

When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright

John Willinsky

Volume 1, numéro 1, 2017

URI : <https://id.erudit.org/iderudit/1083155ar>

DOI : <https://doi.org/10.5334/kula.8>

[Aller au sommaire du numéro](#)

Éditeur(s)

University of Victoria Libraries

ISSN

2398-4112 (numérique)

[Découvrir la revue](#)

Citer cet article

Willinsky, J. (2017). When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright. *KULA*, 1(1), 1–10. <https://doi.org/10.5334/kula.8>

Résumé de l'article

In light of the challenge and promise currently facing scholarly publishing's move to digital models of greater openness, this paper offers a point of historical reflection on an earlier era of concern over sustainable access to learned works. It reports on a period of great turmoil in publishing that ran from the end of British book licensing in 1695, which unleashed a great wave of print piracy and sedition, to the legal remedy afforded by the Statute of Anne 1710, which introduced what we now think of as modern copyright law. The paper begins with John Locke's lobbying of Parliament to end the effrontery of press censorship and monopoly maintained by the three-decade old Licensing Act of 1662. The scholar-friendly legal reforms of this act that Locke proposed in the 1690s were not taken up by Parliament when it allowed the act to expire in 1695. However, six years after Locke's death in 1704, his and others' proposed reforms were to find a place in the Statute of Anne 1710. This legislation was the first to vest authors with an exclusive, limited-term right to print copies of their work, while also protecting the access rights of scholars and the public to these and other works. I argue that the history of the statute reveals how the age of copyright began with striking a fine legislative balance between the interests of learning and those of commercial publishing, while also offering further insight into Locke's influential work on property rights and limits. My hope is that this portrayal of Locke's relatively effective political intervention as scholar-activist and public defender of learning in relation to the subsequent Statute of Anne might inspire and lend weight to the academic community's current grappling with the growing commercial dominance of scholarly publishing.

Copyright © John Willinsky, 2017



Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter en ligne.

<https://apropos.erudit.org/fr/usagers/politique-dutilisation/>

Érudit

Cet article est diffusé et préservé par Érudit.

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche.

<https://www.erudit.org/fr/>

RESEARCH ARTICLE

When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright

John Willinsky

Stanford University, US

john.willinsky@stanford.edu

In light of the challenge and promise currently facing scholarly publishing's move to digital models of greater openness, this paper offers a point of historical reflection on an earlier era of concern over sustainable access to learned works. It reports on a period of great turmoil in publishing that ran from the end of British book licensing in 1695, which unleashed a great wave of print piracy and sedition, to the legal remedy afforded by the Statute of Anne 1710, which introduced what we now think of as modern copyright law. The paper begins with John Locke's lobbying of Parliament to end the effrontery of press censorship and monopoly maintained by the three-decade old Licensing Act of 1662. The scholar-friendly legal reforms of this act that Locke proposed in the 1690s were not taken up by Parliament when it allowed the act to expire in 1695. However, six years after Locke's death in 1704, his and others' proposed reforms were to find a place in the Statute of Anne 1710. This legislation was the first to vest authors with an exclusive, limited-term right to print copies of their work, while also protecting the access rights of scholars and the public to these and other works. I argue that the history of the statute reveals how the age of copyright began with striking a fine legislative balance between the interests of learning and those of commercial publishing, while also offering further insight into Locke's influential work on property rights and limits. My hope is that this portrayal of Locke's relatively effective political intervention as scholar-activist and public defender of learning in relation to the subsequent Statute of Anne might inspire and lend weight to the academic community's current grappling with the growing commercial dominance of scholarly publishing.

Keywords: Intellectual property; scholarly publishing; John Locke; Statute of Anne 1710

The digital era, it seems fair to say, is transforming the circulation of research and scholarship. Not only have journals moved online *en masse*, but, far more radically, a growing portion of these are being made publicly available, or 'open access,' for the first time. Recent studies have found that roughly half the research articles published over the last few years are being made freely available online, through the efforts of academic authors, research funders, and scholarly publishers – many of them employing Creative Commons licensing that establishes that these works are legally free to use (Jamali and Nabavi 2015; Archambault et al. 2014). Still, a world of knowledge that is only half open is still in a state of flux. Consider Elsevier, the largest scholarly publisher in the world with 420,000 articles (of which 20,000 were open access in 2016) that declares itself, in 'a surprising fact,' 'the 2nd largest open access publisher' (Spotlight 2017). This same publisher in the same year successfully sued Sci-Hub, a database of pirated Elsevier and other publishers' research made open to the world, for \$15 million in damages in a New York court (Schiermeier 2017). The suit makes clear that Elsevier is still second to none in asserting ownership over what continues to be an increasing share of this body of work, as well as its underlying infrastructure, given its development and acquisition of indexes, repositories, and publishing systems. Elsevier and the four other big corporate publishers are increasing their market share of the journal subscription market, accompanied by their expanding commercialization of open access, resulting profit margins higher than almost any other business – all at the expense of universities and research funders (Larivière, Haustein and Mongeon 2015). It is enough to raise questions

about whether intellectual property law is still serving its original intent 'to promote the Progress of Science and useful Arts,' as succinctly put in the U.S. Constitution.

This is hardly the first time that learned works have become entangled in economic and legal machinations, and this paper turns for historical inspiration and lessons to the outsize role that scholarly publishing played in the early eighteenth-century formation of modern intellectual property law in Britain. The British Parliament passed of the Statute of Anne 1710, initiating the age of copyright by enshrining in law the author's right to copy a work for a limited term of up to twenty-eight years. This landmark piece of legislation was entitled, in brief, 'An Act for the Encouragement of Learning,' and therein lies my tale. *Learning*, at the time, included the more basic aspects of literacy and learning to read, but it also encompassed the thoroughly scholarly concerns associated with learned publishing—namely, scholars' access to information for research purposes. Historians covering the Statute of Anne have generally noted that, while it refers to 'learning' and 'authors,' printers and booksellers actually profited from the changes it implemented (and so the historic parallel begins). Scholars tend to be divided on the authenticity of the act's emphasis on learning. John Feather, for example, refers to the Statute of Anne's encouragement of learning as superficial 'window dressing' and that it is 'difficult to quantify'; he attests that the act 'ensured the continued dominance of English publishing by a few London firms' (1980, 20, 36, 37). On the other hand, Ronan Deazley holds that with this act 'Parliament focused upon the author's utility in society in the encouragement and advancement of learning,' thereby upholding 'pre-eminence of the common good' as copyright's organizing principle; however, he also allows that 'Parliament bowed to the lobbying of the book trade in passing the Statute of Anne' (2003, 108, 133; 2010, 45). The mixed results, between what is encouraged and how it is exploited (by the book trade) should have a familiar ring to it.

For my part, I trace how learning came to play a prominent part in the Statute by examining the interventions of the philosopher John Locke, who actively lobbied Parliament to improve access to scholarly works in the early 1690s. The role he assumed of public defender for scholarly interests in the property rights struggle associated with printing is worth considering for theoretical and practical reasons. Locke offers a natural law theory of property that is based on a world given to humankind in common from which property is acquired through the exertion of labor within natural constraints, so that all will benefit. This theory forms a key chapter in his *Two Treatises of Government* (published anonymously in 1689), and continues to be a major influence on intellectual property jurisprudence – especially on the nature and limits of ownership rights.¹ Scholars involved in the much-contested interpretations of Locke's theory of property in the *Two Treatises* seldom consider the later suggestions he made on intellectual property (before it was called such) as part of that 1690s lobbying effort. I contend that his earlier theory of property provides context for his later legislative suggestions, which carefully balance authors' ownership rights with the distinctive access and use rights that facilitate scholarship (which later find their place in the Statute of Anne).

Locke began lobbying on January 2, 1693, with a letter that he wrote to his longstanding friend Edward Clarke, then a Whig Member of Parliament from Taunton, in which he expresses his concerns about the current state of the book trade. At the time, Parliament was considering another renewal of the thirty-year-old Licensing of the Press Act of 1662, which was initially a continuation of English press regulation that began with Henry VIII in 1538.² The Act enabled the crown to grant members of the Stationer's Company perpetual monopolies for titles and book genres in exchange for the press' assistance in ensuring state and church censorship. With the Restoration, which placed Charles II on the throne in 1660, a chastened Parliament (following the period of Oliver Cromwell's interregnum) instituted in 1662 'An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating of Printing and Printing Presses.' The Press Act of 1662, as it was known, restricted printing to London, York, and, in recognition of the universities' historic rights, Oxford and Cambridge.³ The Act continued the close censorious and monopolistic association of the Crown, the Church, and the Stationers' Company. The Whig opposition to Charles II regarded it as another instance of Restoration excess. Parliament allowed the act

¹ Joris Deene's work exemplifies the common scholarly assumption regarding Locke's contribution to copyright law: 'The criterion of intellectual effort as a basis for human appropriation of one's own creation has its origins in John Locke's Labor Theory as Described in the *Second Treatise of Government* (1690): 'Every Man has a Property in his own Person... The Labor of his Body, and the Work of his Hands, we may say, are properly his' (2010, 141). On Locke's continuing influence on intellectual property jurisprudence, see, for example, Merges (2011, 31–67).

² The licensing of books can be traced back to Henry VIII's proclamation on November 16, 1538 requiring, in light of 'wronge teacheinge and naughtye printed bokes,' that books receive 'his maiesties special licence' (quoted in Pollard 1916, 22–23).

³ Raymond Astbury reports that during the 1690s, the universities entered into an agreement with the Stationers' Company not to compete on the sales of English Stock-books, which included cheap editions of schoolbooks, psalm-books, and almanacs, further reflecting the universities' struggle to find the right trade off of privileges to make a go of scholarly publishing (1978, 297n2).

to lapse in 1679, only to renew it in 1685, when Charles's controversial (which is to say Catholic) brother, James II, took the throne and renewed the act for another seven years. The act initially survived the Glorious Revolution of 1688 that deposed James and saw William III and Mary crowned. Following the passing of the Bill of Rights in 1689, the Whigs increasingly sought to put an end to press regulation as a regrettable carryover of the *ancien régime*.

In his 1693 letter to Clarke, Locke asked his friend to consider the damage done by the book monopolies granted by the Press Act to the Stationers' Company, the guild representing London's printers and booksellers. In particular, Locke addresses in his letter the effects of the broad monopolies granted to printers and booksellers by the Stationers' Company, as allowed by the Press Act of 1662, as it impeded access for British scholars to improved and imported editions of classical authors:

I wish you would have some care of Book buyers as well as all of Book sellers, and the Company of Stationers who haveing got a Patent for all or most of the Ancient Latin Authors (by what right or pretence I know not) claime the text to be their and soe will not suffer fairer and more correct Editions than any thing they print here or with new Comments to be imported ... whereby these most usefull books are excessively dear to schollers. (1976–89, 4: 614–615)

Locke's letter was too little too late: the Press Act was renewed in March 1693.⁴ It was extended, however, for only two years, indicating Parliament's lack of enthusiasm for book licensing, despite the active support of the Stationers' Company. Locke must have understood it as such, as he decided to continue his campaign against any further renewal of the act. To achieve that end, he Locke worked not only with Clarke, but involved John Freke, a lawyer and Whig lobbyist, and John Somers, who held the parliamentary post of lord keeper of the great seal and was a member of the Privy Council.

In 1694, Clarke was appointed to the House of Commons committee to review those laws that were about to expire, the 1662 Press Act among them. To assist Clarke in preventing the renewal, Locke prepared a memorandum for his friend which begins by sounding the familiar trumpet of a free press: 'I know not why a man should not have liberty to print what ever he would speake' (1997, 331). To require that a license to print a work be obtained in advance was like 'gagging a man for fear he should talk heresy or sedition' (331). All that was required, he proposed, was that the printer or author be clearly identified in the book to ensure that someone will 'be answerable for' any legal transgressions (331). As things stood, 'by this act England loses in general,' and as he puts it, 'Scholars in particular are ground [down] and nobody gets [anything] but a lazy ignorant Company of Stationers. To say no worse of them. But anything rather than let mother church be disturbed in her opinion or impositions, by any bold voice from the press' (335). For Locke, the issues of freedom of speech and scholarly inquiry were closely aligned in ways that, if both are supported, would benefit Britain as a whole.

Locke then moved into what matters to him at least as much as press freedom: the current 'restraint of printing the classic authors' (1997, 334). He asked with a touch of sarcasm about the value of such restraint: 'Does [it] any way prevent the printing of seditious and treasonable pamphlets, which is the title and pretense of this act' (334)? He did not object to the prosecution of sedition, though he might well have cited his earlier political involvement in the attacks on Charles II during the Exclusion Crisis. Rather, what bothered Locke was how poorly the Stationers' Company serves learning: 'Scholars cannot but at excessive rates have the fair and correct editions of these books and the comments [commentaries] on them printed beyond [the] seas'; they are left with 'scandalously illprinted' local editions, given the lack of competition (332). To bring the point home, Locke referred to an imported edition of 'Tully's Works' (Marcus Tullius Cicero), which he found to be 'a very fine edition, with new corrections made by Gronovius, who takes the pains to compare that which was thought the best edition'; the work was 'seized and kept a good while in [the Company's] custody,' before it was sold with the booksellers 'demanding 6s. 8d. per book' (332–33). The problem is that broadly stated patents were being issued by the Stationers' Company, with the support of the Crown, on works of Cicero, for example, which a printer could exercise without end or limit.

Locke's overarching concern for scholars' rights to access led him, finally, to a backhanded commendation of at least one of the current act's clauses: the requirement that a free copy of each new book be sent to 'the public libraries of both universities' (1997, 336). This university-access policy originated in Britain with the

⁴ In the House of Lords, eleven dissenting Peers issued a statement of protest against the act, as it 'subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary, and, perhaps ignorant, Licenser, destroys the Properties of Authors in their Copies; and sets up many Monopolies' (*Complete Collection of the Lords' Protests* 1768, 163).

1610 agreement that Oxford patron Thomas Bodley secured from the Stationers' Company to supply the university library, which Bodley was in the process of restoring. The deed that Bodley secured reads that the Stationers' Company of London 'out of zeale to the advancement of good learning... granted to the University of Oxford, for ever, one copy of every new book in quires that they might borrow or copy any book deposited, for reprinting' (quoted in Philip 1983, 27).⁵ Locke complains that the 1662 Press Act's deposit requirement 'will be found to be mightily if not wholly neglected' by the Stationers' Company, however keenly it might otherwise support the act' (336). From my perspective, the book deposit policy, which applied to the 'public' or university libraries at Oxford and Cambridge, demonstrates longstanding recognition of how the realm of learning is seen to both stand apart from and be supported by the rest of the economy.

In the face of the perpetual monopolies granted to the Stationers' Company, Locke calls for term limits on intellectual property rights, much as he qualified property rights in the *Second Treatise*. There, he held that one could hold property in something if there was 'enough, and as good, left in common for others' and that holding such property did not lead to its spoilage or waste (1988, 2.27). In the case of books, he sought to limit the ability to purchase or sell rights in a work: 'Those [printers and booksellers] who purchase copies from authors that live now and write,' he states in his Licensing Act memo, 'it may be reasonable to limit their property to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years' (1997, 337).⁶ This would encourage the publication of new editions of older works, in contrast to the current situation in which 'the Company of Stationers have a monopoly of all the classic authors' (1997, 332). Locke also objected to import restrictions on books, and Clarke framed his friend's complaint to the House of Lords in Lockean terms of spoilage and waste by pointing out that, for book importers, restrictions and delays meant that 'part of his Stock lie dead; or the Books, if wet, may rot and perish' (Common Reasons 1695, 546). When Locke bemoans in his memo that the act is 'so manifest an invasion on the trade, liberty, and property of the subject,' what appear to be under siege are the intellectual property rights of the learned and learning (1997, 336). As Locke saw it, access to this literature must be facilitated rather than impeded by unfair trade practices such as perpetual monopolies and book blockades: 'That any person or company should have patents for the sole printing of ancient authors,' he writes in the memo, 'is very unreasonable and injurious to learning' (1997, 337).⁷

In 1695, not long after Locke's memo, Clarke began to work with fellow legislator Robert Harley, Earl of Oxford, on a 'Bill for the Better Regulating of Printing and Printing Presses.' Their proposed bill had the virtue of exempting from state licensing books that dealt with science, arts, and heraldry. It would not sustain previously granted privileges, whether the Stationers' Company monopolies or the universities' printing rights.⁸ Locke was not involved in the draft of Clarke and Harley's first go at the new bill, but they sent him a copy of it and he soon proposed amendments. Although a number of Locke's suggestions for the bill are lost, what remains in his papers makes clear his newfound concern for authors' intellectual property rights. He proposes to Clarke that the new bill 'secure the author's property in his copy' for a limited time (1976–89, 5, 795). This property in a work could be safeguarded, he suggests, by a registration process: upon printing, a book was first to be deposited '*for the use of the publique librariys of the said Universities,*' after which the bill 'shall vest a privileg in the Author ... for __ years from the first edition' (796). This time, the exact number of years was left up to Parliament.

While Locke argues for authors' intellectual property rights, the registration process he recommends could, at the same time, also be said to protect the rights of learning. Consider how Locke frames his case: books are intended for the *use* of others (through, for example, the public libraries of the universities), and authors are limited in their privileges. While still offering a financial incentive for authors, the limited copyright term also protected the use of their works through the libraries. Rights are defined with an eye to the advancement of learning, much as Locke proposed that authors have a right over subsequent editions of their work. At

⁵ Philip calculates that this deposit system originally brought in about twenty percent of what was being published in 1615–16 (1983, 28). The idea, which came from Bodley's librarian Thomas James, may have been inspired by François I's Montpellier Ordinance of 1537 requiring (if seldom honored) the placing of books in the French king's library before they were sold (Partridge 1938, 18).

⁶ Joseph Lowenstein judges that Locke's 'opposition to perpetual copyright is one of the most consequential aspects of Locke's critique of the licensing bill,' while pointing out that it was undoubtedly inspired by the 'limited-term privilege' of 'the old institution of the patent' (2002, 230).

⁷ Locke continues: 'Tis very absurd and ridiculous that anyone now living should pretend to have a property in or a power to dispose of the property of any copies or writings of authors who lived before printing was known and used in Europe' (1997, 337).

⁸ Among those calling for a renewal of the Licensing Act was John Wallis, book licenser and professor of geometry at Oxford, who warned that the university's loss of privileges in printing profitable books would leave it unable to subsidize costly scholarly works (a refrain heard from university presses today) (Astbury 1978, 322).

the time of the bill's drafting, he was likely revising the third editions of both *An Essay Concerning Human Understanding* (1689) and *Two Treatises*, likely leading him to consider that the author has the ultimate sense of responsibility for and interest in correcting and improving a work with each new edition. The Stationers' Company understandably lobbied vigorously against Clarke and Harley's 'Better Regulating of Printing' bill. The Company, which sought a straightforward renewal of the Licensing Act of 1662, protested that the reforms proposed by Clarke and Harley were 'wanting as to the Security of [our] Property,' which was a fair enough estimation of their intent to eliminate monopoly privileges (quoted in Astbury 1978, 312). Drawing on the theme of the potential loss to learning articulated in Locke's memorandum, Clarke retaliated by circulating objections to the Company's unfair and illogical trade practices. The bill stalled and died on the floor of the Commons in 1695.

The House of Commons and the House of Lords still took the dramatic step of voting not to renew the Licensing of the Press Act that year. The act expired on May 3, 1695, putting an end to well over a century of oppressive and easily corrupted press regulation. The great nineteenth-century historian and politician Thomas Babington Macaulay later declared that the act's expiry meant nothing less than that 'English literature was emancipated, and emancipated for ever, from the control of the government' (1856, 337). Locke's part in the defeat of the Licensing Act led his biographer, Maurice Cranston, to praise his subject's political realism: 'unlike Milton, who called for liberty in the name of liberty, Locke was content to ask for liberty in the name of trade, and unlike Milton, he achieved his end' (1957, 387).⁹ Yet I would conclude that Cranston sells short the degree to which Locke pursued the liberty of the press, inspired by his interests in advancing learning.

Piracy's Interlude

Immediately following the expiry of print licensing in 1695, upstart printers and booksellers flooded the streets of London with newly conceived broadsides and gazettes (which included the first daily newspaper and as many as eighteen newspapers published in the city by 1709), cheap pirated editions of books and magazines, and scandalous and obscene pamphlets (Deazley 2004, 11). The statesmen Sir William Trumbull wrote in a letter at the time that 'since the Act for Printing Expired London swarms with seditious Pamphletts' (quoted in Astbury 1978, 317). As Locke had predicted when he denounced book licensing, the existing libel and blasphemy laws were brought to bear on transgressive publications with search warrants and arrests. New laws were also added, as Kemp (2012, 26–27) explains, such as the 1698 'Act for the More Effectual Suppressing of Blasphemy and Prophaneness.' The Stationers' Company denounced, with increasing rancor and outrage, a market flooded with cheap reprints of its titles. Since the 1680s, such works had been accused of being acts of *piracy*, having 'stolen' titles assigned to others in their Register (Johns 2009, 41).¹⁰ It was, in fact, a free market in print materials. And the Stationers' Company turned to Parliament for a remedy, only to find that reintroducing regulation was an uphill battle.

Following the Licensing Act's expiry, the Company promoted one unsuccessful parliamentary bill after another, with the Church of England, Oxford University, and journeymen printers also submitting petitions for print regulation (Feather 1980, 21–24). In 1704 (the year of Locke's death), for example, a 'Bill to Restrain the Licentiousness of the Press' was introduced into Parliament. When that did not succeed, the Company decided to take another tactic by embracing the language of learning, even though it had opposed book licensing by Locke and before that Milton in his 1644 *Areopagitica* (1958, 149). The theme had just been revitalized by the novelist, pamphleteer, and journalist Daniel Defoe in his 1704 *Essay on the Regulation of the Press*. The book was full of praise for the French King Louis XIV for the 'Encouragement' he had 'given to Learning' through the liberty of the press in France, contending that the English '*License of the Press*' was not consistent with 'the Encouragement due to Learning' (1704, 9, 11).¹¹

Beginning in 1706, three anonymous petitions were presented before Parliament, likely with the Stationers' Company support, starting with the one-page 'Reasons Humbly Offer'd for a Bill for the Encouragement

⁹ Astbury: 'Clearly, the Commons' objections owed much to Locke's Memorandum of 1694, even though his expressions of animosity towards Court and Church as the leading champions of preprinting censorship were expunged' (1978, 315). Deazley notes that 'the parallels between Locke's commentary and those reasons presents by the Commons to the Lords for refusing to renew the 1662 Act are striking' (2004, 4).

¹⁰ On the origins of the term *piracy*, John Fell refers, in a 1674 letter, to the Stationers' Company as 'land-pirats,' for treading on the university's 'propertie in Printing' (quoted in Johns 1989, 344). The *Oxford English Dictionary* credits J. Mennes' *Recreation for Geniuses Head-peeeces* (1654) with the first use of piracy in this sense.

¹¹ Rose reviews Defoe's extensive writings as a journalist on this theme during this period, commenting at one point on Defoe's Lockean conception of authorship (1993, 38).

of Learning, and the Improvement of Printing' (1706). This petition opens with a concern for the 'Many Learned Men [who] have been at great Pains and Expence in Composing and Writing of Books' and takes a Lockean stance on the author's 'undoubted Right to the Copy of his own Book, as being a Product of his own Labor.' The petition reflects the concern that 'Learned Men will be wholly Discouraged from Propagating the most useful Parts of Knowledge,' given how easily their work could be pirated without state oversight. The petition closes with the requisite image of the bereft author's widow who, in the case 'of the late Archbishop Tillotson,' might have been generously provided for by 'Booksellers' were it not for print piracy ('Reasons Humbly Offer'd' 1706). After more than a dozen such petitions, proposals, and bills had failed (since licensing had ended in 1696), the interlude of unregulated printing was about to come to an end in England.

The Statute of Anne 1710

Print piracy was the driving force behind the Statute of Anne in 1710; however, this legislation was not merely a legal remedy for a greatly disrupted, if vibrant, marketplace. Nor was it a return to the seventeenth-century compact among Crown, Church, and Guild that had underwritten book licensing legislation. This new legislation combined authors' natural rights to their work with the public good of learning. The initial draft of the act, introduced on January 11, 1710, was entitled the 'Bill for the Encouragement of Learning, and for the Securing of Property of Copies of Books to the Rightful Owners thereof.' It refers to 'Books and Writings' as 'the undoubted Property' of authors, with such property regarded as 'the Product of their Learning and Labor,' with labor being a key element to Locke's theory of an ownership claim (cited by Deazley 2008). In the final version of the act, the author's right of ownership is left implicit. It is not what is being legislated. As such, ownership is left to natural and common law, while the act determines that from such ownership a limited-term privilege of monopoly follows. Also worth noting is that in its final form, the act's title no longer sets out the encouragement of learning *and* the securing of property rights as two distinct purposes, but makes the encouragement of learning the very principle behind granting such property rights. The statute becomes '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.' And finally, the switch from 'securing' to 'vesting' suggests that the act is not about pinning down a right but about placing a right-to-copy in the hands of authors for a limited term.

The Statute, passed on April 5, 1710, opens with the Stationers' Company's complaint that 'printers, booksellers, and other persons have of late frequently taken the liberty of printing ... books and other writings, without the consent of the authors or proprietors of such books and writings,' which leads 'too often to the ruin of them and their families.'¹² Authors are characterized as 'learned men' who strive to 'compose and write useful books.'¹³ Thus, the author (or assignee) 'shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years.' The statute requires that books 'before such publication, be entered in the register book of the Company of Stationers, in such manner as hath been usual' (Statute of Anne 1710). What had been usual was the granting of a monopoly right in perpetuity, compared to what was now to be a fourteen-year term limit for the monopoly rights. Such rights were regarded as a temporary 'encouragement' or incentive, intended to ward off 'ruin' while inspiring authors to prepare additional useful books.

Of the roughly ten provisions that follow in the statute, four set out the distinctive rights of learning, or 'the public interest,' as William Cornish frames them (2010, 23–24). Two of these measures spoke directly to Locke's concerns. The first addresses the price of learned books: 'The Vice-Chancellors of the Two Universities... the Rector of the College of *Edinburgh* ... have hereby full Power and Authority ... to Limit and Settle the Price of every such Printed Book... as to them shall seem Just and Reasonable' (Statute of Anne 1710). This power to roll back book prices was granted to the archbishop and other officials, but price controls were clearly a right of particular value for faculty and students in the context of the university. This price-control clause was repealed in 1735, likely through bookseller lobbying, and without having been tested in the courts (Feather 1980, 20). Still, it attests to a parliamentary interest in protecting access

¹² Feather establishes the degree to which the Stationers' Company influenced the final wording of the statute: the Company did bear the expenses associated with seeing the statute through Parliament, although it was not allowed to change the term limit on copyright (1980, 36).

¹³ This language dates back to the Company's 1706 petition, which begins, 'Whereas many Learned Men have been at great Pains and Expence ...' (*Reasons Humbly Offer'd*, 706). While any author was to a degree learned in early eighteenth-century Britain, the Company had in this earlier petition referred to 'a Gentleman [who] has spent the greatest Part of his Time and Fortune in a Liberal Education' (706.).

to learned works in a bill otherwise underwritten by the Stationers' Company. The second new measure in favor of learning, and also a point advocated by Locke, made it clear that with the reinstatement of print regulation, nothing in the act 'shall be construed to extend to prohibit the importation, vending, or selling of any books in Greek, Latin, or any other foreign language printed beyond the seas' (Statute of Anne 1710).

The other two other measures in support of learning were brought forward from the Licensing Act of 1662. One was a reinstatement of the book deposit policy. It required printers to provide 'Copies of each Book ... upon the best Paper' to what was, this time, a wider range of university and college libraries: 'the Libraries of the Universities of Oxford and Cambridge, the Libraries of the Four Universities in Scotland, the Library of Sion College in London, and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh' (Statute of Anne 1710). As Bell explains (1977), while the power of vice chancellors to re-set book prices, as outlined in the statute, may have been lost today, the policy of legal deposit for books has only grown into a common legislative requirement throughout the world. The final measure in the statute declares that nothing herein should 'prejudice or confirm any right that the said universities' had 'to the printing or reprinting any book or copy already printed, or hereafter to be printed' (Statute of Anne 1710). Those rights had historically included Bibles and almanacs by which the university presses—often by leasing out these rights—cross-subsidized scholarly publications, although not without numerous legal disputes with the Stationers' Company. Much as with the libraries and legal deposit, university presses were recognized as standing apart from the common book trade and worth protecting as such.

The Statute of Anne certainly refers more often to 'the author of any book' and 'any such book' than it does to learned men and learned books. It refers to the rights of the 'proprietors of such books and writings,' which is to say the booksellers and printers to whom authors commonly sold their work, but also any 'other person or persons' to whom such rights were assigned. Learning plays a minority role in the statute, if still larger than it had previously been in the nearly two centuries of English book regulation. As Mark Rose suggests, learning had its place alongside 'the emergent ideology of the market' – the main thrust of the statute that was replacing the 'monopolistic system of privilege' among a select set of printers and booksellers (1993, 33–34). The Stationers' Company, having thrived under the old system of privilege, was fully prepared to compete in a book market based on authors' rights to exercise short-term monopolies of fourteen years that could be renewed once (which the booksellers succeeded in having lengthened over time). Still, the statute that was to open the book market and create the age of copyright also granted distinct privileges of access to learning; that is, rights, perpetual and without limit, to fairly-priced books, imported books, books on library shelves, new and better editions from abroad or books printed at university presses.

The guild members of the Stationers' Company were undoubtedly the principal financial beneficiaries of the new economic order brought about by the statute; however, it hardly put an end to print piracy, given it did not extend to Ireland – among other reasons (Ransom 1956, 195). At the same time, the members continued to act for decades on a number of their older (perpetual) monopolies, at least until the courts, in *Donaldson v Becket*, put an end to their assumed rights in 1774.¹⁴ Yet the following year, the British Parliament further intervened in the book market, again on the side of learning, by passing a 'Bill for Enabling the Two Universities to Hold in Perpetuity the Copy Right in books, for the advancement of useful Learning, and other purposes of Education, within the said Universities.' A decade or so later, the Statute of Anne inspired a similarly spirited intellectual property clause in the US Constitution in 1787, empowering Congress to pass laws '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' (U.S. Const. 1.8.8).¹⁵ This concept of copyright as a legal vesting of limited-term rights in the author was to slowly spread around the world – if not without much controversy, complaint, and piracy, amid the ongoing negotiations of international trade bodies and national adoptions of more recent legal elements, such as 'fair use' (Matthews, 2003).

Locke's lobbying efforts on behalf of learning may have played a relatively modest role in the formation of modern copyright law. Yet his involvement in the parliamentary process, with backing from the voices

¹⁴ See Rose on the works of Milton and Shakespeare continuing to be subject to perpetual monopolies (2003, 77); and Deazley (2003) on the myth of a perpetual common law copyright to which *Donaldson v Becket* put an end.

¹⁵ As Oren Bracha put it, 'When, in the late eighteenth century, Americans created their first copyright regime – first through state enactments and then by the federal 1790 Copyright Act – they used the British Statute of Anne as their doctrinal blueprint. Despite a few changes and omissions, the degree of similarity on the level of basic concepts, structure, and text between the 1790 Copyright Act and the 1710 British statute is remarkable' (2010–11, 877–78).

of Milton, Defoe, and others, does appear to have influenced the prominent part that learning came to have within the origins of copyright law. The result was a balancing of interests and rights among authors, scholars (also as authors), printers, and booksellers. Three centuries later, with the emergence of the digital era, a new order of scholarly publishing is facing a similarly powerful commercial force. Much as Locke did earlier, scholars and librarians are speaking out and lobbying today in favor of increased access to needed works and resources. Still, in presenting these parallels, I am cognizant of Kathy Bowrey and Natalie Fowell's caution that 'faith in any enduring legal truth residing in copyright law to resist commodification is ill-founded and politically naïve' (2009, 209). What Locke worked toward was placing some legislative limits on the (inevitable) commodification of scholarly works, with the Statute of Anne creating what was, in effect, a special intellectual property class for further protecting works of learning. This example of legal reform and remedy is worth considering today, when it appears as if few legal limits exist for publisher pricing and profits in the field of scholarly publishing. While in this conclusion, I can only suggest in passing what a modern-day Locke might press for – as he might well advocate legislating the creation of a distinct intellectual property class for research and scholarship to ensure public access, perhaps by following the example of public utility regulations that seek fair access, pricing, and competition.¹⁶ At the very least, the history of the Statute of Anne 1710 should encourage those of my colleagues who are speaking up in defense of a greater openness of learning, while seeking ways of balancing its interests with those of commerce, knowing that this was the original intent of copyright law and is no less worthy a goal today.

Acknowledgement

This piece is based on work included in the forthcoming book, *The Intellectual Properties of Learning: A Prehistory from Saint Jerome to John Locke* (University of Chicago Press). It has benefitted from the comments and suggestions of two reviewers as well as this journal's editorial assistant Samantha MacFarlane.

Competing Interests

The author has no competing interests to declare.

References

- A Complete Collection of the Lords' Protests, from the First Upon Record in the Reign of Henry the Third, to the Present Time*. 1768. Vol. 1. London.
- Archambault, Éric, Didier Amyot, Philippe Deschamps, Aurore Nicol, Françoise Provencher, Lise Rebout, and Guillaume Roberge. 2014. *Proportion of Open Access Papers Published in Peer-Reviewed Journals at the European and World Levels—1996–2013*. Science-Metrix. <http://www.science-metrix.com/en/publications/reports?page=2#/en/publications/reports/proportion-of-open-access-papers-published-in-peer-reviewed-journals-at-the>.
- Astbury, Raymond. 1978. 'The Renewal of the Licensing Act in 1693 and its Lapse in 1695.' *The Library*, s5–33(4): 296–322. DOI: <https://doi.org/10.1093/library/s5-XXXIII.4.296>
- Bell, Richard. 1977. 'Legal Deposit in Britain (Part 1).' *Law Librarian* 8(1): 5–8.
- Bowrey, Kathy, and Natalie Fowell. 2009. 'Digging Up Fragments and Building IP Franchises.' *Sydney Law Review* 31(2): 185–210. <http://search.informit.com.au/fullText;dn=20093203;res=AGISPT>
- Brown, Stephen J, and David Sumner Sibley. *The Theory of Public Utility Pricing*. Cambridge University Press, 1986. DOI: <https://doi.org/10.1017/CBO9780511666773>
- Carroll, Michael W. 2009. 'One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights.' *Ohio State Law Journal*, 70: 1361–1434.
- 'Commons Reasons for Disagreeing to the Clause for Reviving the Printing Act.' 1695. *Journal of the House of Lords* 15(1695): 546. <http://www.british-history.ac.uk/lords-jrnl/vol15/pp544-558#h3-0010>. Archived at: <https://perma.cc/W23Y-E3FN>.
- Cornish, William. 2010. 'The Statute of Anne 1709–10: Its Historical Setting.' In: *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, edited by Lionel Bently, Uma Suthersanen, and Paul Torremans, 14–25. Cheltenham: Edward Elgar.

¹⁶ On creating a separate class of intellectual property with a tailored set of rights, see Carroll (2009); on ways of regulating pricing of public utilities, see Brown and Sibley (1986); on introducing a greater sense of competition for article processing charges (APC), see West, Bergstrom, and Bergstrom (2014); and on the global spread of legislative change, see Yu (2017) on 'fair use.'

- Cranston, Maurice. 1957. *John Locke: A Biography*. Oxford: Oxford University Press.
- Deazley, Ronan. 2003. 'The Myth of Copyright at Common Law.' *Cambridge Law Journal* 62(1): 106–133. DOI: <https://doi.org/10.1017/S0008197303006251>
- Deazley, Ronan. 2004. *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775)*. Oxford: Hart.
- Deazley, Ronan. 2008. 'Commentary on the Statute of Anne 1710.' In: *Primary Sources on Copyright (1450–1900)*, edited by Lionel Bently and Martin Kretschmer. http://www.copyrighthistory.org/cam/commentary/uk_1710/uk_1710_com_272007105424.html. Archived at: <https://perma.cc/V8VY-R5QG>.
- Deazley, Ronan. 2010. 'What's New About the Statute of Anne? Or Six Observations in Search of an Act.' In: *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, edited by Lionel Bently, Uma Suthersanen, and Paul Torremans, 26–33. Cheltenham: Edward Elgar. DOI: <https://doi.org/10.4337/9781849806428.00010>
- Deene, Joris. 2010. 'The Influence of the Statute of Anne on Belgian Copyright Law.' In *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, edited by Lionel Bently, Uma Suthersanen, and Paul Torremans, 136–43. Cheltenham: Edward Elgar. DOI: <https://doi.org/10.4337/9781849806428.00017>
- Defoe, Daniel. 1704. *An Essay on the Regulation of the Press*. London: Elsevier. 2017. 'Spotlight on Open Access.' <https://goo.gl/oiVa2d>.
- Feather, John. 1980. 'The Book Trade in Politics: The Making of the Copyright Act of 1710.' *Publishing History* 8: 19–44.
- Jamali, Hamid R, and Majid Nabavi. 2015. 'Open Access and Sources of Full-Text Articles in Google Scholar in Different Subject Fields.' *Scientometrics* 105(3): 1635–1651. DOI: <https://doi.org/10.1007/s11192-015-1642-2>
- Johns, Adrian. 1989. *Nature of the Book: Print and Knowledge in the Making*. Chicago: University of Chicago Press.
- Johns, Adrian. 2009. *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Chicago: University of Chicago Press. DOI: <https://doi.org/10.7208/chicago/9780226401201.001.0001>
- Kemp, Geoff. 2012. 'The 'End of Censorship' and the Politics of Toleration, from Locke to Sacheverell.' *Parliamentary History* 31(1): 47–68. DOI: <https://doi.org/10.1111/j.1750-0206.2011.00282.x>
- Larivière, Vincent, Stefanie Haustein, and Philippe Mongeon. 2015. 'The Oligopoly of Academic Publishers in the Digital Era.' *PLoS One* 10.6: e0127502. DOI: <https://doi.org/10.1371/journal.pone.0127502>.
- Locke, John. (1690) 1988. *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press. DOI: <https://doi.org/10.1017/CBO9780511810268>
- Locke, John. (1694–95) 1997. 'Liberty of the Press (1694–5).' In: *Political Essays*, edited by Mark Goldie, 329–38. Cambridge: Cambridge University Press.
- Locke, John. 1976–89. *The Correspondence of John Locke*. Edited by Esmond Samuel De Beer. 8 vols. Oxford: Oxford University Press.
- Lowenstein, Joseph. 2002. *The Author's Due: Printing and the Prehistory of Copyright*. Chicago: University of Chicago Press. DOI: <https://doi.org/10.7208/chicago/9780226490410.001.0001>
- Macaulay, Thomas Babington. 1856. *The History of England, from the Accession of James II*. Vol. 4. Philadelphia: Butler.
- Matthews, Duncan. 2003. *Globalising Intellectual Property Rights: The TRIPS Agreement*. London: Routledge.
- Merges, Robert P. 2011. *Justifying Intellectual Property*. Cambridge, MA: Harvard University Press. DOI: <https://doi.org/10.4159/harvard.9780674061125>
- Milton, John. (1644) 1958 'Areopagitica.' In: *Prose Writings*, edited by K. M. Burton, 145–85. London: Dent.
- Partridge, R. C. Barrington. 1938. *The History of the Legal Deposit of Books Throughout the British Empire: A Thesis Approved for the Honours Diploma of the Library Association*. London: Library Association.
- Philip, Ian. 1983. *The Bodleian Library in the Seventeenth and Eighteenth Centuries*. Oxford: Oxford University Press, 1983.
- Pollard, Alfred W. 1916. 'The Regulation of the Book Trade in the Sixteenth Century.' *Library* 7(25): 22–23. DOI: <https://doi.org/10.1093/library/s3-VII.25.18>
- Ransom, Harry. 1956. *The First Copyright Statute: An Essay on an 'Act for the Encouragement of Learning,' 1710*. Austin, TX: University of Texas Press.
- 'Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London (1706).' In: *Primary Sources on Copyright (1450–1900)*, edited by Lionel Bently and Martin Kretschmer. http://www.copyrighthistory.org/record/uk_1706. Archived at: <https://perma.cc/B6P2-NL7V>.

- Rose, Mark. 1993. *Authors and Owners: The Invention of Copyright*. Cambridge, MA: Harvard University Press.
- Rose, Mark. 2003. 'Nine-tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain.' *Law and Contemporary Problems* 66(1): 75–87. <http://www.jstor.org/stable/20059172>.
- Schiermeier, Quirin. 2017. 'US court grants Elsevier millions in damages from Sci-Hub.' *Nature*, June 22 2017. DOI: <https://doi.org/10.1038/nature.2017.22196>
- 'The Statute of Anne, April 10, 1710.' 2008. The Avalon Project: Documents in Law, History and Diplomacy. http://avalon.law.yale.edu/18th_century/anne_1710.asp. Archived at: <https://perma.cc/4ZGH-J6HS>.
- Yu, Peter K. 2017. 'Customizing Fair Use Transplants (October 13, 2017).' Unpublished Texas A&M University School of Law Legal Studies Research Paper No. 17–78. <https://ssrn.com/abstract=3052158>.
- West, Jevin D., Theodore Bergstrom, and Carl T. Bergstrom. 2014. 'Cost effectiveness of open access publications.' *Economic Inquiry* 52(4): 1315–1321. DOI: <https://doi.org/10.1111/ecin.12117>

How to cite this article: Willinsky, John. 2017. When the Law Advances Access to Learning: Locke and the Origins of Modern Copyright. *KULA: knowledge creation, dissemination, and preservation studies* 1(1): 2. DOI: <https://doi.org/10.5334/kula.8>

Submitted: 15 May 2017

Accepted: 29 August 2017

Published: 30 November 2017

Copyright: © 2017 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



KULA: knowledge creation, dissemination, and preservation studies is a peer-reviewed open access journal published by Ubiquity Press

OPEN ACCESS The Open Access logo, which is a stylized 'A' inside a circle.