rate of “ten shillings a sheet for every sheet the said booke shall contein counting for a sheet the same as is contained in a sheet of Milton’s History of England in octavo.” Because the *Essay* was printed in folio (four pages to a sheet), a much larger format than octavo (16 pages to a sheet), this pay scale required a separate accounting, using the number of ems of text in a sheet of the Milton octavo as the unit quantifying what a “sheet” would be for Locke’s payment, rather than the number of sheets in the actual edition.⁸⁶ This was advantageous to Locke not only because payment was proportionate to his labor, but also because the pay scale by its nature required Bassett to make every em count, literally. The care with which Locke wanted to make his debut in the London book market is reflected in the technicality of the terms. The ten-shillings-a-sheet came out to 58 sheets, according to a postscript in Thomas Bassett’s hand, and Locke was paid 29 pounds.⁸⁷ This was a relatively modest amount of money for Locke, who had been appointed Commissioner of Excise Appeals that year at an annual salary of two hundred pounds per year and whose estate upon his death in 1704 was valued at more than twelve thousand pounds.⁸⁸ The benefit to Locke I think was in the precision, more than in the payment, though certainly the recognition of the value that he was transferring to Bassett was meaningful. Bassett’s investment was, if nothing else, further incentive to sell the books in order to recoup his payment to Locke.

In addition, the contract specified that Locke (or his assigns) would receive 25 copies in sheets. These were the cheapest copies, unbound and uncut, suggesting that Locke preferred to receive a higher quantity of copies over

⁸⁵ Locke MS b.1, f.109v.

⁸⁶ Lindenbaum (2002), *supra* note 9, 57.

⁸⁷ Locke MS b.1, f.109v. Lindenbaum walks through the conversion of sheets in the Milton octavo to the number of sheets in the Locke folio and verifies that the calculations in the postscript are correct. Lindenbaum (2002), *supra* note 9, 57. This seems to have been close to the going rate, Locke had heard via a friend about London booksellers like the Churchills, with whom he ultimately published a great deal, ‘that for good books of which they may venture to print 1,000 or 1,120 copies they give sometimes £20, sometimes £30.’ CRANSTON, *supra* note 5, at 298.

⁸⁸ J. R. Milton, *Locke, John (1632–1704)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2008), <https://doi.org/10.1093/ref:odnb/16885>; Milton, *supra* note 5, at 21.

more expensive bound editions, to maximize his ability to circulate the text to chosen recipients. It seems likely that this was a priority for Locke, as Locke was also given the option to buy up to 25 more such copies “at the sale of one half penny a sheet as he the said John Locke shall desire within twelve monthes after the Publishing of the same ... all such money paid for any of the said five and twenty Books the said Thomas Bassett shal repay to the said John Locke when ever he shall Reprint the said Treatise.”⁸⁹ The phrase “whenever he shall Reprint the said Treatise” implies that Bassett had the power to reprint without further consent from Locke, but that point remained somewhat ambiguous until subsequent agreements regarding new editions.

Finally, the contract specified a strict timeline for production of the first impression: “And the said John Locke doth promise to ye said Thomas Bassett to deliver to him on demand from time to time so much of ye said Booke or Treatise as shall make five sheets to be Printed as above said upon the said Thomas Bassetts delivery of a Copy in Print to the said John Locke of what he then last received from him.”⁹⁰ The process nonetheless took considerable time, with Locke making edits right up until the printing was complete in December of that year, so the close working relationship between author and press throughout the process paid off for Locke, who had staked and won his reputation on the essay.⁹¹ In June of 1693, Bassett reached out to Locke to let him know “that the Impression of your Books are so neare sold that I am ready to Reprint it but thought it necessary to acquaint you first with it because you shewed me some alterations and Additions that you had made, and if you have finished what you intended, I desire you would be pleased to send it by the first opportunity.”⁹² Apparently, Bassett did not expect to have to ask for permission to reprint the work, but was interested in acquiring an update. As it happened, Locke did not merely send the new material for inclusion, but rather signed a new deal with Bassett, in which Locke was again paid ten shillings, this time for “each sheet of the bigness of the sheets of the former edition that shall be added to this second edition, whether in text or table.”⁹³ He was also compensated with 20 copies in sheets and a fairly bound copy of Spencer's *de Legibus Ritualibus*. A postscript signed by Thomas Bassett adds that if Locke

⁸⁹ Locke MS b.1, f.109.

⁹⁰ *Id.* We know that Locke sent copies of the *Essay* to several friends. CRANSTON, *supra* note 5, at 327.

⁹¹ Milton, *supra* note 5, at 17.

⁹² Letter from Thomas Bassett to John Locke (Feb. 28, 1693), in 4 CORRESPONDENCE, *supra* note 2, at 645–46.

⁹³ Locke MS b.1, f.168.

needs more copies of the edition, “I will let him have them cheaper than I allow them to booksellers.”⁹⁴

For all of Locke’s interest in controlling the details of the *Essay*’s publication under this deal, it is perhaps worth noting a deal that Locke did not do during this period. In May of 1689, his *Epistola de Tolerantia* was published in Latin anonymously in the Netherlands, under the mystifying initials “P.A.P.O.I.L.A.”⁹⁵ Locke had left the manuscript behind when he returned to England and a friend “saw it through the press.”⁹⁶ It was a controversial work that Locke never publicly acknowledged while he was alive.⁹⁷ He did, however, tolerate an English translation to be prepared and published in London by William Popple in October 1689. Locke was aware of the translation, having sent a copy of the original to Popple.⁹⁸ He casually commented to a friend in June that year, “I learn that some Englishman is now engaged in translating one of the tracts.”⁹⁹ However, Locke never attempted to interfere with or profit from the translation. Perhaps this was because he did not want to admit his authorship of the original, but it is also probable that Locke did not feel it was within his rights to do so. This is consistent with the limitation in the scope of the derivative work right anticipated by Professor Gordon’s understanding of Lockean labor theory, as Locke had no plans to translate the letter himself.¹⁰⁰ When Locke confessed authorship of the *Epistola* in a codicil to his will, he merely commented that it was “afterwards translated into English without my privity.”¹⁰¹ Cranston interprets “privity” here as “knowledge” and observes that Locke was being “mendacious.”¹⁰² There being no reason to lie in his will, I think it likely that Locke meant something more like “privity” in the legal sense, meaning that he had no contractual interest in the translation.¹⁰³

⁹⁴ *Id.*

⁹⁵ Milton, *supra* note 5, at 16. Cranston reports a claim that the initials stood for Pacis Amico, Perscutionis Osore, Johanne Lockio Anglo (A Friend of Peace, a Hater of Persecution, John Locke, Englishman). CRANSTON, *supra* note 5, at 320.

⁹⁶ Milton, *supra* note 5, at 16.

⁹⁷ CRANSTON, *supra* note 5, at 320–21.

⁹⁸ Milton, *supra* note 5, at 17–18.

⁹⁹ CRANSTON, *supra* note 5, at 320.

¹⁰⁰ See *supra* note 75 and accompanying text.

¹⁰¹ Locke, *Locke’s Will*, in 8 CORRESPONDENCE, *supra* note 2, 419–27 at 426.

¹⁰² CRANSTON, *supra* note 5, at 321.

¹⁰³ The *Oxford English Dictionary* cites uses of the word meaning “a relation between two parties that is recognized by law as a consequence of their mutual participation or interest in a transaction, covenant, tenure, lease, service, etc.” going back to 1523. The earliest cited use of the phrase “privity of contract” is in 1650.

2.b Retaining “Copy”: Considerations and *A General History of the Air*

If the contract for the *Essay* is notable for its involvement with the technical details of the publication process, then the next two documents that have survived are remarkable for their focus on the aftermath of publication. In them, Locke asserts control of the right to reprint the texts with a very simple provision. The most prevalent form of documentation for author-publisher agreements that has survived from this era is a simple receipt acknowledging payment, usually signed only by the author, often purporting to transfer title in the copy to the publisher in return for a single lump sum.¹⁰⁴ In 1692, however, Locke had his booksellers sign two agreements that exactly reverse this formula. Instead, they are declarations that the “copy” remains with Locke. The first regarded an economic treatise and reads:

Wee doe hereby declare that the sole right of and in ye Coppy or booke called *Some Considerations of the Consequences of the Lowering of Interest & Raising the value of money* is & remayns in Mr. John Locke witness our hands 2d March 1691/2.¹⁰⁵

It is witnessed by Edward Clarke and signed on behalf of Awnsham and John Churchill, who had by then become Locke's regular publishers.¹⁰⁶ The most extraordinary part of it is that it was signed after the Churchills had already printed *Some Considerations*. The treatise had been hastily published in December, 1691, in order to intervene publicly in the debates regarding a controversial interest bill then before Parliament.¹⁰⁷ This short agreement would function as a kind of covenant not to interfere with Locke's rights in the book. Clearly, Locke was concerned to maintain complete control of the treatise. Similarly, later that same year, Locke had the Churchills sign the following agreement as they were in the midst of printing *A General History of the Air*:

Wee doe hereby declare that the Sole Right of and in the Coppy or book called *A General History of the Ayr* begun by the Honorable Robert Boyle Esq. is &

¹⁰⁴ Lionel Bently and Jane C. Ginsburg, *The Sole Right ... Shall Return to the Authors: Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L. J. 1475, 1496. For an image of a typical example, see Curtin, *supra* note 10, at 231.

¹⁰⁵ Locke MS b.1, f.161.

¹⁰⁶ Awnsham Churchill had published the *Two Treatises of Government* and the *Letter Concerning Toleration*. CRANSTON, *supra* note 5, at 326–27.

¹⁰⁷ Patrick Hyde Kelly, *General Introduction*, in 1 LOCKE ON MONEY 19 (1991).

remains in Mr. John Locke after the Impression wee are now printing. Wittness our hands 25 July 1692.¹⁰⁸

Here we see the strongest assertion of authors' rights in Locke's publishing agreements, a complete reservation of rights.

The words "sole right of and in the Coppy or book" in these declarations must refer to a general right to print, not merely a right of first publication, in the first note because it was executed after publication and in the second note because of its explicit terms. Had the words referred only to a right of first publication, there would have been nothing to "remain" in Locke. In the case of *A General History of the Air*, the Churchills did enter the copy in the Stationers' Register on their own behalf on July 16, 1692.¹⁰⁹ Thus, the Churchills were in a position to block any attempts by another bookseller to have the work printed. However, having subsequently signed the document above, they presumably had bound themselves contractually not to print the work themselves, at least, not without consent from Locke. Thus, with the cooperation of the Churchill brothers, Locke used the strength of the Stationers' Register against itself, to wrest control of reprints from the booksellers.¹¹⁰

It is irresistible to ask why Locke pressed for such control over these particular works. The stakes were more likely reputational and personal than monetary. In the case of *Some Considerations*, the work was published anonymously and Locke insisted on keeping his authorship a secret, even in the face of encouragement from Edward Clarke to reveal himself.¹¹¹ The issues of monetary policy that the work covered were politically sensitive and Locke may have wanted to control the timing of any additional interventions a new edition might make. As for *A General History of the Air*, the reputational interest was chiefly not Locke's own. The work was pulled together from the papers of Robert Boyle, Locke's recently deceased mentor and friend, from his days on a studentship at Oxford.¹¹² In the final months of Boyle's life, Locke helped him to organize the work and then brought it to press as one of Boyle's executors.¹¹³ Locke had a very high opinion of Boyle. In the *Epistle to the Reader* in the *Essay Concerning Human Understanding*, Locke commented,

¹⁰⁸ Locke MS b.1, f. 164.

¹⁰⁹ EDWARD ARBER, 3 A TRANSCRIPT OF THE REGISTERS OF THE WORSHIPFUL COMPANY OF STATIONERS, 1640–1708 A.D. 421 (London, 1914).

¹¹⁰ Though the rights retained by Locke in these arrangements were theoretically perpetual at the time, the Statute of Anne not having been passed, Locke's will does not make mention of them. Locke, *supra* note 101, at 426

¹¹¹ CRANSTON, *supra* note 5, at 350–51.

¹¹² *Id.* at 75–77.

¹¹³ *Id.* at 353.

“everyone must not hope to be a Boyle.”¹¹⁴ Yet, when Boyle passed, Locke was concerned about the disarray of the papers. Boyle had also entrusted him and Sir Isaac Newton with a secret alchemical recipe for multiplying gold, which Newton regarded as utterly worthless and eventually convinced Locke to abandon as bunk.¹¹⁵ So there were reasons that Locke might have felt particularly protective of his former teacher's reputation, and wished to maintain the power to choose when to further disseminate his work.

2.c Striking a New Balance: *Some Thoughts* and *The Reasonableness of Christianity*

The next two agreements, dated June of 1694 and June of 1695, were executed after Locke had entered into the debates on literary property, having written to Edward Clarke in January 1693 to begin his complaints. Both agreements are with Awnsham and John Churchill. Some of Locke's expectations remained constant. For instance, his compensation is still scaled to his labor. But there are also new tools the parties use to resolve the issues of subsequent editions and title to the copy. In the agreement covering *Some Thoughts Concerning Education*, Awnsham and John Churchill agreed to pay Locke *during his life* five pounds upon every impression, with the first impression not to exceed fourteen hundred copies.¹¹⁶ In addition, Locke would be paid ten shillings per sheet for all additions to the same, plus 25 books bound in calfskin and lettered. The limitation of Locke's contractual claims for compensation to the term of his life may well be a reflection of his thoughts on the unreasonable burden on the prices of books caused by the stationers' perpetual claims. Finally, the agreement binds the Churchills, their heirs, executors, administrators and assigns that “during his life that neither we nor they will or shall dispose of the right or title to the Coppy of the said booke to any person whatever without the consent of the said John Locke.”¹¹⁷ So the parties conceived of the book-sellers holding the right to print, but they could not transfer it without Locke's consent. This arrangement may have been suggested to Locke by the circumstances surrounding the bankruptcy of Thomas Bassett, resulting in a jarring letter in March 1694 from Bassett's successor in interest.¹¹⁸ Locke trusted the Churchills with ownership of the copy, but had learned that he wanted to be

¹¹⁴ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 8 (Peter Nidditch, ed., Oxford University Press 1975).

¹¹⁵ CRANSTON, *supra* note 5, at 353, 361.

¹¹⁶ Locke MS b.1, f.173.

¹¹⁷ *Id.*

¹¹⁸ Letter from Samuel Maship to John Locke (March 10, 1694), in 5 CORRESPONDENCE, *supra* note 2, at 29.

able to choose his partners in disseminating his work. This provision was an artful solution.

The contract regarding *The Reasonableness of Christianity* is similar, except that, instead of requiring consent for transfer of the “Coppie,” the agreement requires that “no edition ... be made during his Life without his knowledge and Consent.”¹¹⁹ This provision is likely an indication of the sensitivity of the subject matter, which was theologically controversial enough to cause accusations of heresy.¹²⁰ In particular, the work provoked a virulent string of exchanges in print with the Calvinist provocateur, John Edwards.¹²¹ The Churchills promised to pay Locke (or his executors, administrators, and assigns) ten shillings per sheet for every impression printed during Locke’s life, with the exception that if “John Locke shall dy before the second Impression of the said booke, then wee promise and covenant to pay his Executors, Administrators or assigns ten shillings per sheet in full Consideration for the said Coppie.” So his estate would be entitled only to payment for the second impression. There is also a postscript promising to deliver to Locke 22 bound copies of every impression. Because the delivery is directly to Locke (and not his assigns), in this context it seems reasonable to assume that the provision also applies only to impressions printed during his life. So this contract similarly limits the contractual claims of Locke’s estate, but supports his control of and compensation for the work during his life.

2.d Giving Back to the Public Good: 4th Edition of the *Essay* and Locke’s Will

The last agreement in Locke’s papers covered the fourth edition of the *Essay* and at last cleared up any lingering ambiguity there might have been as to whether Locke’s consent was needed for new editions. The agreement was signed by Samuel Manship and Awnsham Churchill, who eventually succeeded to half-shares of Bassett’s interest in the rights to the *Essay*. According to a letter Manship sent to Locke in March of 1694, “Mr. Basset has disposed of the Copy to me and one more. We shall take care to satisfye you as if he had it him selfe, he having left your agreement with us, Mr. Basset sence is removed to the fryers and his shop is shet up.”¹²² Though Manship claimed to have retained the plate and the effigies of Locke that Bassett had prepared, Locke can hardly have been comforted by the letter. A third edition of the

¹¹⁹ Locke MS b.1, f.178.

¹²⁰ Astbury, *supra* note 14, at 313.

¹²¹ CRANSTON, *supra* note 5, at 390–91.

¹²² Letter from Samuel Manship to John Locke, *supra* note 118, at 29.

Essay was printed in December of 1695, almost unchanged from the second edition,¹²³ but for the fourth edition, the parties negotiated a new agreement. In June of 1699, Manship and Churchill each agreed to the following terms “for my half part in the said Copy.” Locke, or his assign, was to be paid six books, well-bound in calfskin and gilt, “as soon as the next edition of the *Essay* shall be printed and six other such books for every impression that shall be hereafter made of the said *Essay* during the life of the said Mr. John Lock,” plus ten shillings per sheet for all the additions. The reduction of the number of copies down to 12 books per impression (six from each bookseller), but bound in gilded calfskin, was perhaps an indication that Locke was beyond the stage at which his priority was to circulate his own work in higher numbers, or to benefit commercially from selling copies. Instead, he opted for more expensive presentation copies of the kind that might prove durable and have long lives in library collections. The parties did not appear to anticipate needing to contract again in the event of new impressions.

Nonetheless, we know that Locke did have plans for the copies of his works that he retained in his own library. Locke's will contains the final transaction he entered into regarding his works. In a codicil dated September 15th 1704, he granted the request of the Library Keeper of the Bodleian Library for a full set of the books authored by himself for the public library at Oxford University, “in acknowledgement of the honour done me in thinking my writings worthy to be placed among the works of the learned in that August repository.”¹²⁴ He then confessed authorship of the works published during his lifetime without his name. Finally, he also donated copies of the works of his theological opponent, John Edwards, saying: “Both which treatises it is my Will should be bound up in one volume with my three letters on the same subject that therein any one who pleaseth may have the convenience to examine what my Opponent and I have seyed in this controversy.”¹²⁵ Locke died just a few weeks later.

The legacy of books bequeathed to the Bodleian Library was a fitting tribute to a life dedicated to intellectual work that became truly public only in the last 15 years before his death. That he also confessed authorship of his remaining works in the same transaction was a kind of cashing out (or in) of the reputational currency he had stewarded throughout his life, giving it over to history to judge its final value. Locke's resourceful use of transactional tools to disseminate his work did faithfully reflect his political and philosophical views in a number of ways, or perhaps it was his experience as an author and

¹²³ Milton, *supra* note 5, at 20–21.

¹²⁴ Locke, *supra* note 97, at 425–26.

¹²⁵ *Id.* at 426.

reader that helped to inform his political views on the literary property debates of his day. When he “trafficked” with booksellers, it was not merely “for gain” but to safeguard the integrity of his work, to advance the cause of science, and to contribute to the intergenerational, intangible commons imagined in his philosophy.