Prerogative, Nationalized: The Social Formation of Intellectual Property

Laura R Ford
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As happened in many other cases, this prerogative of the king came to be regarded as the right of the subject.

- F.W. Maitland

Intellectual property is mysterious. Not least among its many mysteries is its origin: when did this new type of property emerge, and how did it emerge? Some scholars have argued that intellectual property is very old, even timeless,¹ while others have argued it is quite new.²

In this article, I will tell a “social formation story”³ about the emergence of intellectual property in Britain. According to this story, certain unique features of the Protestant Reformation in England helped to make it an originator of this legal institution.⁴

The basic outline of the story I will tell is as follows. Prior to the Reformation – which is traditionally marked as beginning in 1517 with Martin Luther’s 95 Theses against Indulgences –

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³ See Daniel Hirschman & Isaac Ariail Reed, Formation Stories and Causality in Sociology, 32 SOC. THEORY 259 (2014). In this article, Dan Hirschman and Isaac Reed argue that the kinds of social things (e.g. legal institutions) that exist are historically-variable. See id. at 259-60. Social formation stories account for the emergence of new social realities and for large-scale social changes in history. See id. at 268-74. Max Weber’s classic and much-debated account of the emergence of “modern rational capitalism,” and his identification of a new, “Protestant work ethic” as a contribution to this macro-historical development, could be considered a social formation story, according to Hirschman & Reed’s conception. See Richard Swedberg, Preface, in THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM vii-ix (Richard Swedberg, ed., Norton Critical Edition 2009).

nothing like the modern legal institution of intellectual property existed. At this time, England’s King, Henry VIII, was an intellectually-committed Catholic, joined to Spanish Christendom through his marriage to Catherine of Aragon. In order to secure his succession by remarriage, however, Henry initiated a Reformation, asserting a legal “Supremacy” in England. This assertion of Supremacy involved an unprecedented elevation of the King’s Prerogative, and of statutory law. As one among many outgrowths of this process, the Prerogative became the basis for early modern precursors to modern patents and copyrights. But these were originally the property of the King, not his subjects. Over the course of the Seventeenth Century, and culminating in the Eighteenth Century, Parliament “nationalized” these Prerogative properties through statutory law, transforming them into a potential property of the British nation.

Intellectual property is a potential property, because it typically comes into existence for an individual inventor or creator after he or she complies with statutory conditions. This potential property is held out by the nation-state as an inducement to inventive and creative

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8 See id.
9 See infra notes 116 to 119 and accompanying text.
10 See id.
11 See infra notes 144 to 270 and accompanying text.
12 See 35 U.S.C.A. §101 (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”); 17 U.S.C.A. §102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.....”); 17 U.S.C.A. §101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”); 15 U.S.C.A. §1051(a)(1) (“The owner of a trademark used in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and......”); 15 U.S.C.A. §1127 (“The term ‘use in commerce’ means the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce.....”); Zazu Designs v. L’Oreal, 979 F.2d 499, 503 (7th Cir. 1992) (“Under the Common Law, one must win the race to the marketplace to establish the exclusive right to a mark...Registration modifies this system slightly.....”); Allard Enterprises v. Advanced Programming Resources, 146 F.3d 350, 357 (6th Cir. 1998) (“In the absence of registration, rights to a mark traditionally have depended on the very same elements that are now included in the statutory definition [15 U.S.C.A. §1127]: the bona fide use of a mark in commerce that was not made merely to reserve a mark for later exploitation.”).
activity, and it becomes actual under conditions specified, or agreed to, by legally-designated representatives of the nation.13

In this article, I will take the position that the case of Millar v. Taylor (King’s Bench 1769) constituted the first explicit and fully-considered recognition of intellectual property, as a new type of legal property under the English Common Law system.14 This is therefore the moment at which we can say, with confidence, that the English legal institution of intellectual property has emerged.15 Scottish judges came to a different conclusion under Scottish law,16 however, and the House of Lords would muddy the legal waters with their decision in Donaldson v. Becket.17 Nevertheless, in the wake of the Millar and Donaldson decisions, it was becoming clear that copyrights were property.18 Ambiguities would endure with respect to their status under Common Law, but their proprietary status under Britain’s statutory law was established.19

Moreover, repeated analogies had been drawn in the cases and surrounding discussion between copyrights and patents for new inventions, which had been recognized by statute since the Seventeenth Century.20 The combined effect of the Millar and Donaldson decisions was therefore to support the argument that copyrights and patents were a new type of legal property, an “intellectual property,” that was based in the statutory powers of Parliament.21

13 See U.S. Const. Art. 1, §8, Cl. 8 (“Congress shall have the Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
15 See also Deazley, supra note 2, at 178 (“It had now been established that when Millar had originally filed his bill against Taylor he did have a property in the writings of James Thomson, he had had a property in The Seasons.” (emphasis in original))
16 See Deazley, supra note 2, at 111-28.
18 See Simon Stern, From Author’s Right to Property Right, 62 U. Toronto L.J. 29, 85 (2012) (by the 1770s, largely as a result of these two cases, property had become the “default category” for copyright).
19 See infra note 275 and accompanying text.
20 See infra notes 145 to 149 and accompanying text.
21 See infra notes 280 to 315 and accompanying text.
The formation story of British intellectual property is the story of a Constitutional Revolution: a revolution in the foundations of law, in society, and in the economy. As we will see, the Protestant Reformation played a crucial role in this Revolution. Before launching into my story, however, I must respond to a skeptical question: Why should a contemporary legal audience care how and when intellectual property emerged as a legal institution?

I. Contemporary Legal Relevance of the Social Formation Question

There are at least two reasons why it is important that contemporary legal scholars come to a consensus about when, how, and why intellectual property emerged. First, in arriving at this consensus, we may learn something that is generally true about the ways in which law contributes to changes and developments in socio-economic institutions. Such lessons can be valuable and useful, for example, in considering the public policy effects of legal change, and in reflecting on the ethical roles that lawyers play in society. Second, the question of intellectual property’s origins is intimately related to the question of its legitimacy, as a form of legal property. The

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22 Sociologists and historians often distinguish between social revolutions and political revolutions. See Theda Skocpol, States and Revolutions: A Comparative Analysis of France, Russia, and China 4-5 (1979). Steve Pincus has recently provided a thoughtful critique of this distinction, however, and has argued that England’s “Glorious Revolution” (1688-89) should be understood as the “first modern revolution,” a fundamental transformation in state and society. 1688: The First Modern Revolution 30-45 (2009).

23 See Berman, supra note 4, at 201 ff.; see also G.R. Elton, Reform & Reformation (1979).

24 Following Max Weber, I conceptualize institutions as patterns of social-relational activity. If we could look down on ourselves in the same ways that we look down on an anthill, we would see patterns in the activities of individual people: they would be regularly going to the same places, regularly doing the same things, and regularly spending time with the same people. If we wanted to understand and explain why those patterns exist, however, we would have to draw on our understandings of human motivation. In contrast with the anthill, we have unique access to an understanding of human motivation because we, the observers, are also human. We accordingly know that our motivations for action often involve our relations with other people. Our motivations also often involve perceptions of obligation and/or entitlement, based on our understandings of law, morality, and social convention. By a legal institution, I mean a pattern of social-relational activity, which is motivated in some way by a legally-sanctioned sense of obligation and/or entitlement. See Max Weber, Economy and Society 3-62 (1978); Max Weber on Law in Economy and Society (Max Rheinstein ed. 1967); Max Weber, Collected Methodological Writings (Hans Henrik Brun and Sam Whimster, eds., Hans Henrik Brun trans. 2012); see also Richard Swedberg, Max Weber’s Contribution to the Economic Sociology of Law 2 Ann. Rev. L. & Soc. Sci. 61 (2006).


26 See infra notes 280 to 317 and accompanying text.
legal status of intellectual property, as property, seems to turn in important ways on the timing and process of its original emergence.

An illustration of this close connection between historical emergence and proprietary status may be seen from Chief Justice Roberts’ 2011 majority opinion in *Stanford v. Roche.*27 This case raised questions about conflicting patent assignments,28 and about the effects of the “Bayh-Dole Act”29 on the original title to Federally-funded inventions.30 Suffering from a weak contractual position, Stanford tried to argue that it held the original title to the invention in question, by virtue of its position as a Federal funds recipient under the Bayh-Dole Act.31 In his majority opinion rejecting this argument, Justice Roberts started from the Constitutional, statutory, and historical foundations of American intellectual property law.32 He went back, in other words, to the Eighteenth Century, drawing from those foundations the premise that individual inventors are the initial owners of their patented inventions.33 This initial ownership carries with it the presumptive right to assign the property, together with the protections afforded by a requirement that assignments to employers must be expressly contracted.34 Based on these premises, Chief Justice Roberts concluded that the language of the Bayh-Dole Act could not be interpreted to “vest” title in Federal funds recipients, like Stanford University.35

The “basic principle” that inventors are the owners of their patented inventions is, according to Chief Justice Roberts, “one of the fundamental precepts of patent law.”36 In order to overcome the principles of assignability that flow from this, Congress would have to speak very explicitly.37 If Congress were to attempt an explicit “vesting” of ownership in someone other

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27 131 S. Ct. 2188 (2011).
28 See id. at 2192-93; see also Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, 538 F.3d 832, 837-38, 841-42 (Fed. Cir. 2009).
30 See 131 S. Ct. at 2192-94.
31 See id. at 2193, 2195-96. The patents pertained to methods of measuring HIV in blood samples, and thereby judging the effectiveness of anti-retroviral treatments. See id. at 2192-93; see also 538 F.3d at 836-38.
32 See 131 S. Ct. at 2194-95.
33 See id. Chief Justice Roberts avoided use of the word “ownership,” preferring the language of “belonging” and “rights.” See id. However, some of his quoted sources used the language of ownership, as did the Federal Circuit. See id.; 538 F.3d at 839-42.
34 See id. at 2195.
35 See id. at 2195-99.
36 Id. at 2197, 2198.
37 See id. at 2198-99.
than the inventor, it would be effecting a “sea change in intellectual property rights,” one that would likely raise the specter of “Takings” jurisprudence. 

But is intellectual property really Property, in the fullest sense of that word under the Anglo-American Common Law tradition? This is exactly the question that was addressed in the Millar and Donaldson cases, and this is why those cases remain pertinent to contemporary intellectual property law, despite their age. As we can see from Chief Justice Roberts’ 2011 opinion, when it comes time to answer such a question, we find ourselves returning to the Eighteenth Century.

II. The Cases of Millar v. Taylor (King’s Bench 1769) and Donaldson v. Becket (House of Lords 1774)

The Millar case presented the Court of King’s Bench with a dispute between two men: Andrew Millar, a member of the Stationers Company (a London guild of printer-publishers), and Robert Taylor, a bookseller from Berwick-upon-Tweed, who made a regular practice of purchasing books in Scotland for resale in England. The dispute concerned poems written by James Thomson, which were being sold by both parties under title of The Seasons by James Thomson. The justices were called upon to determine whether Andrew Millar was indeed a “proprietor” of this poetic work, a determination that would render Robert Taylor’s publication and sale of the work to be unlawful. The legal question to be decided by the Court of King’s

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38 Id. at 2199.
39 See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 739 (2002) (noting that the patent law doctrine of equivalents and the rule of prosecution history estoppel are “settled law,” which can only be changed by Congress, and that “[f]undamental changes in these rules risks destroying the legitimate expectations of inventors in their property”). Adam Mossoff reads this case as a suggestion that the Supreme Court might subject fundamental legal changes in patent law to regulatory takings analysis. See Adam Mossoff, Patents as Constitutional Private Property, 87 BOSTON U. L. REV. 689, 690 (2007).
40 Of course, the narrow holdings of Millar and Donaldson addressed copyrights alone. However, as I will discuss further in this article, the implications of those cases were much broader, since (1) copyrights grew out of the same Prerogative that constituted the source of patents, and (2) analogies between patents and copyrights were pervasive in these cases.
42 A town in the far north of England, bordering Scotland.
43 See Millar, 98 Eng. Rep. at 202-205. Andrew Millar was among the most prominent publishers of his day, and was known for his generosity to the authors (including David Hume) whose works he published. He had become “free” of the Stationers Company in 1738. See Hugh Amory, “Millar, Andrew (1705-1768), bookseller,” in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (Online Edition 2008). Robert Taylor is discussed in Richard B. Sher, The Enlightenment and the Book: Scottish Authors and Their Publishers in Eighteenth-Century Britain, Ireland, and America (2006), at 470.
45 See id.
Bench concerned the nature of “literary property”: was it really a form of property recognized and protected by Common Law, as was being claimed by the Stationers Company?  

The jury was persuaded that Mr. Millar had complied with customary practice by purchasing (for “valuable and full consideration”) the “copy-right” to James Thomson’s poetic work, and had complied with Stationers Company by-laws by entering his copy-right into the Company’s “registers” (account books). For these reasons, the jury concluded that Mr. Millar had been wronged (“damnified”) by Robert Taylor’s unlicensed publication of that work. However, the jury professed ignorance as to whether this wrong was one recognized and remedied by the Common Law.

Andrew Millar died the morning of June 8, 1768, one day after the second set of oral arguments in his case. The Donaldson case concerned a portion of his estate: the copy-rights to a number of literary works by James Thomson, including the Seasons poems, which had been transferred to Mr. Millar’s heirs pursuant to the terms of his will. As reported in the Donaldson case, these copy-rights had been acquired by Mr. Millar over a number of years, beginning in 1729 with a purchase of the tragedy Saphonisba and the poem Spring from Mr. Thomson “in consideration of £137 10s.” In 1738, Mr. Millar purchased the rights to a number of additional poems by James Thomson – including Summer, Autumn, and Winter – from a Mr. Millan for £105, who had in turn purchased them in 1729 from Mr. Thomson at the same price. The rights to all these works were sold in 1769, at an auction held in St. Paul’s churchyard, to fellow members of the Stationers Company, including one Thomas Becket.
Meanwhile, in 1768 Alexander Donaldson and an unnamed partner had begun printing and selling a volume titled *The Seasons, by James Thomson* in Edinburgh.\(^{55}\) Having paid £505 for their copy-rights, Becket and his Stationers Company associates sought an injunction to prevent Donaldson and his partner from further printing.\(^{56}\) Becket and his associates instituted an action in the Chancery court in 1771, obtaining a perpetual injunction from the Chancellor in 1772.\(^{57}\) A special master was appointed to determine how much Donaldson and his partner had profited by their sales, and thereby to determine the damages payable to Becket and his associates, but before this determination could be made the case was appealed to the House of Lords.\(^{58}\)

**III. The World-Historical Significance of the Millar and Donaldson Cases**

The resolution of the House of Lords in the *Donaldson* case is, in its broad outlines, familiar to intellectual property scholars. Whatever the complexities of its precise holding, this case established the statutory limitation of English copyright, while also affirming its proprietary character, within the boundaries of statutory limitation.\(^{59}\) Taken together, the *Millar* and *Donaldson* cases established a clear legal precedent for regarding copyrights as a type of statutorily-defined property.\(^{60}\) As Simon Stern has argued, by the 1770s, and certainly after *Donaldson* was decided, copyrights had become property.\(^{61}\) Because the judges in *Millar* and *Donaldson* drew repeated analogies between copyrights and patents, these cases also laid a legal foundation for regarding patents as (statutorily-defined) property.\(^{62}\) In short, the *Millar* and *Donaldson* cases may be seen as the cornerstone of the British institution of intellectual property, and as a turning-point in its institutional emergence.

The significance of this turning-point is clear when it is viewed from an historical and comparative perspective. Laying the national trajectories for the English, American, French, and German institutions of intellectual property alongside one another, it becomes apparent that Britain was the first nation-state to recognize and protect intellectual property, as a new type of

\(^{55}\) See id.
\(^{56}\) See id.
\(^{58}\) See id.
\(^{59}\) See id. at 839-49; see also *Millar*, 98 Eng. Rep. at 257-66; Stern, *supra* note 18, at 85-6.
\(^{60}\) See *Wheaton v. Peters*, 33 U.S. 591 (1834).
\(^{62}\) See infra notes 146-148 and accompanying text.
legal property. America’s development of intellectual property as a legal institution depended heavily upon Britain. Moreover, connections between the American and French Revolutions suggest borrowings and dependencies here, as well. By the time Bismarck was forging the nucleus of a German nation-state in Prussia, the potential benefits of intellectual property for economic development were apparent, and the main question was therefore one of implementation. To summarize, Britain was first, and subsequent developments in other nation-states were at least partially dependent upon those in Britain. Britain’s development of the institution of intellectual property was therefore a global turning-point, just as much as a national turning-point.

From this perspective, the Millar and Donaldson cases become a crucial inflection-point for the institution of intellectual property. This is the moment at which legitimating foundations for the institution were cemented into place, and we must understand what happened here, if we want to fully understand how this new legal institution was created. Any qualms that we may have about the legitimacy of intellectual property, as a legal institution, must be confronted here. And, from a different standpoint, fascinating insights into the ways that legal institutions are born and legitimated may be found here.

The Millar Court, with one vociferous dissent, decided that English Common Law did indeed recognize literary property (copyrights) as a form of property, which exists independently of statutory foundation. In arriving at this resolution, however, the justices struggled at great length to make a coherent whole out of the relevant legal authorities. Drawing on many of the

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63 The assertions made in this paragraph are further supported in my doctoral dissertation – Intellectual Property: A Study in the Formulation and Effects of Legal Culture (Cornell 2014).

64 For example, the Continental Congress’ recommendations to the pre-constitutional states that they enact copyright protections contain echoes of Justice Aston’s opinion in Millar v. Taylor. See Ford 2014, supra note 63, at 159; see also Oren Bracha, Commentary on Connecticut Copyright Statute (1783), in PRIMARY SOURCES ON COPYRIGHT, supra note 14; BRUCE W. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967).

65 For example, a friend of Noah Webster’s, Joel Barlow, who had been closely involved in “lobbying” for copyright in the early United States, served in the French National Assembly. See Ford 2014, supra note 63, at 166-67; HARLOW GILES UNGER, THE LIFE AND TIMES OF AN AMERICAN PATRIOT 177-78 (1998).

66 I argue briefly in my dissertation – but this argument needs further development – that Prussian rulers may have used inter-national treaties in order to leverage intellectual property protections into domestic law. See Ford 2014, supra note 63, at 336-39, 346. The argument draws on Andrew Moravcsik’s argument about the uses of human rights treaties in post-war Europe. See Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 INT’L ORGANIZATION 217 (2000). In many ways, indeed, the Prussian-German constitution was forged through inter-national treaties, as in the Concert of Europe. See EDWARD HERTSLET, THE MAP OF EUROPE BY TREATY, VOLUME I (1875).

same legal authorities, the House of Lords (acting in its judicial capacity) came to a different conclusion in the Donaldson case.68

For reasons that we can only infer, the Lords decided that literary property is only a temporary form of property, created and limited by statute, analogous in certain ways to a patent for a new invention.69 By concluding that copyrights are a form of “intellectual” property, limited in time and created by statute in a manner analogous to patents, the Millar and Donaldson decisions laid a foundation in the British legal tradition for fusing them together under a common category of “intellectual” property.70

In litigating their cases, the plaintiffs Millar and Becket (and, behind them, the Stationers Company) had invoked the legal concept of property, drawing on authorities in the English legal tradition. The defendants Taylor and Donaldson, on the other side, had invoked the legal concept of a “monopoly,” also drawing on authorities in the English legal tradition. Sacred property or diabolical monopoly: hardly a starker conflict in the Anglo-American legal tradition can be imagined.

IV. Intellectual Property in England: Three Legal Traditions

1. The Prerogative Tradition

The case for copyrights as Common Law property was, as a matter of case-law precedent, strongest based on the “Prerogative” tradition whereby royal privileges, freedoms, and powers were discretionarily granted from monarch to subject.71 This strength was rooted in the

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69 See infra notes 275, 283-288 and accompanying text; Deazley, supra note 2, at 191ff.
70 The fusing of patent and copyright together under the heading of intellectual property would be completed as a result of future interpretive activity. At this point, the outcomes were, strictly speaking, more limited. They were: (1) that copyrights are a form of literary property created by statute, limited in time, and vested in authors, and (2) that patents are analogous to copyrights because they also are created by statute, limited in time, and vested in another type of intellectual laborer: inventors.

Lord Mansfield played an important role in the development of English patent law, including in the development of the idea that patents are property. See Mossoff, supra note 14, at 1291ff. He was only able to play this role, however, once the jurisdiction of the Privy Council over patent cases had ended, a development that came in 1753. See id. at 1285-86; E. Wyndham Hulme, Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794, Part I, 33 L.Q. REV. 63 (1917); E. Wyndham Hulme, Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794, Part II, 33 L.Q. REV. 180 (1917).
71 See Millar, 98 Eng. Rep. at 208-209; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOLUME II: OF THE RIGHTS OF THINGS 409-11 (1979 [1766]); W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOLUME 6, 373-74 (1924). For a contemporary discussion of the nature of the royal Prerogative, as understood by Australian courts, see Benjamin Saunders, Democracy, Liberty, and the
Prerogative tradition’s long-standing position that the granted privileges, freedoms, and powers are the property of their monarchical grantors. According to the doctrines of this legal tradition, when the king by means of “open letters” (letters patent) or charters granted to his favored subjects “privileges and immunities” to incorporate cities, or “liberties” in forming corporate guilds for the exclusive exercise of a particular trade, he was granting something that originally belonged to him. This beneficent king or queen was bestowing upon the favored subject some element of his patrimony, her property.

In the Millar case, the Prerogative tradition was discussed by all of the judges, albeit with ambivalence. One senses that the justices would have preferred not to draw in the tradition at all, since the monarchical Prerogative was highly distasteful to Whiggish Britons only a few generations removed from the Prerogative-inflating Stuarts, the Civil Wars, and the Glorious Revolution. Justice Willes, for example, looked back critically on the age of the Stuarts as “times when the Prerogative ran high.”

However, the earliest legal authorities relevant to the issue of literary property were unquestionably part of this Prerogative tradition. These legal authorities were: (1) decrees of a “Prerogative Court,” the Star Chamber, and (2) Restoration caselaw pertaining to Prerogative Copyright. Moreover, by referencing its royal Charter of incorporation, together with the by-
laws and usages constructed pursuant to that Charter, the Stationers Company had invoked the Prerogative tradition that brought it into being. There was, therefore, no way to avoid addressing that tradition.

The same Justice Willes who looked critically on the times when Prerogative “ran high” took responsibility for painstakingly assembling the legal authorities relevant to the question of literary property, and addressing them in his written opinion. Beginning with the earliest Council Orders and Star Chamber decrees, as “Acts of State,” Justice Willes construed the authorities together as establishing the existence of a Common Law Copyright, which was prior to the statutory framework created by the Statute of Anne (1710), and which remained supplementary to that statutory framework. For Justice Willes, England’s “Common Law” was not reducible to “positive law,” whether that was derived from Parliamentary statute or caselaw. England’s Common Law, rather, underlay various English “usages” and practices, including those of the Crown, its courts, and the Stationers Company. It was, in other words, a kind of nationally-peculiar, legal tradition.

And, prior to 1640, that nationally-peculiar legal tradition very clearly recognized a Prerogative property and authority vis-à-vis printed texts. This was reflected in an Order of Elizabeth’s Council (1566) and two Star Chamber decrees, the first (dated 1586) having been rendered under Elizabeth, and the second (dated 1637) under Charles I. These Conciliar orders and decrees built upon an earlier foundation laid by Henry VIII, delineating a framework for the censorship and regulation of printing, at the same time that they sanctioned the Stationers Company’s exclusive rights in printing and publishing.

Council, alongside the increasingly-independent Chancery, as part of the curia regis – council (or “court”) of the king. See BAKER’S ENGLISH LEGAL HISTORY, supra note 73, at 97-124. The Star Chamber was, essentially, the Privy Council, sitting as a court. See G.R. ELTON, THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 158-84 (1965) (hereinafter Elton’s Tudor Constitution); see also W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOLUME 1, 477-516 (1922); W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOLUME V, 135ff. (3d ed. 1945); Maitland, supra note 71, at 216-21, 261-64, 274-75.

78 See Millar, 98 Eng. Rep. at 203-204, 207. On the characterization of the Charter as an exercise of the royal Prerogative, see BACON’S NEW ABRIDGMENT, supra note 73, at 203-14; BAKER’S ENGLISH LEGAL HISTORY, supra note 73, at 450; Chitty, supra note 71, at 119-33.

79 See Millar, 98 Eng. Rep. at 205-18. The judges read their opinions in order of seniority, beginning with the most junior justice (Willes) and ascending to the Chief Justice (Mansfield). See id. at 205.

80 9 Stat. 256; see infra notes 269 to 270 and accompanying text.


82 See id., especially at 209-10.

83 See id. at 205-18, especially at 206, 209.

84 See id. at 206-207; see also ELTON’S TUDOR CONSTITUTION, supra note 77, at 105-107, 179-84; Holdsworth (Volume 6), supra note 71, at 367-70.

85 See Peter Blayney, William Cecil and the Stationers, in ROBIN MYERS & MICHAEL HARRIS (EDS.), THE STATIONERS’ COMPANY AND THE BOOK TRADE (1997); ELTON’S TUDOR CONSTITUTION, supra note 77, at 87-115; infra notes 114-115 and accompanying text..
The 1566 Order was primarily aimed at establishing an enforcement regime for censorship.\textsuperscript{86} Incorporating by reference any substantive prohibition of content established pursuant to statute, law, ordinance, injunction, or letters patent, the Order proscribed the printing, binding, or sale of any “Booke or copie” covered by substantive prohibition, and specified penalties for violation.\textsuperscript{87} The penalties, especially for printers, were steep: the books or copies themselves were to be forfeited, while the offender was to pay a fine, suffer 3 months imprisonment (“without baile or mainprise”), and be thenceforth prohibited from practicing the trade of printing.\textsuperscript{88} The Wardens of the Stationers Company, or their named deputies, were authorized to enforce the Order by searching any suspect imports and domestic shops, seizing any books or copies they deemed illegal.\textsuperscript{89} Overseeing this regulatory regime were the “High Commissioners in Causes Ecclesiastical” and the Council.\textsuperscript{90} Persons offending against the decree were to be arrested by Stationers Company deputies and presented to the Ecclesiastical Commissioners.\textsuperscript{91} And the Stationers were also answerable to those overseers: the Stationers were required to formally promise that they would obey all ordinances pertaining to printing, and to secure this promise with a financial deposit.\textsuperscript{92}

The 1586 and 1637 Star Chamber decrees built substantially on this foundation, while adding considerable detail and force.\textsuperscript{93} The Wardens of the Stationers Company (or their deputies) retained their search and seizure powers;\textsuperscript{94} these were strengthened, moreover, by provisions requiring registration of printing presses with the Company,\textsuperscript{95} and prohibiting presses from being maintained anywhere other than London (excepting the monarch’s own presses, and those of Oxford and Cambridge University).\textsuperscript{96} Furthermore, the number of licensed printers was limited to a number fixed by the Archbishop of Canterbury and Bishop of London (fixed at 20 in the 1637 decree), with positions in these slots to be filled by individuals selected from within the

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\item \textsuperscript{86} A copy of this Order is set forth in Edward Arber’s transcripts of the Registers of the Stationers Company. \textit{See Edward Arber, A Transcript of the Registers of the Company of Stationers, Volume I,} 322 (1875) (hereinafter \textit{I Arber}).
\item \textsuperscript{87} \textit{See id.}
\item \textsuperscript{88} \textit{See id. at §2.}
\item \textsuperscript{89} \textit{See id. at §5.}
\item \textsuperscript{90} \textit{See id. at §§5-6.} The Court of High Commission was, like the Star Chamber, an outgrowth of the Council, which, as a result of the King’s assertion of Supremacy over the English Church, exercised a wide-ranging, ecclesiastical jurisdiction. \textit{See Holdsworth (Volume 1), supra note 77, at 580-632, especially 605-11.}
\item \textsuperscript{91} \textit{See I Arber, supra note 86, at §5.}
\item \textsuperscript{92} \textit{See id. at §§5-6.}
\item \textsuperscript{93} \textit{See II Arber (1875), at 807-12; IV Arber (1876), at 528-36.}
\item \textsuperscript{94} \textit{See II Arber at §§2,6,7; IV Arber at §§25-26.}
\item \textsuperscript{95} \textit{See II Arber at §1; IV Arber at §§13-14.}
\item \textsuperscript{96} \textit{See II Arber at §2.}
\end{itemize}
Stationers Company and approved by the Ecclesiastical Commissioners. To limit the number of individuals learning the “arte or mysterye” of printing and bookselling, the number of apprentices was fixed: no more than three for the master and upper wardens of the Stationers Company, no more than two for lower wardens and those having achieved Livery status, and no more than one for the “yeomen” Stationers.

As far as content was concerned, the 1586 Star Chamber decree provided for a capacious category of legal prohibition: any book or copy “contrary to any allowed ordinance set down for the good governance of the Company of Stationers within the City of London.” From this time forward, in other words, Stationers Company by-laws were elevated to the status of law, effective to prohibit the printing or selling of books. Beginning in 1637, the Stationers Company registry books became official records of the assignment of licenses to print: no book could be printed or sold unless first licensed by specified officials and “first entered into the Registers Booke of the Company of Stationers.”

By the reign of Charles I, on the eve of the Civil War, the Stationers Company had become an administrative agent for the monarchy, in its attempts to regulate and censor printing. The powerful position that this created for the Stationers Company would have a profound effect on that Company, and would lead its members to begin viewing their rights to copy as a kind of property that they were entitled to hold in perpetuity, to transmit to their heirs, and to use for the benefit of Stationers Company widows and orphans.

What I want to emphasize here, however, is the way in which the monarchy’s regulation and censorship of printing was premised on the Prerogative tradition. That tradition, in other words, provided the legitimating foundation for a new set of rulership-related activities: overseeing the materials that are printed and distributed within the kingdom. The historical context for this new set of rulership-related activities was, of course, the growth of printing technology, which had so inflamed the political, religious, and legal conflicts of the Reformation.

Henry VIII’s “Reformation from Above” had, indeed, been based to a very large degree upon the Prerogative tradition and had, in turn, added greatly to that tradition. Two centuries

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97 See II Arber at §3; IV Arber at §15.
98 See II Arber at §§8-9; IV Arber at §19.
99 See II Arber at §4.
100 See IV Arber at §2.
101 See Holdsworth (Volume 6), supra note 71, at 360-70; Patterson, supra note 14, at 114-42.
102 See id.
later, Matthew Bacon would describe the “Supremacy of the Crown of England, in Matters Ecclesiastical” as a “most unquestionable Right” forming part of the Royal Prerogative. The development of this Supremacy, under the Tudors, played a vital role in defining the sphere of English Royal jurisdiction and executive authority, and therefore in defining the English state. According to Bacon:

All Jurisdiction exercised in these Kingdoms that are in Obedience to our King, is derived from the Crown; and the Laws, whether of a Temporal, Ecclesiastical, or Military Nature, are called his Laws; and it is his Prerogative to take Care of the due Execution of them. Hence all Judges must derive their Authority from the Crown, by some Commission warranted by Law; and must exercise it in a lawful Manner, and without any the least Deviation from the known and stated Forms.

The jurisdictional and executive authority of the monarchy – its authority to engage, in other words, in what Gianfranco Poggi has called the “business of rule” – was asserted and legitimated through the Prerogative tradition. And that tradition had been greatly expanded in the crisis of the early Reformation.

The Ecclesiastical Rulership of the King – his Prerogative Supremacy – was first powerfully asserted through the Writ of Praemunire, a writ developed in the Fourteenth Century to protect the Royal jurisdiction against papal assertions, and used with dramatic effect to destroy Cardinal Wolsey, Henry VIII’s powerful Chancellor. In 1530, following Wolsey’s downfall, the Writ was used to initiate legal proceedings against a handful of prelates and clergy in the Court of King’s Bench, and, in 1531, the writ was implicitly threatened against all of the English clergy. A series of Parliamentary statutes, issued at the behest of the King, then proceeded to affirm and elaborate the Prerogative Supremacy of the King. Pursuant to that Supremacy,
England’s clergy were divorced from Rome, and “subjected to the royal will.”112 From this time forward, the English clergy would hold their offices, like other Officers of the Crown, pursuant to the Royal Prerogative, and would be answerable in the Royal Courts.113

The assertion and delineation of the Prerogative Supremacy greatly expanded the monarchy’s sphere of rulership, particularly in areas that had been previously governed by the Church. Henry VIII extended this rulership into the censorship of “heretical books” in 1529,114 allocating the responsibility to approve and license domestic publications to his Privy Council from 1538 onwards.115 Under the Prerogative Supremacy of the Tudors and early Stuarts, ecclesiastical authorities, together with the royally-chartered Stationers Company, became agents for the Crown in the effort to control heretical, seditious, and “schismatical” printing.116

So an elevation of the Prerogative tradition was key to the definition and legitimation of the Crown’s rulership over the printing and sale of books. But there was also another, more proprietary, side to the Prerogative tradition. Indeed, the Prerogative was frequently described in proprietary language: it belonged to the Royal Person bearing the Crown, and passed as part of

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112  ELTON’S TUDOR CONSTITUTION, supra note 77, at 329.
113  See BACON’S NEW ABRIDGMENT, supra note 73, at 174.
114  See PAUL L. HUGHES & JAMES F. LARKIN (EDS.), TUDOR ROYAL PROCLAMATIONS, VOLUME 1, Nos. 122, 129, 161 (1964). For a discussion of the importance of Tudor royal proclamations, as exercises of the Prerogative power and as historical sources, see Paul L. Hughes & James F. Larkin, Introduction, in TUDOR ROYAL PROCLAMATIONS, VOLUME 1, xxi-xlii (1964); cf. Holdsworth (Volume 4), supra note 105, at 296 ff.
115  See Proclamation Prohibiting Unlicensed Printing of Scripture, Exiling Anabaptists, Depriving Married Clergy, Removing St. Thomas à Becket from Calendar, in Hughes & Larkin (eds.), supra note 114, No. 186; see also Blayney, supra note 85, at 11. Under Edward VI, a general licensing regime overseen by the Privy Council was created. See Acts of the Privy Council, Volume II, at 311-12 (August 13, 1549), available at British History Online, http://www.british-history.ac.uk/acts-privy-council/vol2/pp301-325 (last accessed Feb. 9, 2015); Proclamation Enforcing Statutes against Vagabonds, Rumor Mongers, Players, Unlicensed Printers, etc., in Hughes & Larkin (eds.), supra note 114, No. 371; see also Blayney, supra note 85, at 11-12.
116  See An Act Restoring to the Crown the Ancient Jurisdiction over the State Ecclesiastical and Spiritual, and Abolishing all Foreign Power Repugnant to the Same, 1 Eliz., c. 1 (1558-59); A Most Joyful and Just Recognition of the Immediate Lawful and Undoubted Success, Descent, and Right of the Crown, 1 Jam., c. 1 (1603-4); Holdsworth (Volume 4), supra note 105, at 305-6; Holdsworth (Volume 6), supra note 71, at 360-70.
the Royal Inheritance to the next rightful bearer of the Crown.\textsuperscript{117} Elements of the Prerogative could be sold or leased by the Crown, through charters and letters patent.\textsuperscript{118} The content of these grants could include a wide range of things, including judicial and administrative offices, rights to hold a market, privileges to practice a trade, and rights for the “sole liberty of printing.”\textsuperscript{119} Here, on this proprietary side of the Prerogative tradition, was the Prerogative Copyright, a Copyright that had received extensive attention from Common Law courts during the Restoration era.

Indeed, the earliest Common Law cases raising the question of literary property involved conflicts deriving from Prerogative grants.\textsuperscript{120} The first case – \textit{The Stationers v. The Patentees about the Printing of Roll’s Abridgment}, or “Atkins’ Case” (1666) – involved a patent to print “all law books that concern the Common Law.”\textsuperscript{121} The patent had been granted to a non-member of the Stationers Company, transmitted through inheritance and marriage, and was being enforced against the Company, which had printed a Common Law treatise by an eminent judge – Henry Rolle’s \textit{Abridgment des Plusieurs Cases} – in violation of the patent.\textsuperscript{122} Judgment had been given in Chancery on behalf of the patentees (Colonel Atkins, through his heiress wife, “and his assigns”), and an injunction was issued to prevent the Stationers from selling the \textit{Abridgment}.\textsuperscript{123} The Stationers appealed the case to Parliament, and judgment in favor of the patentee was there given, on the basis of the royal Prerogative underlying the patent grant.\textsuperscript{124}

The subsequent case of \textit{Roper v. Streater} (House of Lords 1672) was viewed as definitively resolving the question: the exclusive printing and publishing of law books were within the royal Prerogative, and could therefore be granted by means of letters patent and enforced, even against the Stationers Company.\textsuperscript{125} Although multiple arguments were originally given to support this printing Prerogative in law books,\textsuperscript{126} the later consolidation of these arguments, by the Court of King’s Bench, relied fundamentally on the Prerogative Supremacy:

\begin{itemize}
  \item \textsuperscript{117} See \textit{BACON’S NEW ABRIDGMENT}, supra note 73, at 149-66.
  \item \textsuperscript{118} See id. at 174, 203-10.
  \item \textsuperscript{119} See id.
  \item \textsuperscript{120} See \textit{Millar}, 98 Eng. Rep. at 208 (Willes).
  \item \textsuperscript{121} The Stationers against The Patentees about the Printing of Roll’s Abridgment, Carter 89, 124 Eng. Rep. 842 (1666) (hereinafter \textit{Atkins’ Case}).
  \item \textsuperscript{122} See id. The publication of Rolle’s \textit{Abridgment} was delayed by this litigation until 1668. See \textit{BAKER’S ENGLISH LEGAL HISTORY}, supra note 73, at 185-86.
  \item \textsuperscript{123} See \textit{Atkins’ Case}, supra note 121, at 842.
  \item \textsuperscript{124} See id. at 842-44; see also \textit{BACON’S NEW ABRIDGMENT}, supra note 73, at 208.
  \item \textsuperscript{126} See \textit{Atkins’ Case}, supra note 121, at 842-44.
\end{itemize}
“matters of law and religion ought and always was [sic] under the immediate care and government of the King.”127

In the Company of Stationers v. Seymour,128 the Prerogative Copyright was held to extend to almanacs, partly due to their religious content and partly due to the fact that, as compilations, they had no particular author.129 By implicit analogy, just as tangible things belonging to no one belonged to the monarch according to the Prerogative tradition, so the copies of a text without an author belonged to the monarch.130 Thus the copyrights to almanacs, Psalters, Bibles, Year-Books, and Books of Common Prayer were all within the royal Prerogative, and, along with law books, subject to grant by letters patent.131 In fact, with the exception of the patent pertaining to Common Law, all these patents came to be held and enforced by the Stationers Company.132

What is so striking to us today about the Prerogative tradition is the fusion of property with rulership conceptions. This fusion of proprietary and rulership conceptions is, in fact, characteristic of the Prerogative tradition, according to legal historians.133 Reaching back to the Thirteenth Century, in Bracton we read that ownership over certain things belonging to no one—which, according to the law of nations (jus gentium) or natural law, would belong to the first person to take possession (“occupy”) them—belong to the king under English civil law.134 Similarly, an island in a public river “belongs to the first occupier, and consequently to the king in virtue of his privilege.”135 Furthermore, we read that certain things belonging to the king by virtue of his privilegium may be granted to his subjects; these include the “liberties” relating to

129 See id.
130 See id. See also BACON’S NEW ABRIDGMENT, supra note 73, at 208-9; Blackstone, supra note 71, at 410.
132 See id.
133 See Saunders, supra note 71, at 365-68; BAKER’S ENGLISH LEGAL HISTORY, supra note 73, at 9, 381, 472-3; FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 511-26 (1952).
134 See 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 19, 27, 42 (SAMUEL E. THORNE REV. & ED. 1968). In other places, Bracton states that these things belonging to no one belong to the “sovereign” (princeps) according to the jus gentium. See id. at 41, 166-67, 293; see also id. at 57-9, 339. On the significance of Bracton for the development of English law during the period of the Tudors and Stuarts, and especially for the Prerogative tradition, see W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW, VOLUME II, 286-90 (3d ed. 1923); see also The Argument of Sir George Crooke...in the Great Case of Ship-Money, 3 HOWELL’S STATE TRIALS 1127, 1136 (1637); The Trial of Charles Stuart, King of England, Before the High Court of Justice, for High Treason, 4 HOWELL’S STATE TRIALS 990, 1009 (1649).
135 See Bracton, supra note 134, at 45.
the taking of “wrecks of the sea,” treasure trove, great fishes and royal fishes.136 These privileges and liberties can be granted to favored subjects, because to do so would not harm the “common welfare,” as would a grant of the other Prerogative attributes, which include responsibility for peace and justice.137

This doctrine is elaborated in a section of Bracton addressed to questions about who may grant liberties.138 Who? It is the lord king....

himself who has ordinary jurisdiction and power over all who are within his realm. For he has in his hand all the rights belonging to the crown and the secular power and the material sword pertaining to the governance of the realm. Also justice and judgment [and everything] connected with jurisdiction, that, as minister and vicar of God, he may render to each his due. Also everything connected with the peace....He also has, in preference to all others in his realm, privileges by virtue of the jus gentium. By the jus gentium things are his which by the jus naturale ought to be the property of the finder, as treasure trove, wreck, great fish, sturgeon, waif, things said to belong to no one. Also by virtue of the jus gentium [things are his] which by jus naturale ought to be common to all...139

Which of these liberties may be transferred?

Those concerned with jurisdiction and the peace...cannot be transferred to persons or tenements, neither the right nor the exercise of the right, nor be possessed by a private person unless it was given him from above as a delegated jurisdiction, nor can it be delegated without ordinary jurisdiction remaining with the king himself. Those called privileges, however, though they belong to the crown, may nevertheless be separated from it and transferred to private persons, but only by special grace of the king himself.140

Here we see the fusion of proprietary and rulership conceptions in an early, potent form. And it is in addressing the issue of transfer that Bracton leads us to the strand of Prerogative tradition most relevant to intellectual property: the grant of privileges, liberties, and immunities by means of letters patent and charters.

In Bracton, permissible grants of privilege include exemptions from tolls and customs dues, and powers to levy tolls and customs dues.141 In particular, they include grants “to a universitas, as to citizens or burgesses or others, that they may have a market and fair in their vill, city or borough, and may take customs and tolls and be quit of rendering toll or any other

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136 See id. at 57-9.
137 See id.
138 See id. at 166-73.
139 Id. at 166-67.
140 Id. at 167 (emphasis added); see also id. at 108-10, 111 ff. (on charters from the king and their interpretation).
141 See id. at 169-70
customary due throughout the whole of his realm.”142 By the Seventeenth Century, these early foundations had been transformed into a developed, Royal Prerogative tradition addressing the grant of privileges, including copyrights, by letters patent.143 Perceived abuses of this Prerogative tradition would trigger the development of another legal tradition that was vital to the development of English intellectual property: the anti-monopoly tradition.

2. Prerogative Practices & The Anti-Monopoly Tradition

The anti-monopoly tradition was a response by the Common Lawyers and Parliament to liberal reliance on the Prerogative tradition, under conditions of fiscal and political pressure, by Elizabeth and her Stuart successors.144 The issue of “monopoly” patent grants came to a head during the reign of James I, and resulted in the “Statute of Monopolies” (1624), which laid the foundation for a modern conception of the “patent for new invention,” as a statutory exception to a general prohibition of monopolies.145

The Statute of Monopolies was repeatedly referenced in the Miller and Donaldson cases, and the parallels in monopolistic potential between patents for new inventions and copyrights were repeatedly discussed.146 At a rhetorical level, the Stationers Company was castigated as a “monopolist” by the barristers, justices, and peers opposed to literary property.147 Among the Hanoverian Lords, apparently, the future monopolies that a perpetual form of literary property

142 Id. at 169.
143 See BACON’S NEW ABRIDGMENT, supra note 73, at 203-10; Holdsworth (Volume 4), supra note 105, at 314-54; Holdsworth (Volume 6), supra note 71, at 360-70.
would potentially create constituted a chief basis for concluding that the Common Law could never sanction such a species of property.148

In the Millar and Donaldson cases, the anti-monopoly tradition provided a legal framework within which to analogize patents and copyrights to one another, and a common basis from which to critique them. In this respect, the anti-monopoly tradition provided a crucial contribution to the development of “intellectual property,” later to be conceived as encompassing both patents and copyrights (“literary property”).149 In order to see how this happened, it is necessary to examine the socio-economic practices connected with the Prerogative tradition more closely.

The granting (or recognition) of exclusive privileges by means of letters patent and charters, for purposes that we may broadly conceive as economic and administrative in nature, was a growing practice throughout early modern Europe.150 Examples include a number of early privileges for mining and manufacturing techniques (glass-making, cloth-dying, wool-working and weaving, silk-making, paper-making, and salt-making), as well as Venice’s famous Fifteenth Century statute elaborating a framework for the granting of privileges in new inventions.151 Patents for the printing of particular works also became widespread, as the art of printing spread across Europe.152

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150 For developments in the Holy Roman Empire, under Maximilian I, see Friedemann Kawohl, Commentary on the Privilege of the Prince-Bishop of Würzburg (2008), in PRIMARY SOURCES ON COPYRIGHTS, supra note 14; Hansjörg Pohlmann, The Inventor’s Right in Early German Law, 43 J. OF THE PATENT OFFICE SOC. 121 (1961); Price, supra note 144, at 3-5. See also 1513 Imperial Privilege for Eucharius Rösslin (Strasbourg), 1511 Imperial Privilege for Arnolt Schlick (Speyer), 1511 Imperial Privilege for Albrecht Dürer (Nuremberg), 1501 Imperial Senate Privilege to the Sodalitas Celtica (Nuremberg), 1479 Privilege of the Prince-Bishop of Würzburg (Scanned originals and English translations available at PRIMARY SOURCES ON COPYRIGHTS, supra note 14). For developments in Europe more broadly, see Edward C. Walterscheid, The Early Evolution of the United States Patent Law: Antecedents, Part I, 76 J. PATENT & TRADEMARK OFFICE SOC. 697 (1994).
151 See J. Kostylo, Commentary on Venetian Statute on Industrial Brevets (1474) (2008), in PRIMARY SOURCES ON COPYRIGHTS, supra note 14; Venetian Statute on Industrial Brevets (Venice 1474) (scanned original and English translation available at PRIMARY SOURCES ON COPYRIGHTS, supra note 14). See also sources cited supra, notes 144 and 150; Giulio Mandich, Venetian Origins of Inventors’ Rights, 42 J. PAT. OFFICE SOC. 378 (1960); Giulio Mandich, Venetian Patents (1450-1550), 30 J. PAT. OFFICE SOC. 166 (F.D. Prager trans. 1948).
152 See Kawohl Commentaries on Primary Sources on Copyright (Germany), in Primary Sources on Copyright, supra note 150 (2008); ELIZABETH ARMSTRONG, BEFORE COPYRIGHT: THE FRENCH BOOK-PRIVILEGE SYSTEM 1498-1526 (2002). See also sources cited supra, note 144, 150, 151; Holdsworth (Volume 6), supra note 71, at 360-70.
Foundational studies by Harold Fox (1947) and William Price (1906) have shown that, even as early as the Fourteenth Century, English monarchs occasionally used Prerogative-based patents and charters to facilitate the development of particular industries within their territory.153 Early on, the patents seem to have been primarily for the importation of arts already developed on the Continent (e.g. cloth-working and dying); occasionally, they were granted in secret, rather than as “open” (“patent,” i.e. public) charters.154 These early patent grants often provided special exemptions against the local, civic monopolies of guilds and cities.155 They were limited, royally-protected freedoms from the local regulatory and monopolistic traditions that operated through cities and guilds. Under the Tudors, however, the interweaving of rulership and proprietary conceptions in the Prerogative tradition, combined with the enhanced force that tradition received under Henry VIII’s ecclesiastical Supremacy, provided a powerful legitimating foundation for a qualitative shift in Prerogative-based economic and administrative practices.156

Under the Tudors, the “King’s household” was starting to become the administrative state.157 An early architect of this transformation was Thomas Cromwell, Henry’s “Secretary of State.”158 Stretching from the reigns of Edward VI and Elizabeth, to James I, the transformation process continued under William Cecil (Lord Burghley) and his son, Robert Cecil (Earl of Salisbury).159 Especially under the Cecils, Prerogative-based patents and charters were used to create or oversee national and global monopolies in trade and industry.160 Domestically, these monopolies were used to break down and unify the local regulatory frameworks of cities and guilds, to create proto-administrative agencies, and to reward favorites.161 Globally, these monopolies would be used to combat the commercial ambitions of Continental monarchs, and to

153 See Fox, supra note 144, at 24-56; Price, supra note 144, at 3-24; see also Holdsworth (Volume 4), supra note 105, at 314-54; Hulme, supra note 144, at 141-44.
154 See id.
155 See id; see also Holdsworth (Volume 5), supra note 77, at 62ff.
156 See Chris Dent, Patent Policy in Early Modern England: Jobs, Trade and Regulation, 10 LEG. HIST. 71 (2006); Fox, supra note 144, at 57-85; Price, supra note 144, at 3-24; Hulme, supra note 144, at 144.
158 See id.
159 See Peter Blayney, William Cecil and the Stationers, in ROBIN MYERS & MICHAEL HARRIS (EDS.), THE STATIONERS’ COMPANY AND THE BOOK TRADE (1997); CONYERS READ, LORD BURGHLEY AND QUEEN ELIZABETH (1960); CONYERS READ, MR. SECRETARY CECIL AND QUEEN ELIZABETH (1955); ALAN G.R. SMITH, WILLIAM CECIL: THE POWER BEHIND ELIZABETH (1982); Alan G.R. Smith, The Secretariats of the Cecils, circa 1580-1612, 83 ENG. HIST. REV. 481 (1968); White, supra note 145, at 4-7, 284-90.
161 See Nachbar, supra note 160, at 1318-27; cf. Dent, supra note 156, at 71 ff.
appropriate industries, thereby laying the foundations for Imperial trading companies and markets.\textsuperscript{162}

It is in this context that the Stationers Company emerges into the light of historical record. The Company received its corporate charter in 1557, during the brief reign of Philip II (of Spain) and Mary Tudor.\textsuperscript{163} Sir William Petre was then acting as Privy Councilor and Principal Secretary, having been reappointed by Mary following her accession to the throne in 1554.\textsuperscript{164} Petre, William Cecil, and Sir Thomas Smith had served together as secretaries and Privy Councilors under Edward VI, overseeing the Council’s licensing regime for book publication since 1549.\textsuperscript{165} In 1559 the Stationers’ corporate Charter was confirmed by Elizabeth, with Cecil at the helm as Principal Secretary.\textsuperscript{166} Beneath the dramatic changes in the monarchy during this period, in other words, we see a continuous line of policy in the Prerogative-based corporate chartering practice, and William Cecil (soon to become Lord Burghley) is a central bearer of that continuity.

Pursuant to its corporate charter, the Stationers Company was erected as a corporate community with “perpetual succession,” meaning that Company would henceforth have its own property, which would be held in its name for as long as it endured.\textsuperscript{167} The Company was endowed with the capacity to sue and be sued under its own name in any court, and to make “ordinances, provisions, and statutes” for “the good and sound rule and government” of the incorporated community.\textsuperscript{168} Most significantly, the Articles of Incorporation provided further that:

No person within this our realm of England or the dominions of the same shall practise or exercise by himself or by his ministers, his servants or any other person the art or mistery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mistery or art of Stationary of the foresaid City, or has therefore

163 A copy of the Charter is transcribed in Edward Arber’s transcripts of the Registers of the Stationers Company. See ARBER I, supra note 86, at xxix.
164 See Blayney, supra note 159, at 13; see also Read, Mr. SECRETARY CECIL, supra note 159, at 45, 55, 103.
165 See supra note 115 and accompanying text; see also Read, Mr. SECRETARY CECIL, supra note 159, at 42-3, 57, 117ff.
166 See ARBER I, supra note 86, at xxix; Blayney, supra note 159, at 13.
167 See ARBER I, supra note 86, at xxx-xxxi.
168 See id.
license of us, or the heirs or successors of us the foresaid Queen by the letters patent of us or the heirs or successors of us the foresaid Queen.169

By its act of incorporation, then, the Stationers Company was set up as a community of members exclusively privileged to practice the “art or mystery” of printing throughout England. At the same time, the Company was given broad search and seizure powers to enforce this exclusive privilege.170 In other words, the charter gave the Company “nation-wide powers, almost as if it were an executive arm of the Government.”171

As a means of overseeing economic development and creating bonds of patronage, the patent system had the obvious advantage of requiring no payment on the part of the crown: patent-holders were compensated, instead, through their ability to charge high prices, and their self-enforcement privileges made them an effective substitute for an extensive, government-run, administrative apparatus.172 Some patents even provided a revenue-stream to the crown.173 During the Elizabethan and early Stuart period, however, the patent practices were increasingly perceived as abusive.174 Moreover, the self-enforcement methods of patent holders were seen as destructive and punitive.175 The English anti-monopoly tradition emerged as a reaction to these perceived abuses.

The jurist whose name is most closely connected to the early English anti-monopoly tradition is Edward Coke. From 1589-1628, Coke was ubiquitous throughout the Elizabethan and Jacobean legal system, Parliament, and administration.176 In 1592, Coke became Solicitor General and began serving in an advisory capacity for the Privy Council.177 That same year, he

169 Id.
170 Id. at xxxi.
171 CYPRIAN BLAGDEN, THE STATIONERS COMPANY 31 (1960); see also Holdsworth (Volume 6), supra note 71, at 360-70. Beginning in 1557, the Company recorded the internal allocations of “Copyes as be licensed to be printed by the master and wardyns of the mystery of stacioners.” ARBER I, supra note 86, at 74. Next to an individual’s name and the “copy” allocated to the individual (e.g. “To William pekerynge a ballet called a Ryse and wake”) the records present a monetary figure, which indicates the fee paid by that individual to the Company for the license of the copy (e.g. 4 pence). See id. These records were placed alongside annual records of expenses, which were regularly incurred for the annual dinner connected with livery pageantry, and periodically incurred to provision the monarchy (e.g. with grain or ships). See id. Regular accounts were also kept of fines imposed on members, which prominently included fines for printing without license. See id.
172 See Dent, supra note 156, at 71 ff.; Fox, supra note 144, at 43-85; Holdsworth (Volume 4), supra note 105, at 314-54; Holdsworth (Volume 6), supra note 71, at 360-70; Price, supra note 144, at 6-7; Smith, supra note 105, at 121-26, 240-41, 260-61, 282-83.
173 See id.
174 See id.
175 See id.
176 See generally White, supra note 145, especially at 4-11, 284-90; see also Holdsworth (Volume 5), supra note 77, at 423-93; Maitland, supra note 71, at 268-71, 300-301.
177 See White, supra note 145, at 4.
gave a reading at his alma mater, the Inner Temple, on the Statute of Uses (1536), which had strengthened the Royal Prerogative by settling the problem of “uses.” From the 1580’s onward, Coke was closely tied, both personally and professionally, to the Cecils. His close connection with Lord Burghley meant that Coke was frequently asked to undertake special investigations, on behalf of the Privy Council, into the economic affairs of the Kingdom. In this capacity, Coke gained extensive knowledge of the national finances, and of the workings of English industry, a knowledge that he would draw upon in the Parliamentary debates of the 1620s.

As Elizabeth’s Attorney General, Coke argued the “Case of Monopolies” – *Darcy v. Allen* (1603) – on behalf of the Queen’s patentee and Groom of the Privy Chamber, Edward Darcy. Although Coke argued in support of the patent, his report of the case, appearing alongside another anti-monopoly case (concerning the Tailors of Ipswich guild) in the Eleventh Volume of his reports (1615), provided a conceptual framework for opposing monopoly patents. Coke drew on this framework a few years later (1621-24) in drafting and supporting The Statute of Monopolies (1624) in Parliament.

The *Darcy* case involved a patent on playing-cards. It included three specific types of privilege, allocating each of them to the patentee Edward Darcy (along with his agents and assigns): (1) the exclusive right to domestically manufacture cards and sell them, (2) the exclusive right to import cards and sell them, and (3) the right to enter and search buildings where it was suspected that cards imported in violation of the patent were being held, and to seize and carry away any cards found (i.e. a right to self-enforcement). The defendant in the *Darcy* case, Thomas Allen, was a London “haberdasher”, who admitted to manufacturing a small number of cards in violation of the patent. In his defense, he alleged that, as a freeman of the “society of

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178 3 Stat. 539 (1536).
179 A complicated form of land transfer, which transferred use without transferring title, and thereby deprived the King of his Prerogative rights to fees connected with the transfer of title upon the death of a tenant. See MARGARET McGLYNN, THE ROYAL PREROGATIVE AND THE LEARNING OF THE INNS OF COURT (2003).
180 See White, *supra* note 145, at 4-11.
181 See *id.* at 284-90.
182 See *id.* at 86-141, 284-90.
184 See *id.*
185 See *id.*
187 See *id.*
188 See *id.* at 1260-61.
Haberdashers,” he was a citizen of the City of London and entitled to its ancient liberties, which included the manufacture and sale of playing cards. 189

The Court ruled against Edward Darcy, but gave no reasons for its holding. 190 In a thorough study of the ruling, Jacob Corré has shown that the actual reasons for the Court’s holding may have been procedural: the Court may have considered Darcy’s reliance on the “action on the case” an impermissible extension of this form of action, especially given the specification of remedies provided in the patent itself. 191 Be that as it may, due to the influence of Coke, the case has come to stand as a precedent establishing the invalidity of monopoly patents.

Coke reported the case in 1615, in a form that makes it appear as if the judges gave an extended set of reasons for their holding, reasons that articulated distinctions between valid and invalid patents. 192 According to Coke’s report, the grant of an exclusive right to practice a particular trade, by excluding all others from practicing the trade, violated the ancient rights of Englishmen to practice their respective trades and thereby to contribute to the English commonwealth. 193 Moreover, Coke argued, all such monopolies on the practice of a particular trade have three inevitable effects on the product of the trade: the price of the product is increased, the quality of the product is reduced, and the tradesmen who previously practiced the particular trade are impoverished, along with their families. 194

If, as Corré argues, the court’s actual holding was premised on a procedural basis, the ruling may have avoided confrontation with the royal Prerogative: the court may never have reached the question about the patent’s validity. 195 However, as Coke reported the Darcy case, it presumes the power of a Common Law court to declare limits on the royal Prerogative, limits premised on certain inherent, trade-related rights of Englishmen, and on the legal sovereignty of Parliament (vis-à-vis the monarchy) in addressing trade-related issues. 196 According to Coke, only Parliament has the legal power to restrain an Englishman from practicing his trade by granting a trade-related monopoly. 197 The granting of trade-related monopolies, Coke later argued in Parliament, was an exercise of the royal Prerogative that implicated what is “mine and

189 See id. at 1261. Allen later alleged that he had deliberately violated the patent, with the encouragement of the Mayor, Aldermen, and Council of London, so that the challenging of the patent in court might secure a favorable ruling concerning the liberties of London. See Davies, supra note 160, at 394-414.
190 See Corré, supra note 183, at 1265, 1267-72, 1325-27.
191 See id. at 1285-92, 1326-27.
193 See id. at 1260-62.
194 See id. at 1262-65.
195 See Corré, supra note 183, at 1265, 1285-92, 1321-27.
196 See id.
thine” (meum et tuum); this meant that, unlike other exercises of the Prerogative, it could be legally challenged in courts and in Parliament.198

The Crown and Council saw things somewhat differently. In 1601, when vociferous challenges to trade-related “monopolies” had been raised in the House of Commons, Elizabeth had promised her subjects their “ordinary remedy” under “her highness’ laws of this realm.”199 This promise was made in a Proclamation preceding Elizabeth’s “Golden Speech,” a speech that cooled the Commons’ debates by dramatically highlighting the Queen’s love and concern for her subjects.200

However, Elizabeth’s Proclamation Reforming Patent Abuses had carefully preserved the Prerogative power to invalidate patents, based on two reasons: the applicants had made “false and untrue suggestions” about their effects, and the execution of the patents had been “extremely abused.”201 The notion that her courts had the power to declare legal limits on her Prerogative, and thereby to invalidate her patents, was forcefully resisted by Elizabeth and her advisors.202 Just the previous month, her Privy Council had issued a letter to the Court of Common Pleas, ordering the court to stay a hearing on Darcy’s playing-card patent, and making them to “understand her Majesty’s pleasure in that behalf that her Prerogative Royall may not be called in question.”203

Elizabeth’s Proclamation Reforming Patent Abuses deflected the issue of monopolies to the reign of her successor, James VI of Scotland (House of Stuart), who would become James I of

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198 See White, supra note 145, at 119-20, 122-25, 139-40.
200 See Proclamation Reforming Patent Abuses, supra note 199, at 235-38; Neale, supra note 144, at 376-93; 1 Cobbett’s Parliamentary History 940-42.
201 See Proclamation Reforming Patent Abuses, supra note 199, at 236.
202 “[S]o her Majesty doth notify and signify by these presents that if any of her subjects shall seditiously or contemptuously presume to call in question the power or validity of her prerogative royal annexed to her imperial crown in such causes; all such persons so offending shall receive severe punishment according to their demerits.” Hughes & Larkin, supra note 199, at 237. In the previous Parliament, Elizabeth’s language had been more conciliatory, but less had been conceded: “Her Majesty... hoped that her dutiful and loving subjects would not take away her prerogative – which is the chiefest flower in her garland and the principal and head pearl in her crown and diadem – but that they will rather leave that to her disposition....they shall all be examined to abide the trial and true touchstone of the law.” Neale, supra note 144, at 355; 1 Cobbett’s Parliamentary History 905.
203 32 Acts of the Privy Council 237 (October 7, 1601); see also 32 Acts of the Privy Council 501 (August 7, 1603) (“A letter to Sir George Harvey, Lieutenent of the Tower, and Sir William Waad, Clerke of the Counsell, to commit Thomas Allen and Thomas Turner to prison if they will not cease to prosecute their former suits against Sir Edward Darcy and utterly relinquish the same according to a former order made by the [Council]”).
England. During the course of his journey from Scotland to London, upon the Queen’s death, James received many expressions of grievance, which pertained to monopolies. Immediately upon his arrival in London, in May 1603, James issued a Proclamation inhibiting the use and execution of any Charter or Grant made by the late Queene Elizabeth, of any kind of Monopolies, &c.” This Proclamation provided for review of all Elizabeth’s patents by the King and his Privy Council. James also acted quickly to ensure administrative continuity from Elizabeth’s reign, a goal that he furthered through the elevation of Robert Cecil to the peerage, as the Earl of Salisbury. Cecil/Salisbury would serve as James’ Principal Secretary, overseeing his administration, leading his Privy Council, and serving him in the House of Lords, until his death in 1612.

Exactly one month after James’ Proclamation regarding monopolies was issued, the King-in-Council proceeded to review their first patent: a patent issued by Elizabeth to Thomas Brigham and Humphrey Wemes “for the pre-emption of tin.” Shortly thereafter, James issued a Proclamation concerning the Patents for Tin, which declared the following determination:

We, after long debate thereof before our self and our Privy Council, where objections of either side were made, and where the inconveniences were laid open, have resolved not only to consider how the generality of our subjects might be relieved in suspension of this grant, but how the same might be done without any injustice to any particular person, who is interested therein by virtue of Letters Patents under the Great Seal of England, whereof we never intend to seek any course of revocation, but by an ordinary course of justice, in which all our people are equally interested. In which respect having commanded the Lords and others of our Privy Council to call before them the patentees, and then to offer them all such trial for the maintenance of that patent, as the justice of this our

204 See A Proclamation, declaring the undoubted Right of our Soveraigne Lord King James, to the Crowne of the Realms of England, France, and Ireland (March 24, 1603), in JAMES F. LARKIN & PAUL L. HUGHES (EDS.), STUART ROYAL PROCLAMATIONS OF JAMES I 1-4 (1973).
205 See Larkin & Hughes, supra note 204, at 12 n.2.
206 Larkin & Hughes, supra note 204, at 11-14 (May 7, 1603); see also Kyle, supra note 149, at 205.
207 See id.; see also 32 Acts of the Privy Council 497 (May 4, 1603) (naming a special commission “to take knowledge and consider of all monopolies and grants that are offensive to the subjects of this land, and to informe his Majestie of the same, that such order may be taken for the calling in of those that are greivous and burdensome to the subject as his Majestie in his princely wisedom shall thinke fitt and convenient”).
208 See A Proclamation signifying his Majesty’s pleasure, that all men being in Office of Government at the death of the late Queen Elizabeth, should so continue till his Majesty’s further direction (April 1, 1603), in Larkin & Hughes, supra note 204, at 4-6.
209 See Kishlansky, supra note 157, at 70-87; Smith, supra note 105, at 226-28; Smith, supra note 159, at 481-504; see also 32 Acts of the Privy Council 495-502.
210 See id.
212 Larkin & Hughes, supra note 204, at 29 (June 16, 1603).
realm affordeth, the said patentees have rather yielded in their own duty and discretion, to surrender the patent, than to go about to maintain it.213

Offered the option of a trial, in other words, the patentees had chosen to surrender the patent.

The story of the Tin Patent did not end with its surrender, however. The following year it was reissued, by order of the Privy Council, to the same patentees.214 In November 1606, the Lord Treasurer Dorset noted certain “points to be considered, in the question of the King’s right to the preemption and exportation of tin,” which had been challenged by Richard Glover and the London Pewterers’ Company.215 On November 14, 1606, the Star Chamber issued a decree upholding the patent, against Richard Glover and the Pewterers, “for endeavoring to frustrate a patent granted to Thomas Brigham and Humphrey Wemes for preemption of tin in Cornwall and Devon.”216 Pursuant to this decree, Glover and the Pewterers were ordered to be imprisoned, fined, and to publicly confess their guilt to the Privy Council.217

The problem of monopoly patents and licenses, in turned out, was inseparable from the Crown’s broader, fiscal problems.218 Despite an apparently genuine intention to address the grievances that these patents brought to his subjects, James desperately needed the revenue that they might provide.219 In many cases, moreover, it is clear that regulatory purposes underlay the granting of a monopoly.220 In 1621, in a Proclamation to repeal patents relating to inns, ale-houses, and the manufacture of gold and silver thread,221 James declared that his intentions with his patents “were no other but the increase of profitable Arts and Inventions, the repressing of

213 Id.
217 See Larkin & Hughes, supra note 204, at 29 n.2; see also id. at 352-54 (A Proclamation for restraining the abuses in Tin, according to the Laws and ordinances of the Stannaries).
219 See Larkin & Hughes, supra note 204, at 29 n.2 (tin); 163-66, 188-92, 224-27, 237-41, 250-53, 473-75 (starch); 182-84 (transportation of leather); 224-27, 319-22, 380-84 (alum); 233-36 (pepper); 293-95 (French wines); 300-302, 312-14, 327-29, 371-73 (cloth); 287-90, 308-10 (farthing tokens); 342-43, 464-66 (glass); 365-69 (wool); 384-89, 441-46 (gold and silver thread); 393-95 (peddling); 401-401 (manufacture of pins); 409-13 (ale-houses); 446-49, 457-60, 478-84 (tobacco); 470-72 (glossing of “new drapery” cloths); 490-93 (apothecaries).
220 See, e.g., id. at 446-49, 457-60, 478-84 (tobacco); 490-93 (apothecaries); see also Dent, supra note 156, at 89-93.
221 Id. at 503-505 (March 30, 1621).
vice and disorder, and reformation of sundry enormities and abuses.”

Shortly thereafter James issued a much broader Proclamation, including the promise that all subjects grieved or injured by a lengthy list of patents “may take their remedy...by the Common Laws of the realm, or other ordinary course of justice.”

The grievances of James’ subjects, provoked partly by his patents and more generally by the conditions of economic stress attendant upon the outbreak of the Thirty Years War, had been widely discussed in the First Session of the 1621 Parliament, which met from January to June. By March, Sir Edward Coke had drafted a bill to address the issue. The bill referenced James’ “Book of Bounty” (1610), which had declared monopolies to be “things contrary to our lawes.”

Drawing on this legal support, the bill proceeded to “declare and enact” that all grants of monopoly were “utterly void,” and should be tried “by the laws of this realm in the King’s courts of record”; the bill also prescribed treble damages and double costs against anyone who would attempt to exercise the monopolies prohibited by the act. Strikingly, the bill provided for a further penalty against anyone attempting to exercise the prohibited monopolies: praemunire.

This bill was debated in the Parliaments of 1621 and 1624, and in the course of debate, particularly in conference with the House of Lords, a number of provisos were added in the attempt to delineate the difference between an illegal “monopoly” and a legal, trade-related patent or charter. The final result of this debate and drafting was the Statute of Monopolies, enacted in 1624.

The goal of the Statute of Monopolies was to articulate the legal boundaries of the Prerogative power to issue trade-related patents and charters, boundaries which Coke considered

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222 Id. at 504.
223 Id. at 511-19 (July 10, 1621) (A proclamation declaring His Majesty’s grace to his subjects, touching matters complained of, as public grievances).
224 Id. at 516.
226 See Kyle, supra note 149, at 206; White, supra note 145, at 128-29.
227 See Fox, supra note 144, at 330-35 (Appendix VII); see also Foster, supra note 225, at 59; cf. Kyle, supra note 149, at 205, 207.
228 See White, supra note 145, at 128-29; see also Kyle, supra note 149, at 207.
229 See id.
230 See White, supra note 145, at 128-35; see also Kyle, supra note 149, at 207-16.
to be determined (and determinable) by Common Law and Parliament.232 During the debate, some had suggested defining the word “monopoly,” since “the etymology of the word may be larger than the true definition or civil description of the thing.”233 However, Coke successfully resisted such efforts, while at the same time compromising on the insertion of specific provisos.234

First among these provisos was the exception for “any Patent and Grant of Privilege…of the sole working or making of any manner of new Manufacture within this Realm, to the first and true Inventor or Inventors of such Manufactures.”235 The terms of such patents and grants of privilege were explicitly limited: 21 years (or under) for patents already granted, and 14 years (or under) for future patents.236 These exceptions provided a clear statement of the belief, held certainly by Coke and apparently held by many of his contemporaries in Parliament and in the courts, that the Common Law sanctioned such patents as legitimate exercises of Prerogative power.237

According to this belief, Parliament was only declaring in the Statute of Monopolies what had always been true under Common Law, while perhaps adding some clarity in delineating specific patent terms.238 Nevertheless, it remains true that this is the first statutory statement of the principle that patents for new inventions are legally sanctioned, and distinct from illegal “monopolies.” As such, it is the first canonical text in the British legal tradition pertaining to patents of new invention, and to the later institution of intellectual property.239 Occupying this prime position in the British patent tradition, the Statute of Monopolies also became a canonical text in the patent-related traditions of Britain’s colonies.240


233 Quoted in White, supra note 145, at 133.

234 See 4 Stat. at 1212-14; White, supra note 145, at 129-35.

235 4 Stat. at 1213.

236 See id.; see also Fox, supra note 144, at 125; Kyle, supra note 149, at 206-16; White, supra note 145, at 129-35.

237 See Edward Coke, III Inst. 181-85 (1817); Fox, supra note 144, at 125; Kyle, supra note 149, at 206-16; White, supra note 145, at 129-35.

238 See id.; see also Foster, supra note 225, at 76-77.

239 See Kyle, supra note 149, at 203.

240 See, e.g., Dent, supra note 225, at 415-17 (discussing the significance of the Statute of Monopolies for Australian patent law).
3. Parliamentary Traditions

The story of the English anti-monopoly tradition is also a story about the assertion of Parliament’s share in the Supremacy, and in sovereignty.\(^{241}\) It is, accordingly, part of the story of Britain’s constitutional development, as much as the development of intellectual property.

The anti-monopoly tradition, as we have seen, emerged from the Common Lawyers and from Parliament, but it was narrowly targeted to the declaration of limits on the exercise of royal Prerogative. However, during the long series of political events now identified with the English “Revolution,” an important development took place in the legal traditions pertaining to patents and copyrights: these came to be rooted statutes, which positively asserted proprietary status. The foundational stage of this line of development leads through the Glorious Revolution (1688-89) to a statute named for the Queen of the Stuart line: the Statute of Anne (1710).\(^{242}\) The heart of the debate in the Millar and Donaldson cases concerned the relationship between this statute, on the one hand, and the Common Law and Prerogative traditions, on the other. Parliament itself, acting as a Supreme Court, would determine the outcome of that debate.

During the “Long Parliament” – which began in 1640 and formally continued through the “Interregnum” to 1660 – Parliament took over the Prerogative tradition pertaining to printing, thereby continuing the basic framework for censorship and regulation that had strengthened the Stationers Company’s exclusive rights in printing and publishing.\(^{243}\) However, Parliament made

\(^{241}\) See Charles Howard McIlwain, Constitutionalism Ancient and Modern 135 (1947) (the Statute of Monopolies is “the first statutory invasion of the royal prerogative”); see also J.P. Kenyon, The Stuart Constitution: Documents and Commentary 57-58 (1966); Foster, supra note 225, at 76-77; Maitland, supra note 71, at 260-61; Smith, supra note 105, at 402 (the Statute of Monopolies is “the first important statutory limitation on the royal prerogative during the seventeenth century”). Citing Geoffrey Elton and other “revisionist” historians, Chris Kyle has questioned McIlwain’s interpretation of the Statute of Monopolies, characterizing it as “whiggish.” See Kyle, supra note 149, at 203-204, 216-17. Kyle accepts Coke’s description of the Common Law prior to the Statute of Monopolies, an acceptance that leads him to assert that the Act of Monopolies “was simply a declaratory statement of the Common Law position.” Id. at 217. However, as Jacob Corré’s careful research has shown, there are good reasons to question Coke’s objectivity on this point. See supra notes 190-198 and accompanying text. Furthermore, scholars have noted that revisionist history of the Seventeenth Century Parliaments may at times go too far in denying the political and constitutional dimensions of the parliamentary debates. See Smith, supra note 105, at 372; Smith, supra note 218, at 7-9.

\(^{242}\) An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned, 8 Anne, c. 21, 9 Stat. 256 (1710). For a strongly positive characterization of Anne’s reign, see Bucholz & Key, supra note 157, at 331-37 (Anne was “arguably the most successful ruler” of the Tudor and Stuart period).

\(^{243}\) See the Act against dissolving the Long Parliament without its own assent, 17 Charles I, c. 7 (1641). Scholars typically refer to individual “Parliaments” between 1640 and 1660 using separate names (e.g. “Barebone’s Parliament”). See Smith, supra note 105, at 233-34, 305-308. However, in lumping these Parliaments together under one name, I am following the Long Parliament’s own statutory prescription, and
two important changes to the regulatory framework: (1) they substituted themselves, as overseers of the regulatory regime, for the Privy Council and Prerogative Courts (the “High Commissioners in Causes Ecclesiastical” and the Star Chamber), and (2) they introduced the Justices of the Peace, as well as other secular officials, into the framework for enforcement, as a support to the Stationers Company’s own deputies, which continued to serve as the primary enforcers.244

Most significantly, Parliament began referring to the Stationers Company members as “Owners of the Copies” of books registered in their names in the registry books of the Company.245 Since the 1637 Star Chamber decree discussed above did not use the language of “ownership” when referring to the members of the Stationers Company registered as rightful printers of the copy, we can pinpoint the shift in legal language – from the language of registered licensing to the language of “ownership” – to this exact moment in time: 1637-1643. At the same time, we see in 1637 and 1649 the first regulatory discussions of the “mark” of the Stationers Company, in prohibitions against “counterfeiting” the “name, title, marke or vinnet” of the Company.246

So Parliament was in some ways continuing the framework in place since the Tudors, while it was in other ways introducing changes. For our purposes the most important continuity relates to the Stationers Company: excepting the Universities of Oxford and Cambridge, the king’s printer(s), and any independent holders of printing patents, the Stationers Company remained the sole authorized printer in England, and the primary enforcer of this privileged status.247 Most significantly, the Stationers Company’s registry books remained the sole record of licenses to print: they indicated which individuals were the holders of copy-rights.248 From a semantic perspective, the most dramatic change introduced by Parliament was the legal description of these holders of copy-rights as “owners.”

According to Stephen D. White, a decisive shift in Parliament’s conception of its constitutional role and relationship to the monarchy occurred in the 1620’s.249 In the Parliaments
of 1625 and 1628, leaders in the House of Commons (prominent among them Edward Coke) began to lose confidence in the monarchy; they increasingly believed that more explicit recognition of Parliament’s privileged role in protecting the rights of citizens and the common good would be required, if such rights and the common good were to be preserved at all. The rights of property were particularly emphasized: Parliament began to conceive of itself as the primary guardian of citizens’ rights, especially their property rights and personal liberties.

Parliamentary speeches, bills, and negotiations with the king began to focus also on the establishment of Parliament’s constitutional privileges and roles. Crucially, these privileges and roles were not presented as new; they were rather presented as having been established and continued through ancient precedents, traceable ultimately to the Great Charter (Magna Carta) of 1215. However, even when both sides conceded these precedents, the question of their legal interpretation still remained. For Parliament, especially the Commons, it became increasingly important to establish that these privileges could not be retracted, that they existed as a matter of ancient “rights,” vested in Parliament, independent from and of equal weight with the royal Prerogative.

The men who acted in Parliament at this time were predominantly members of the “landed gentry”: owners of real property throughout the “shires” and “boroughs” of England, and now extending into Ireland, Scotland, and Wales. Their rise to power since Henry VIII’s Supremacy had constituted one of the “seismic” social shifts of the preceding century, one made possible by the massive redistributions of land connected with Henry’s Supremacy. Their political and ecclesiastical authority had been decisively elevated through their legislative support of the Henrician Reformation, and their economic position depended on the continuing stability of that Reformation. Parliament was, in other words, heavily invested in the Tudor

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250 See id.
251 See id. at 229 (quoting a 1628 resolution of the House of Commons: “the ancient and undoubted right of every free man is that he hath a full and absolute property in his goods and estate, and that no tax, tallage, loan, benevolence, or other like charge ought to be commanded or levied by the King, or any of his minister [sic], without common assent by act of Parliament.”)
252 See White, supra note 145, at 187-274.
253 See id.
254 See id. In addition to the freedom of Parliamentary speech, the judicial powers of Parliament were a particular focus during this period. Ultimately, Parliament obtained Charles’ concession to the “Petition of Right.” See id.
255 See Smith, supra note 218, at 19-31.
257 See Smith, supra note 105, at 53.
258 See id. at 87-97.
Reformation, even if it was beginning to undermine the Prerogative Supremacy that had brought that Reformation about.

As Parliament met, warfare between Catholics and Protestants was devastating Continental Europe, and was perceived as an imminent threat at home.\(^{259}\) To make matters worse, Archbishop William Laud – a man whose religious doctrines were seen as “Arminian” and therefore Catholic-leaning – was undertaking a comprehensive reform of the Episcopate, seeking to strengthen doctrinal and administrative authority of bishops.\(^{260}\) Laud was among the most influential members of the Privy Council, and a primary advisor to King Charles I.\(^{261}\) These were the circumstances under which Scotland revolted against its Scottish King, and Parliament began its slide into military dictatorship.\(^{262}\)

With this as background, we can better understand the changes introduced by the Long Parliament into the framework for regulation of printing and publishing. Parliament was substituting itself for the monarchy, and for the ecclesiastical powers under the monarchy’s Supremacy. At the same time, Parliament was rhetorically elevating the legal position of copyright-holders. In its position as guardian of the rights of citizens, particularly their property rights, Parliament was elevating the Stationers’ copy-rights from (1) temporary privileges vested by operation of the royal Prerogative to (2) property recognized as such by Parliamentary act.\(^{263}\)

This rhetorical elevation of copy-rights to the status of property continued after the Restoration under Charles II. In 1662, Charles II “by and with the Consent and Advise of the Lords Spiritual and Temporal & Commons in this present Parliament assembled” enacted an “Act for preventing the frequent Abuses in printing seditious and unlicensed Bookes and Pamphlets and for Regulating of Printing and Printing Presses” (hereinafter the “Licensing Act of 1662”).\(^{264}\) This Act returned in many ways to the framework established by the 1637 Star Chamber decree.\(^{265}\) Ecclesiastical officers once again took their place as the primary licensors of printing,

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\(^{259}\) See Caroline Hibbard, Charles I and the Popish Plot (1983); Geoffrey Parker (ed.), The Thirty Years’ War (2d ed. 1987).

\(^{260}\) See Smith, supra note 105, at 279-87; Smith, supra note 218, at 111-20.

\(^{261}\) See Julian Davies, The Caroline Captivity of the Church (1992); Smith, supra note 105, at 284-86.


\(^{263}\) It is important to note that Parliament was acceding to an argument made by the Stationers Company, that “there is no reason apparent why the production of the Brain should not be as assignable, and...held as tender in Law, as the right of any Goods or Chattels whatsoever.” See Arber I, supra note 86, at 587-88; see also Patterson, supra note 14, at 130.

\(^{264}\) 14 Char. II, c. 33, 5 Stat. 428 (1662).

\(^{265}\) See id. The Stationers Company registers serve as the record of licensed printers and holders of “copy-rights”; the Stationers Company is the primary enforcer of the regulatory regime, with broad search and seizure powers; the Stationers Company registers printing presses; with the exception of the Universities
and as overseers of the Stationers Company. Nevertheless, the proprietary language of copyright introduced during the Long Parliament was continued: the Act prohibited the printing or importing of any copy, with respect to which another had a right by virtue of a patent or an entry in the Stationers Company registry books, without the consent of the “Owner or Owners Proprietor or Proprietors of such Copy.” Here we see the entry in the Stationers Company registry books placed on parity with a printing patent, and the rights established by either method being referred to in the language of property.

With the Statute of Anne (1710), the transition to a statute-based, proprietary concept of copyright was nearly complete: the Act explicitly declared its intention to “secure” to the “Proprietor” the “Property in every such Book” addressed by the Act. The “Proprietor” whose security was provided for under the Act might be an author, or he might be the purchaser of the copyright from the author. The Act declared that copyrights are “vested” first in the authors of books, and only secondarily in purchasers (i.e. printers and booksellers). Here, as scholars have noted, is the beginning of authorial copyright.

Nevertheless, an important question might still be posed, and was posed by the Stationers Company: might not the Statute of Anne merely “secure” copyrights that already existed by virtue of another source of law, operating alongside statutory law, such as the Common Law? Or did the Statute of Anne provide the statutory basis for the right itself? If this latter view were the correct one, copyright was strictly a creature of statute: pursuant to the statute, some kind of proprietary right was born with the act of authorship, but it died at the end of 28 years, the birth and death occurring by operation of the statute.

and other specifically licensed printers, the Stationers Company remains the sole licensed printer in England; the number of licensed printers with the Company is limited to 20; and the transmittal of the knowledge and capacity to engage in printing is limited the requirement that a printer, bookseller or bookbinder serve a proper apprenticeship. See id.

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[266] See id. at §2.
[267] Id. at §5.
[268] The Act also continued the prohibition against counterfeiting the “mark” of a licensed printer, along with the use of the justices of the peace as a supplement to the enforcement powers of the Stationers Company. See id. at §§ 6, 13.
[269] Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasors of such Copies during the Times therein mentioned. 8 Anne, c. 21, 9 Stat. 256 (1710).
[270] Id. at §2.
[271] See id. at §1.
[272] See Deazley, supra note 2, at 31-50; Patterson, supra note 14, at 143 ff.; Rose, supra note 14, at 31-66.
[273] It is important to recall that the literary works at issue in Millar and Donaldson had been written and sold by their author roughly 40 years before the cases were being litigated. There was therefore no possibility of claiming under the Statute of Anne. The only hope for the Stationers Company was to claim that the copyrights at issue were protected under Common Law, which would provide an independent basis for the rights, and an independent set of remedies for their violation.
[274] See 8 Anne, c. 21 §§1, 11.
The Justices of the King’s Bench concluded in 1769 that the Common Law provides an independent basis for copyright, but Parliament rejected this conclusion in 1774.\(^\text{275}\) Parliament rendered this determination through the House of Lords, which had been re-vivified by the Restoration.\(^\text{276}\) That Restoration, while renewing the Stuart monarchy, had also affirmed the plenary powers of Parliament, particularly the judicial powers of the House of Lords.\(^\text{277}\) Shortly thereafter, in the “Glorious Revolution,” a newly-partisan Parliament had successfully asserted its control over the religion of the monarch, and the monarchical succession.\(^\text{278}\) The Statutory Supremacy, wielded above all by Parliament, was now complete.\(^\text{279}\) This is the context in which intellectual property emerged.

**V. Common Law, Intellectual Property, and the Prerogative Tradition: Sketches of the Millar and Donaldson Debates**

The legal and political actors involved in the *Millar* and *Donaldson* cases had been called upon to decide, once and for all, whether a new, “intellectual,” form of property really fit within the English Common Law system, and, if so, how.\(^\text{280}\) The Chancery courts seemed to be behaving, at least at times, as though this new form of property did fit within the Common Law system.\(^\text{281}\) However, the Chancellors had until recently been relatively free to make their decision based on their perception of “equity” in a particular case, and they could not render an authoritative decision as to the Common Law.\(^\text{282}\) It was the Justices of the King’s Bench and the

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\(^\text{276}\) See Maitland, supra note71, at 288-89; Smith, supra note 218, at 19-22.

\(^\text{277}\) See Maitland, supra note71, at 316-17; Smith, supra note 218, at 32-48.

\(^\text{278}\) See An Act for Removing and Preventing all Questions and Disputes Concerning the Assembling and Sitting of this present Parliament, 1 Will. & Mary, c. 1 (1688); An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 Will. & Mary Sess. 2, c. 2 (1689); An Act for the Further Limitation of the Crown and Better Securing the Rights and Liberties of the Subject, 12 & 13 Will. III, c. 2 (1701). See also Maitland, supra note 71, at 281-88; GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC* 447-50 (2009).

\(^\text{279}\) See Maitland, supra note 71, at 254, 281, 297-301.

\(^\text{280}\) The use of the adjective “intellectual,” to characterize this admittedly new type of legal property, occurred with some frequency in the *Millar* case. See, e.g., Millar, 98 Eng. Rep. at 251 (Mansfield).

\(^\text{281}\) See Deazley, supra note 2, at 51-85, 111-47; Patterson, supra note 14, at 158-63; Rose, supra note 14, at 49-66

\(^\text{282}\) See Holdsworth (Volume 5), supra note 77, at 215-338; Plucknett, supra note 77, at 673-707.
Lords who would have to engage in the difficult project of determining whether England’s Common Law system actually sanctioned this new, “intellectual” form of property.

Perhaps the most influential argument against the idea that the Common Law recognized copyright as property was given in the House of Lords by Lord Camden.\footnote{See 17 Cobbett’s Parliamentary History, at 958 (note), 992-1001.} When it came to principles of “sound policy,” he argued from the general premise that “science and learning are in their nature publici juris, and they ought to be as free and general as air or water.”\footnote{Id. at 999.} Glory, not profit, is the reward of science.\footnote{Id. at 1000.} Given this basic principle, the Stationers’ efforts to claim literary works as property was nothing other than an abhorrent attempt to continue a monopoly.\footnote{See id.} The consequence of continuing this monopoly, which would follow if the Lords decided for the Stationers, would be “exorbitant price...for every valuable author will be as much monopolized by them as Shakespeare is at present.”\footnote{Id.}

Lord Effingham, likewise, saw dangerous policy effects flowing from a decision for the Stationers, but for him the danger was to the freedom of the press, and to the political health of the Commonwealth:

Lord Effingham rose last, and begged to urge the liberty of the press, as the strongest argument against this property; adding, that a despotic minister, hearing of a pamphlet which might strike at his measures, may buy the copy, and by printing 20 copies, secure it his own, and by that means the public would be deprived of the most interesting information.\footnote{Id. at 1003.}

Economically, the Common Law copyright would sanction a monopoly; politically, it would stifle the freedom of the press and thereby suppress politically-relevant information. For both of these reasons, the property must not exist.

Justice Yates, the second most senior judge of the King’s Bench, agreed that copyright was not property under Common Law, and he also gave arguments based on national consequences for this conclusion.\footnote{Millar, 98 Eng. Rep. at 249-50.} However, his most powerful arguments approached the question from a formalist direction. Justice Yates began his opinion by defining the basis for
property under English Common Law: “however peculiar the laws of this and every other country
may be, with respect to territorial property, I will take upon me to say, that the law of England,
with respect to all personal property, had its grand foundation in natural law.”

Justice Yates, in other words, agreed with the Stationers Company’s lawyers that the
general question about the proprietary status of copyrights could only be answered by looking to
“the general principles of property.” These general principles, however, included the
requirement that the object being claimed as property have identifiable boundaries, and an
“intellectual” property, like copyright, could not meet this requirement.

All property has its proper limit, extent, and bounds. Invention or labour (be they
ever so great) cannot change the nature of things; or establish a right, where no
private right can possibly exist. The inventor of the air-pump had certainly a
property in the machine which he formed; but did he thereby gain a property in
the air, which is common to all? or did he gain the sole property in the abstract
principles upon which he constructed his machine? and yet these may be called
the inventor’s ideas, and as much his sole property as the ideas of an author. To
extend this argument, beyond the manuscript, to the very ideas themselves, seems
to me very difficult, or rather quite wild. Indeed the invention and labour, which
are ranked among the modes of acquiring specific property in the subject itself,
are that kind of invention and labour, which are known by the name of
occupancy. In that sense, invention is defining or discovering a vacant property:
and labour is the taking possession of that property, and bestowing cultivation
upon it. Property is founded upon occupancy. But how is possession to be taken,
or any act of occupancy to be asserted, on mere intellectual ideas?...The
occupancy of a thought would be a new kind of occupancy indeed. By what
outward mark must the property denote appropriation? and if these are void of
that which the act of occupancy requires, it is a proof to me they cannot be the
object of property.

Indeed, Justice Yates interpreted the natural law tradition as limiting the objects of
property to tangible (“corporeal”) objects. He recognized, of course, that intangible rights (e.g.
easements) might exist in relation to tangible objects. However, with respect to the object
itself, “it is a well-known and established maxim, (which I apprehend holds as true now, as it did
2000 year ago,) ‘that nothing can be an object of property, which has not a corporeal
substance.’

291 Id.
292 Id. at 230.
293 See id. at 232.
294 See id. at 232-33.
295 Id. at 232; see also id. at 245: “But goods must be capable of possession; and must, of course, have
some visible substance: for, nothing but what has visible substance, is capable of actual possession. The
author’s unpublished manuscript will indeed very properly fall under this class of property; because, that is
Ultimately, it was his insistence on the tangible character of legal property that determined Justice Yates’ conclusion. The other three justices of the King’s Bench did not agree, and they were therefore able to conclude that intellectual property was, in principle, no different from any other type of property recognized by English Common Law.

Justice Aston focused particular attention on the Common Law concept of trespass, as it related to Andrew Millar’s claim to literary property. However, he did so in a way that was very significant. Admitting that the type of property being claimed was new, Justice Aston went back to the earliest foundations of the Common Law tradition to argue that the tradition had always been willing to draw new objects of property into its ancient grasp.

In respect to the several species of property; though the rules touching them must ever have been the same, yet the objects of it were not all at once known to the Common Law, or to the world: and many have been disputed, as not being objects of property at Common Law, which yet are now established to be such; as, gunpowder, &c, &c, &c.  

Drawing on cases from the time of Henry VIII and Elizabeth, which addressed the question as to whether an action would lie to recover stolen dogs, along with the legal treatises of Coke and Brooke, Justice Aston argued that the Common Law tradition permitted the use of the action of trespass, even where the property at issue was new. From the Common Law authorities adduced, Justice Aston concluded that the action for trespass on the case was appropriate, since all that was requisite was that there be some “distinguishable property” with a “determinate owner.” This standard was clearly met in the present case, “for, I confess, I do not know, nor can I comprehend any property more emphatically a man’s own, nay, more incapable of being mistaken, than his literary works.”

But this was a somewhat radical argument, one that was not explicitly endorsed by Justice Willes or Lord Mansfield. The most conservative argument in favor of the case for intellectual property was the argument based on legal precedent. And here is where the Prerogative tradition becomes important.

William Blackstone’s Commentaries, which are probably indicative of his arguments in the Millar case, hint at the way that the Prerogative tradition could be interpreted as a legal foundation for literary property. While preferring to base his arguments in favor of intellectual

corporeal. But after publication of it, the mere intellectual ideas are totally incorporeal; and therefore incapable of any distinct separate possession.”

296 Id. at 223.
297 Id. at 223-24.
298 Id. at 224.
property on natural law and chancery precedents, Blackstone nevertheless considered the case for literary property to be significantly bolstered by “those adjudged cases at Common Law, wherein the crown hath been considered as invested with certain Prerogative copyrights.”299 The argument proceeded by way of analogy: “if the crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.”300 For Blackstone, then, Copyrights constituted a legally-legitimate form of property within the Common Law system, a system that was at one and the same time a Constitutional system of public law, and a system of private law.

Lord Mansfield, Chief Justice of the King’s Bench, regarded the argument from the Prerogative tradition as “equally conclusive” with the argument from natural law.301 Like Blackstone, Lord Mansfield read the Prerogative tradition as one that established limitations on the powers of the monarchy.302 However, his reading emphasized the effect of the Revolution more than Blackstone’s.

Examining the precedents carefully, Lord Mansfield drew a line between the cases decided before the Revolution, and those decided after. Conceding that the Restoration cases had been decided on the basis of the Prerogative tradition, Lord Mansfield distinguished royal property from the royal Prerogative, arguing that the former basis for the decisions continued to survive a post-Revolution case – *Stationers Company v. Partridge*, 88 Eng. Rep. 647 (1709) – that he regarded as decisively rejecting the doctrine of Prerogative as a basis for the “Crown copyright,” even while it was never actually decided.303

Lord Mansfield, in other words, excised the proprietary conception of the Prerogative tradition away from the rulership conception,304 equated the Prerogative tradition to the rulership conception alone, and argued from the implicit premise that this had been destroyed by the Revolution as a legitimate foundation for the Crown copyright. The Common Law precedents establishing the Crown copyright over lawbooks, statute books, English bibles, year-books and prayer-books remained valid, according to this interpretation, because they did not solely depend on royal Prerogative (as equated with the rulership conception alone), but also depended on the “power” that “rests in property.”305 The proprietary basis underlying these valid precedents,

300  *Id*.
302  See *id*. at 253-54.
303  See *id*. at 254.
304  On the distinction between the “proprietary” and “rulership” conceptions of the Prerogative, see *supra* notes 103-143 and accompanying text.
according to Lord Mansfield, derived from the king’s payment, which operated as a transfer of property.306 This property was paid for by the king and transferred to him, and he could therefore grant it by means of letters patent to any of his subjects.

Having interpreted these precedents as providing an exclusively proprietary basis for the crown copyright, Lord Mansfield then made the argument by analogy: “Whatever the Common Law says of property in the King’s case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors.”307 Thus, reinterpreting a portion of the Prerogative tradition as an egalitarian, proprietary tradition, Lord Mansfield argued that it survived the dramatic events of the Civil Wars, Restoration, and Revolution. Surviving to support the Crown copyright, this reinterpreted tradition must also support an author’s copyright, since the king could have no greater proprietary right than his subjects. “Crown-copies are, as in the case of an author, civil property.”308 This argument, alongside the arguments from natural law, was “conclusive,” in Lord Mansfield’s opinion, in determining that literary property existed as a matter of Common Law.

Justice Yates adamantly disagreed with the notion that an analogy could be drawn between the Crown and the subject, thereby enabling a conclusion about an author’s copyright under Common Law.309 For Justice Yates, the Prerogative Copyright was an entirely different type of property, one rooted in the Supremacy. No analogy could be drawn between the King and the Subject here. “The King’s right to all these is, as head of the Church, and of the political constitution.”310 For Justice Yates, then, the Prerogative tradition survived the Revolutions of the Seventeenth Century, and it continued to ground the Crown Copyright in ways that could not ground a Common Law copyright for the King’s subjects.

It is important to realize that, if the Prerogative tradition remained valid in its full, pre-Revolutionary strength, the “Lockean” argument from occupatio would not work as a legal argument. As Justice Yates had pointed out, this argument proceeded by analogizing an invention or creation to a res nullius, a thing previously belonging to no one because it was newly-discovered or created. Under principles of natural law (rooted in Roman law), a res nullius belonged to the person who first discovered and claimed it. However, according to the English Prerogative tradition, such things would belong to the King, by operation of English Common Law. In other words, someone who took the Prerogative tradition seriously, as Justice

306 See id.
307 Id.
308 Id. at 254.
309 See id. at 243-45.
310 Id. at 243.
Yates appeared to do, could never accept the “Lockean” natural law argument as a legal argument for proprietary copyright.

Thus, in the disagreement between Justice Yates and Lord Mansfield we can see that the question of intellectual property’s legitimating foundations under the English Common Law system turned, to a significant degree, on interpretation of the Prerogative tradition. Lord Mansfield was willing to reinterpret that tradition, in light of the Revolution, and Justice Yates was not. Thus, for Lord Mansfield, the natural law argument could coexist with the Prerogative tradition, which had survived the Revolution as an egalitarian, proprietary tradition. For Justice Yates, the Prerogative tradition implicitly excluded the “Lockean” natural law argument.

VI. Conclusion: The Crown Prerogative, Nationalized

In 1769, Lord Mansfield concluded that intellectual property (of the copyright variety) really is property, according to the principles of English Common Law. He came to this conclusion for two reasons: (1) it was the conclusion that he believed was logically-coherent and just, and (2) it accorded with Common Law principles of property, as these had developed through the Revolution.311 In this second argument – “equally conclusive” with the first, he believed – Lord Mansfield implicitly recognized that the Seventeenth-Century’s Parliamentary Revolution had impacted the property principles of English Common Law.312 Prerogative Copyright – which, in his view, was property – survived the Revolution, but only in a nationalized form.313 From this point forward, the King’s property was “civil” property, and could only be rooted in principles that were also applicable to the King’s subjects.314 Any special proprietary privilege belonging to the King, such as Prerogative property in a thing belonging to no one (res nullius), had been eliminated by the Revolution, in Lord Mansfield’s view.315

Lord Mansfield, in this reading of him, acknowledged that the events leading up to and growing out of the Glorious Revolution – events stretching from the Parliaments of Coke, through the Civil Wars, and ending with the Hanoverian succession – constituted a social, political, and legal revolution in Britain, one that did not leave principles of property untouched. His willingness to acknowledge a nationalizing change in the principles of property, and to see

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312 See id. at 253-56.
313 See id.
314 See id.
315 See id. at 254.
this change as occurring through a process of political and social change, is significant, and relevant to our contemporary debates over the legitimacy of intellectual property.

The implication of this type of approach might be that the principles establishing what property is, and how property works, are fundamentally determined by the type of social and political group within which property is recognized and protected. In a pure monarchy, for example, all property is the King’s, although he may decide to grant that property to favored subjects, in the form of “privileges” or “tenures.” In a pure democracy, on the other hand, all property is fundamentally that of “the people.” They may decide to grant that property to particular individuals who perform useful services for them, but the property ultimately belongs to them, and it is returnable to them upon terms of their choosing.

Property that is held by reason of public service, for a temporary period, and subject to conditions precedent determined through positive, democratically-accountable legislation, is hardly the “Sole and Despotic Dominion” of Blackstone’s “Ownership.” This is a different, much more contingent type of property, a property that is more like a leasehold (or “usufruct”) than like “Ownership.”

In this article, I have argued that intellectual property emerged through a process of nationalization. In this process, elements of the Crown Prerogative were appropriated by Parliament, then transformed into national legislative and judicial rulership, on the one hand, and intellectual property, on the other. “As happened in many other cases, this prerogative of the king came to be regarded as the right of the subject.” This nationalization process, which was driven so significantly by religious commitments, contributed in vitally-important ways to the type of social and political organization that we recognize as a National State. Intellectual property is thus a creature of the nation-state, just as much for Eighteenth Century Britain, as for the United States and France.

Understanding the nature of the social and political organization from whence intellectual property arises helps us to understand the nature of the property itself. This is a property that is positively created by the nation-state to serve national purposes, a National Property. The contingencies upon which this type of property depends are fundamentally national, and (in a democratic nation-state) democratic. The nation-state determines whether and how long the property continues to exist, and whether the property is serving the purposes for which it has been created.

316 See Blackstone, supra note 71, at 3.
317 Maitland, supra note 71, at 271.
In a democratic nation-state, intellectual property has no deeper foundation than democratic adherence. Recognizing this and acknowledging it might help to increase the public sense of “investment” in intellectual property. This might contribute to its legitimacy. However, it would also have the effect of limiting ownership-based presumptions that currently work for the benefit of intellectual property holders.