

Locke's (Own) Literary Property

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John Locke's philosophy on the origins and justification for property rights in natural law has long played an influential role in modern copyright theory. There have been a number of important interpretations of Locke's philosophy of property rights as applied to intellectual property, by Justin Hughes, Wendy Gordon, Fred Yen and others.² We also know a fair amount about Locke's reactions to the legal and political developments of his day in copyright's evolution. During his life, Locke expressed views on the expiration of the Licensing Act of 1662, which he desired, and on the deleterious effect of the Stationers' monopoly on classical literary property.³ He corresponded with friends at some length regarding these issues and commented on draft bills that were before Parliament in the 1690s. Book historians and legal historians continue to find his comments to be of note. Ronan Deazley has summarized Locke's view as one in which "what property existed in a book was to be statutorily defined as well as temporally limited in extent."⁴ Raymond Astbury saw in Locke a perspective that considered the needs of authors and readers at an individual level: "[T]hough Locke spelt out in detail the ill-effects on the book trade, and on authors and readers, of the monopoly system and powers . . . of the Stationers' Company, most of his complaints reveal directly or by implication his concern for the intellectual, economic, and social freedoms of the individual."⁵

How, then, did Locke himself navigate the challenges of the book trade as an individual author? This project explores the relationship between Locke's philosophical views regarding (literary) property and his actual commercial dealings with publishers, as evidenced by a series of his contracts that have survived in the papers of the Bodleian Library.⁶ One interest of the project is

¹ Professor of Law, Suffolk University Law School. J.D., University of Virginia, 2009; PhD Harvard University, 2004; A.B. Princeton University, 1996. This project will be an expansion of a topic I have briefly covered in a previous article, *The Transactional Origins of Authors' Copyright*, 40 COLUMBIA JOURNAL OF LAW & THE ARTS 175 (2016). In that article, I considered Locke's publication contracts alongside the contracts of several other authors and viewed the relationship between Locke's philosophy and his commercial dealings as beyond the scope of the Article. In this piece, I will return to the same raw material with a view toward exploring that relationship through a more detailed and contextual reading of the contracts.

² See e.g., Wendy J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property," 102 *Yale Law Journal* 1533 (1993); Justin Hughes, "The Philosophy of Intellectual Property," 77 *Georgetown Law Journal* 287 (1988); Fred Yen, "Restoring the Natural Law: Copyright as Labor and Possession," 51 *Ohio State Law Journal* 517 (1990).

³ Justin Hughes, "Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)," 27 *Cardozo Arts & Ent. L. J.* 555 (2010).

⁴ Ronan Deazley, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775) 10 (2004)

⁵ Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *THE LIBRARY* 296, 308 (1978).

⁶ There are seven contracts in the collection, all preserved in Bodleian Library Locke MS b.1. The contracts have previously been described and analyzed in the work of Peter Lindenbaum, see Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century, II: Brabazon Aylmer and the Mysteries of the Trade*, 3 *THE LIBRARY* 32

in understanding if and how philosophical theory got translated to commercial practice in Locke's case. But perhaps more importantly, these transactions provide a case study in how a sophisticated author of the day, who was demonstrably well-informed on both the theoretical ideas and the economic realities at play in the market, managed his literary property. In these agreements, Locke and his publishers deployed a diverse set of transactional tools that give dimension to the way they conceived of the "sole right of and in the Coppy" and reveal an emerging sense of author's rights prior to the passage of the Statute of Anne. I think I can argue that we see Locke reaching for a balance that both supports his work and protects his legacy, while at the same time limiting the extent of his own claims in ways that speak to Astbury's sense, cited above, of Locke's overriding concern for "intellectual, economic, and social freedoms of the individual."

(2002), and Peter Lindenbaum, *Authors and Publishers in the Late Seventeenth Century: New Evidence on their Relations*, 17 *THE LIBRARY* 250 (1995).