

The Public Sphere and the Emergence of Copyright: *Areopagitica*, the Stationers' Company, and the Statute of Anne*

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I. INTRODUCTION

The notion of the public sphere, or more precisely the bourgeois public sphere, associated with German philosopher Jürgen Habermas, has become ubiquitous in eighteenth-century cultural studies. Scholars concerned with media and democratic discourse have also invoked Habermas. Nonetheless, the relationship between the emergence of the public sphere and the emergence of copyright in early modern England has not been much discussed. In this Article, I will explore the relationship between the Habermasian public sphere and the inauguration of modern copyright law in the Statute of Anne in 1710.¹

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1. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). One particularly influential study that applies the concept of the public sphere to eighteenth-century culture is MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* (1990). See generally Rosemary J. Coombe, *Dialogic Democracy, in THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 248-99 (1998); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L. J.* 215 (1996); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001) (providing important discussions of media and democratic discourse that invoke Habermas).

Habermas's concept of the emergence and transformation of the public sphere is social theory on a grand scale. The danger in taking material from such a theory and applying it to a topic like the formation of modern copyright in England is that one can find oneself unable to get beyond the level of abstraction. There are two temptations that lead in this direction. The first is to become enmeshed in the theoretical debates that Habermas has inspired and thus perhaps never reach the level of concrete cultural and legal history. The second is that one may be encouraged by the abstraction and generality of Habermas's own style to pitch the discussion of English cultural and legal history at an equally abstract and general level.

I propose to avoid the first temptation by keeping my description of Habermas's theory as brief as possible and by limiting my critique to one point having to do with the period in which the public sphere emerged in England. Furthermore, in order to avoid the pressure of Habermas's own tendency to abstraction, I will anchor my discussion of the emergence of the public sphere in a single important text, John Milton's *Areopagitica*, a tract written in 1644 to protest prepublication censorship of the press.² In this well-known tract, I suggest that one can find an early sketch of the public sphere vividly realized. As for the older form of publicity that, according to Habermas, preceded the bourgeois public sphere, I will examine some of the features of the early modern Stationers' Company, an institution in which I believe the lineaments of the social form that Habermas calls "representative publicness" can be found. Finally, I turn to the Statute of Anne itself, a document in which the bourgeois public sphere is given concrete legal reality. I conclude with a brief coda in which I touch upon the complex topic that Habermas calls the "hollowing out" of the public sphere.

II. HABERMAS AND THE PUBLIC SPHERE

Jürgen Habermas's study of the public sphere, originally published in 1962, first appeared in English in 1989 as *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*.³ In this influential study, Habermas describes the historical appearance of a new and distinctive social space which he refers to as the "bourgeois public sphere."⁴ Located conceptually

2. See JOHN MILTON, *Areopagitica*, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 724 (Merritt Y. Hughes ed., 1957).

3. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., 1991).

4. See *id.* at 1, 27.

between the private sphere of the family and the authoritative sphere of the State, the early modern public sphere was at first a forum in which art and literature could be discussed, but quickly developed into an arena in which issues of general social concern, including the actions of the State, could be examined and critiqued.⁵ Habermas sees the public sphere appearing first in eighteenth-century England where the modern concept of “public opinion” as a political force developed along with such new civic institutions of conversation and exchange as coffee houses, newspapers, and clubs.⁶

The public sphere may be conceived, Habermas says, “as the sphere of private people coming together as a public.”⁷ This form of “publicity”—that is, “publicity” in the sense of the condition of being public—is to be contrasted with the form Habermas calls “representative publicness” that he associates with the premodern period.⁸ In this social form, publicity was attached to the person of the noble or other authoritative figure who displayed himself publicly as an embodiment of some higher power, such as the prince or the deity. “Representative publicness” was not a social realm but something like a status attribute. The prince and the estates were not the empowered agents of the people—that is, they did not “represent” the people in anything like the modern republican sense of representation. Rather, the prince and the estates were the living embodiment of the country. To call this older social form “representative publicness” may at first seem confusing because of our association of representation with election. But what Habermas wants to emphasize is the way authority in this social form was represented before or demonstrated to the people in a continuous social drama of rituals, processions, and other presentations that incorporated distinctive elements of costume, demeanor, and forms of address, including such honorifics as “highness,” “grace,” “majesty,” and “excellence.” In order to grasp what Habermas means by “representative publicness,” think of the ritual of coronation in which the monarch, clothed in a form of dress unique to his status, presents his person to the estates in a display of majesty. Publicity in this social form operates in a manner entirely different from that in which publicity consists of private people coming together in coffee houses, concert halls, or salons to constitute themselves as a “public.”

5. *See id.* at 29, 127-29.

6. *See id.* at 57.

7. *Id.* at 28.

8. *See id.* at 5, 9.

Sometimes the title of Habermas's study, *The Structural Transformation of the Public Sphere*, is wrongly taken to refer to the early modern development of the bourgeois public sphere. In fact, the "structural transformation" referred to in the title is the later process that Habermas terms the "hollowing out" of the public sphere and identifies with the appearance of mass society and the social welfare State.⁹ Habermas locates this process in popular social and political movements, such as Chartism in Britain. In this process, the basis of the public sphere as a distinctive social space independent of the State began to erode as the State assumed regulatory and protective functions in civil society. In Habermas's account, the public sphere became an arena of competition and struggle rather than the site of conversation and exchange. In response, the mass media developed and changed to reflect the newly formed mass publics of modern society. Instead of being sites of discussion and debate, institutions such as newspapers and mass magazines became organs of advertising and manipulation for commercial purposes. Gradually, the social foundations underlying the formation of "public opinion" as an independent source of political authority were eroded. In this context, a process that Habermas calls "refeudalization" occurred as both political figures and large organizations, such as commercial entities, displayed themselves before mass publics in a manner analogous to feudal rituals of authority. This "hollowing out" of the public sphere, which Habermas sees as beginning in the nineteenth century and continuing to the present day, is the "structural transformation" to which his title refers.

Habermas's concept of the bourgeois public sphere and its later transformation has provoked a great deal of discussion in various circles. This concept has been charged with being naïve and idealist in its representation of the early modern public sphere as a social space insulated from State power. Moreover, the exclusionary and all-male public space that Habermas celebrates is by no means acceptable as an ideal today. Furthermore, it is far from clear that one can speak of a single eighteenth-century public sphere as opposed to multiple overlapping arenas of discussion and critique. Still, as Michael McKeon, writing in a recent issue of the interdisciplinary journal *Criticism* devoted to Habermas, puts it, the category of the early modern public sphere has become "indispensable to historical understanding."¹⁰ Habermas's theory,

9. See *id.* at 141, 157.

10. See Michael McKeon, *Parsing Habermas's "Bourgeois Public Sphere,"* 46 *CRITICISM* 273 (2004); see also *HABERMAS AND THE PUBLIC SPHERE* (Craig Calhoun ed., 1992) (providing critical discussions of Habermas). See generally LUKE GOODE, *JÜRGEN HABERMAS: DEMOCRACY*

which can be challenged on some historical particulars, has proven its usefulness because it allows us to identify important social changes that occurred in the early modern period. Therefore it cannot, I think, simply be dismissed.

One revision that must be made, however, pertains to the period to where the nascent public sphere is assigned. Habermas emphasized the economic foundations of the public sphere and located its appearance in the early eighteenth century. But in fact, many of the institutions of civil exchange that Habermas cites date from the seventeenth rather than the eighteenth century. The famous coffee houses of London, for example, were born in the aftermath of the English Revolution, proliferating in the 1670s and 1680s and creating a new kind of civic space in which tradesmen and gentlemen could meet and discuss matters of public interest on an equal basis.¹¹ But even before the spread of the coffee houses, the English Revolution unleashed a torrent of controversial print after Star Chamber was abolished by the Long Parliament in 1641. This was an act that dissolved the ancient partnership between the crown and the Stationers' Company, which long regulated the English press. Much of the pamphleteering focused on questions of religious doctrine and church government. In the early 1640s, we must remember, religious and political debate were so intertwined as to be indistinguishable and matters related to church government were of fundamental importance to the political and cultural future of the country. As William Haller, who has closely studied this explosion of print, remarks, the controversies of this period were "evidence of the growing realization by all parties of the power of public opinion, and by each of the importance of securing for itself control of that power."¹² The principal instrument for doing this was the newly unfettered press. It is in this revolutionary context, I think, that we can see the shape of the nascent public sphere emerging, and it is in this context that Milton wrote *Areopagitica*. Interestingly, in England, unlike France and Germany, the public sphere does not, as Habermas

AND THE PUBLIC SPHERE (2005) (providing a good account of Habermas and some of the discussion he has provoked).

11. See MARKMAN ELLIS, *THE COFFEE HOUSE: A CULTURAL HISTORY* (2004).

12. William Haller, *Before Areopagitica*, 42 PMLA, 875, 876 (1927); see also DAVID ZARET, *ORIGINS OF DEMOCRATIC CULTURE: PRINTING, PETITIONS, AND THE PUBLIC SPHERE IN EARLY-MODERN ENGLAND* (2000) (demonstrating how the public sphere in England arose as a consequence of the impact of printing on political communication in the context of the English Revolution). Zaret emphasizes that the appearance of the public sphere was more a product of practical commercial forces than political theory. See *id.* See generally David Zaret, *Religion, Science, and Printing in the Public Sphere in Seventeenth-Century England*, in HABERMAS AND THE PUBLIC SPHERE, *supra* note 10, at 212-35.

suggests, emerge first as a forum for the discussion of art and literature, but instead emerges directly as an arena of religious and political debate.

III. *AREOPAGITICA*

In 1643, the flood of print released by the abolition of Star Chamber led the Stationers' Company to petition parliament to reinstitute some form of press regulation both for the good of the State and for the good of the stationers. Parliament responded by passing an ordinance reestablishing licensing under its own authority. At first, Milton did not seem to be concerned, but gradually it became apparent to him, as to others, that vigorous and open public discussion was the prerequisite for continuing political and religious reform. What brought this point home was evidently a petition of August 24, 1644, in which the Stationers' Company demanded stricter enforcement of the printing ordinance and cited Milton himself as a transgressor. Three months later, Milton responded with *Areopagitica*. This was by no means the first appeal for liberty of the press as is sometimes claimed, but it was certainly the most eloquent and is considered an important document in both the history of the public sphere and, in some respects, the history of copyright as well.¹³

One reason *Areopagitica* is a powerful document is that it vividly animates the world of books, turning the production and circulation of printed texts into little dramas. For example, in a famous passage Milton mocks the practice of licensing as an invention of the counter-reformation. Here, Milton portrays the title page of an officially sanctioned book with its multiple licenses or imprimaturs as an Italianate piazza in which deferential worthies bow and curtsy to each other as they debate the fate of the author, a marginalized figure who stands to one side in confusion.

13. Milton's *Areopagitica*, *supra* note 2, was anticipated by several other tracts including WILLIAM WALWYN, *The Compassionate Samaritane* (1644), which objected to the 1643 order on the grounds that it empowered self-interested licensers to suppress "honest men's writings." See also Haller, *supra* note 12, at 896, who describes the context in which *Areopagitica* was written. For a suggestive discussion of Milton and Habermas see Donald L. Guss, *Enlightenment as Process: Milton and Habermas*, 106 PMLA 1156 (1991); David Norbrook, *Areopagitica, Censorship, and the Early Modern Public Sphere*, in *THE ADMINISTRATION OF AESTHETICS: CENSORSHIP, POLITICAL CRITICISM, AND THE PUBLIC SPHERE* 3 (Richard Burt ed., 1994); BLAIR HOXBY, *MAMMON'S MUSIC: LITERATURE AND ECONOMICS IN THE AGE OF MILTON* (2002) (arguing that for Milton, as for others of his time, the concept of freedom of the press was related to that of freedom of trade). See FRANCIS BARKER, *THE TREMULOUS PRIVATE BODY: ESSAYS ON SUBJECTION* (1985), for a discussion of the transformation of the subject into the private citizen; see also Abbe Blum, *The Author's Authority: Areopagitica and the Labour of Licensing*, in *REMEMBERING MILTON* 74 (Mary Nyquist & Margaret W. Ferguson eds., 1987); JOSEPH LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* (2002).

Sometimes five Imprimaturs are seen together, dialoguewise, in the piazza of one titlepage, complimenting and ducking each to other with their shaven reverences, whether the author, who stands by in perplexity at the foot of his epistle, shall to the press or to the sponge. These are the pretty responsories, these are the dear antiphonies that so bewitched of late our prelates and their chaplains with the goodly echo they made; and besotted us to the gay imitation of a lordly Imprimatur . . .¹⁴

The witty metaphor of the title page as a piazza is brilliant both because of its novelty and its aptness. Publishing is here seen as an essentially social act. But the social space of this Italianate drama of servile bobbing and bowing is not the public arena of civic exchange among equals. In other words, it is not the bourgeois public sphere but rather a courtly arena of status and deference dominated by the clerical censors. The author is relegated to “the foot of his epistle”—that is, the author’s name does not appear on the title page but only in the front matter of the book at the foot of the dedicatory epistle.¹⁵ There, in Milton’s conceit, the author stands by in perplexity, silently awaiting the censors’ decision as to whether his work is to be published or wiped clean with a sponge.

Dramatically opposed to this Italianate courtly scene is the social space that Milton invokes in the title page of his own publication: *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England*.¹⁶ Here, the author’s name, “Mr. John Milton,” figures prominently, spreading from one edge of the decorative frame to the other, printed in the same large swash type face as the title, “*Areopagitica*.” The largest and boldest word on the title page, however, is “Speech,” a word that emphasizes the fiction of the pamphlet as an actual address to parliament. The title, “*Areopagitica*,” alludes to the Athenian court of the hill of Ares, the Areopagos, which Milton conceives as a kind of parliament, and the rhetorician Isocrates whom Milton describes in the body of the tract as he “who from his private house wrote that discourse to the parliament of Athens that persuades them to change the form of democracy which was then established.”¹⁷ Like Isocrates, then, Milton presents himself as a private man entering the public sphere to address the parliament and the commonwealth at large on a matter of public import. Moreover, we should note that Milton’s title page bears neither the mark of the licenser—not surprising in a tract written against licensing—nor of the

14. MILTON, *supra* note 2, at 724.

15. *See id.*

16. *See id.* at 717.

17. *Id.* at 719.

printer or bookseller.¹⁸ The consequence of omitting these names is to emphasize Milton himself as the sole authority responsible for the tract. This is related to the theme of the speech, which might either be described as a defense of “the liberty of unlicensed printing,” as the title page presents it, or, alternatively, as a protest against the indignity to which licensing subjects the author.¹⁹ Thus, in another famous passage, Milton condemns the circumstance in which an author “must appear in print like a puny”—that is, a child—“with his guardian, and his censor’s hand on the back of his title to be his bail and surety that he is no idiot or seducer.”²⁰ Such compelled infantilism, Milton writes, “cannot be but a dishonor and derogation to the author, to the book, to the privilege and dignity of learning.”²¹ Under such circumstances, in other words, there can be no coming together of serious men to discuss public matters freely and openly.

Books and authors are conflated throughout *Areopagitica*. Books are seen as the embodiments of authors and authors are presented as living in their books. Indeed, the dominant metaphor of *Areopagitica* might be said to be the representation of books as living persons. Thus Milton acknowledges the need to keep “a vigilant eye how books demean themselves.”²²

For books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. I know they are as lively and as vigorously productive as those fabulous dragon’s teeth; and being sown up and down, may chance to spring up armed men.²³

The reference to the “fabulous dragon’s teeth” invokes the myth of the hero Cadmus who, having slain a sacred dragon, sowed the ground with its teeth from which sprang a race of armed men who fought each other. It emphasizes the vital, generative quality that Milton associates with the writing of books, and so, of course, does the metaphor of the brain child that Milton employs when he acknowledges that truly offensive books may be suppressed after publication. Until the institution of licensing, he wrote, “books were ever as freely admitted into the world as any other birth; the issue of the brain was no more stifled than the issue of the

18. *See id.* at 717.

19. *See id.*

20. *Id.*

21. *Id.* at 735.

22. *See id.* at 720.

23. *Id.*

womb.”²⁴ But if a man’s “intellectual offspring” proved a monster, “who denies that it was justly burnt, or sunk into the sea?”²⁵ Nonetheless, Milton urges caution even in the suppression of supposed monsters. A good book is “the precious lifeblood of a master spirit, embalmed and treasured up on purpose to a life beyond life,” and we must be wary

how we spill that seasoned life of man preserved and stored up in books; since we see a kind of homicide may be thus committed, sometimes a martyrdom; and if it extend to the whole impression, a kind of massacre, whereof the execution ends not in the slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself, slays an immortality rather than a life.²⁶

I want to call attention here to the sexuality of Milton’s language in his treatment of books and learning. In the early modern period, seminal fluid was believed to be a distillation of blood. Moreover, sexual and intellectual generation were thought to be parallel activities and the brain was understood to incorporate an organ parallel to the womb in which ideas were brought to term. Milton’s contemporary, William Harvey, the discoverer of the circulation of the blood, believed that he had proved this parallel through his dissections of female deer.²⁷ Thus Milton’s representation of a good book as the “precious lifeblood of a master spirit” that has been “embalmed and treasured up . . . to a life beyond life” had in its day a biological dimension that may no longer be immediately apparent.²⁸ And so too does his image of a book as the “purest efficacy and extraction” of a living intellect preserved “as in a vial.”²⁹ This train of thought, summarized in the statement that books “do contain a potency of life in them to be as active as that soul was whose progeny they are,” led Milton from the image of the vial of living essence to the story of the dragon’s teeth that transformed themselves into armed warriors.³⁰ As Milton’s metaphors and allusions suggest, he conceives the public arena of printed discussion and debate as a social space that is also a kind of biological space, one teeming with ideas that are imagined to be

24. *See id.* at 735.

25. *Id.* at 725.

26. *Id.* at 720.

27. *See* William Harvey, *Of Conception*, in *DISPUTATIONS TOUCHING THE GENERATION OF ANIMALS* 443 (Gweneth Whitteridge trans. & ed., 1981) (reporting on experiments with deer). *See generally* Mark Rose, *Mothers and Authors: Johnson v. Calvert and the New Children of Our Imagination*, 22 *CRITICAL INQUIRY* 613 (1996) (discussing the idea that there was thought to be a parallel between intellectual and biological generation).

28. MILTON, *supra* note 2.

29. *See id.*

30. *Id.* at 720.

in constant struggle and competition. Milton considers this sometimes confusing activity as a necessary and good thing in the strenuous pursuit of truth. Thus he writes, “Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.”³¹

I am suggesting that *Areopagitica* is a key document in the emergence of the bourgeois public sphere in two senses. First, it is a document in which Milton, portraying himself as a private man addressing the public at large through parliament, participates in the discourse of the public sphere. Second, it is a document that portrays both the premodern form of publicity—here, I am thinking of the satirical sketch of bobbing and bowing imprimaturs—and the vibrant arena of arguing and clashing opinions that Milton presents as a positive alternative. The Habermasian public sphere is sometimes imagined as a scene of quiet rational debate. But Milton’s conception of the social space in which public opinion is formed is less serene and is in some respects quite odd. Here, I think of the biological element in his portrayal of the public sphere, his sense of the public arena as teeming with struggling life. While one might imagine that Milton was a Darwinist before his time, the paradigm, in fact, is biblical and religious. “Be fruitful, and multiply,” was the first command given to Adam and Eve, and it was a crucial tenet for Milton, who, like other protestant thinkers of the period, vehemently rejected ideas of the sanctity of virginity. “Our Maker bids increase,” Milton says in *Paradise Lost*, “who bids abstain / But our Destroyer, foe to God and Man?”³² For Milton, then, liberty of printing is a form of Christian liberty and a principle of vitality; licensing is a dangerous and authoritarian principle of sterility.

IV. THE EARLY MODERN STATIONERS’ COMPANY

In *Areopagitica*, Milton invokes the Stationers’ Company in passing when he accuses parliament of having been deceived by the “fraud of some old patentees and monopolizers in the trade of bookselling” who argued for the reinstatement of licensing.³³ In this passage, Milton comments about the “just retaining of each man his several copy,” in reference to the rights of stationers rather than of authors.³⁴ For Milton, copyright may be a guild matter, but publishing in the sense of speaking

31. *Id.* at 743.

32. JOHN MILTON, *Paradise Lost*, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE, *supra* note 2, at 296.

33. *Id.* at 749.

34. *See id.*

in public is an affair of the author in relation to the commonwealth. But this was not the way the issue appeared in the Ordinance of 1643. There the focus was not on the author—authors were mentioned only once, along with printers, as possible producers of scandalous books—but on the Stationers' Company as the guardian of “ancient custom.”³⁵ The goal of the ordinance was to empower the Stationers' Company to suppress “abuses” and “disorders” dangerous to religion and government.³⁶

Milton, who was undoubtedly stung by the Stationers' Company citing him as an offender in its petition for stricter enforcement of licensing, charged that the ordinance was the product of fraud and bad faith. But while it is true that licensing was very much in the financial interests of the major figures in the company, more than deceit was involved. The early modern Stationers' Company incorporated an orientation and a stance toward the State strikingly different from Milton's. Milton was concerned with liberty and the advancement of knowledge; the company was concerned with propriety and the maintenance of order. As the controversialist Henry Parker put it in *The Humble Remonstrance of the Company of Stationers*, published in 1643 as part of the campaign for the reinstatement of licensing, the issue as the company saw it was not merely the advancement of knowledge but “the advancement of wholesome knowledge.”³⁷ Parker praised the catholic countries for their strict printing regulations—this was a touch that must have inflamed Milton—and he cited Germany and the Netherlands as examples of countries where the press was disorderly.³⁸ “It is not mere Printing, but well ordered Printing that merits so much favour and respect,” Parker stated, and he complained about the multitude of presses that had sprung up since the abolition of Star Chamber.³⁹

In the seventeenth century, the term “propriety” incorporated both the notion of appropriateness and of property. Consequently, as Paul Langford has noted, propriety was at once a way of looking at the world and a way of sharing it out.⁴⁰ In *The Nature of the Book*, a monumental

35. Ordinance of 1643, in *ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660*, at 184 (C.H. Firth & R.S. Rait eds., 1911).

36. *See id.*

37. *See* HENRY PARKER, *THE HUMBLE REMONSTRANCE OF THE COMPANY OF STATIONERS TO THE HIGH COURT OF PARLIAMENT* (1643).

38. *See id.* at 1-2.

39. *Id.* at 1.

40. *See* ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* (1998) (citing PAUL LANGFORD, *PUBLIC LIFE AND THE PROPRIETED ENGLISHMAN 1689-1798* (1991)). My discussion of Stationers' Company practices draws heavily on Johns' brilliant analysis of the Company, *supra*, at 187-265, which adopts an anthropological approach to the early modern company. I am also indebted to Peter W.M. Blayney for useful comments made to

study of how printed books achieved credibility in the early modern period, Adrian Johns analyzes the structures and practices of the early modern Stationers' Company to illustrate the company's institutional commitment to order and decorum.⁴¹ Both dimensions of propriety were evident, for example, in the social structure of the Stationers' Company which, like that of other livery companies, was emphatically hierarchical.⁴² The most important distinction was between the freemen (those who had been admitted to the company) and the livery (the small body of elite members who had substantially greater rights, privileges, and earning potentials).⁴³ Moreover, the line between the freemen and the livery was conspicuously and publicly marked. Only the livery had the right to don the impressive fur-lined gowns and satin hoods that were worn on formal occasions. The hierarchical social structure echoed that of feudal society. Likewise, as Johns notes, the governance of the company which rested in the hands of the master and a council called the "table of assistants" echoed that in which the monarch presided over the privy council and through it governed the realm.⁴⁴

Propriety was also evident in the ceremonies and feasts that marked the yearly cycle of life in the company. In order to convey the flavor of these ritual occasions, let me evoke one comparatively minor event: the feast held each spring by the company members who were printers by trade. We know about this feast because it was described in detail by Joseph Moxon in his seventeenth-century handbook of printing known as *Moxon's Mechanick Exercises*.⁴⁵ Held on the occasion of the annual election of four stewards to represent the printers, the feast began with a formal procession from Stationers' Hall to church led by four attendants with white staves in their hands and red and blue ribbons hung across their shoulders.⁴⁶ After church, the group returned to the hall for a formal meal accompanied by music.⁴⁷ Then, the ceremony of election began with the four current stewards withdrawing from the hall to a chamber

me personally. Pending the publication of Professor Blayney's major study, the standard history of the company remains CYPRIAN BLAGDEN, *THE STATIONERS' COMPANY: A HISTORY, 1403-1959* (1960). For a useful discussion of the structures and practices of the London livery companies, see IAN W. ARCHER, *THE FRAMEWORK OF SOCIAL RELATIONS: THE LIVERY COMPANIES, THE PURSUIT OF STABILITY: SOCIAL RELATIONS IN ELIZABETHAN LONDON 100-48* (1991).

41. See JOHNS, *supra* note 40, at 189.

42. See *id.* at 208.

43. See *id.* at 202-03.

44. See *id.* at 204.

45. JOSEPH MOXON, *MECHANICK EXERCISES: ON THE WHOLE ART OF PRINTING*, 1683 (Herbert Davis & Harry Carter eds., 1896).

46. See *id.* at 329.

47. See *id.* at 330.

from which they returned led by the company beadle.⁴⁸ Marching in order of seniority, each steward now wore a fresh garland of leaves and carried a long white wand.⁴⁹ Each was preceded by an attendant who carried a bowl of sugared white wine in his right hand and his staff of office in the left.⁵⁰ The procession circled the hall three times; then, the most senior steward took his attendant's bowl, selected his successor from the assembled company, crowned him with his garland of leaves, and drank to him as "master steward elect."⁵¹ According to Moxon, there would be a great clapping of hands and drumming of feet to applaud the choice, after which the entire party would walk another round about the hall together with the newly elected steward, a ritual that was repeated three times until all four printers' stewards for the year had been elected.⁵²

What is striking about this event is how formal and elaborately ritualized it was. The election, of course, was not an election at all in the modern sense but a ceremonial transfer of authority publicly displayed and publicly ratified with each steward responsible for the appointment of his successor, most likely on the basis of precedence and seniority. Moxon emphasized that the feast was commonly kept on or near May Day. It is interesting to note the folk elements that figure in this ceremony of renewal, including the leafy crowns and the long white wands, given that the printers' feast, begun in 1621, was not an ancient ceremony.⁵³ Nonetheless, by incorporating such folk elements, the event was given an aura of antiquity. Both the rules prescribed for feasts and ceremonies and the sometimes fussy rules prescribed for regular occasions, such as the monthly meetings of the table of assistants, were important because they constituted "an outward and visual guarantee of the moral propriety of proceedings."⁵⁴ It was through the maintenance of public displays of decorum and probity that the Stationers' Company confirmed their authority and the authority of their printed productions.

Of course, the reality of life in the Stationers' Company was not nearly as decorous as the description of its structures and practices suggests. At various times, the company was torn with dissension and, more than once in its history, unprivileged members revolted and made

48. *See id.* at 331.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* at 330-31.

54. JOHNS, *supra* note 40, at 197.

difficulties for the grantees.⁵⁵ But the point that I want to stress is precisely the appearance of propriety that the company strove to maintain. In the stately universe of the Stationers' Company with its hierarchy, and its public displays of hoods and gowns, we recognize the social form that Habermas calls "representative publicness" and that Milton mocks in his satirical invocation of curtsying imprimatur complimenting and ducking in the piazza of an approved title page. Milton's dislike of the monopolizing grantees of the Stationers' Company was echoed some years later by John Locke, who spoke disparagingly of the monopolies held by "ignorant and lazy stationers."⁵⁶ Indeed, in later seventeenth century progressive circles, it became a form of political correctness to cast aspersions on the grantees of the Stationers' Company. I suspect that we too, as the intellectual and cultural descendants of Milton and Locke, are inclined to regard the patent and monopoly holders of the early modern Stationers' Company as retrogressive figures. However, in looking back at the early modern Stationers' Company, we must recognize that we are looking across a cultural divide. The company grantees who fought for the restoration of licensing in 1643, and who would do so again in 1695, did not see themselves as ignorant, lazy, or greedy; rather, they saw themselves as the champions of order, probity, and decorum.

V. THE STATUTE OF ANNE

Except for the brief period between the abolition of Star Chamber and the Ordinance of 1643 and a second temporary gap after 1679, licensing in various forms remained in effect in England from the early Tudors until 1695, when the Restoration Licensing Act of 1662 was allowed to lapse for the final time.⁵⁷ During the period from the Restoration through the Revolution of 1688 to the lapse of licensing in 1695, the bourgeois public sphere was actively developing in England. This was the period of the phenomenal spread of the London coffee houses. It was also the period in which clearly defined party divisions emerged in England and in which the English electorate, spurred by legislation that assured regular parliamentary elections, became an

55. See Joseph Loewenstein, *For a History of Literary Property: John Wolfe's Reformation*, 18 *ENG. LITERARY RENAISSANCE* 389 (1988) (discussing John Wolfe's revolt against privileged stationers).

56. See also Letter from John Locke to Edward Clarke (Jan. 2, 1693), in *CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE* 366 (Benjamin Rand ed., 1927).

57. See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and Its Lapse in 1695*, 33 *LIBRARY* 296 (1978). On the general subject of licensing, see FREDERICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776* (1952).

important force on the public scene.⁵⁸ Causality is often difficult to specify in historical matters, but perhaps the most accurate way of formulating the relationship between the bourgeois public sphere and the end of licensing is to say that the developing public sphere provided the context that enabled the collapse of traditional press controls. Open hostility to the great booksellers' monopolies provided one impetus for resistance to the continuation of licensing. The danger of having a partisan licenser in control of the press was also becoming evident. Moreover, a third form of resistance directly echoed Milton's emphasis on the dignity of authorship and the importance of the free circulation of ideas.⁵⁹

The active development of the public sphere provided the context for the lapse of licensing. Equally important, the collapse of press controls created a feedback loop that accelerated the further development of the public sphere. When licensing ceased on May 3, 1695, there was only one London newspaper, the official *Gazette*, which published government announcements and foreign dispatches. By the end of the month, five additional papers had appeared, and within a decade there were nine or more in London alone, including the *London Post*, the *English Post*, the *Post-Man*, the *Post-Boy*, the *Flying-Post*, the *Observer*, the *Review* (written by Daniel Defoe), and the *Daily Courant*. Contemporary materials suggest that by 1704 sales of newspapers—not readership, which would of course be much greater—reached about 44,000 copies per week.⁶⁰ By 1711, sales probably totaled some 70,000 copies per week.⁶¹ Within fifteen years of the end of licensing, a massive quantity of printed news and commentary was in general circulation. Moreover, important politicians, such as Robert

58. See Triennial Act, 1694, 6 & 7 W. & M., c.2, § 3. Passed in 1694, the Triennial Act provided for regular and frequent parliamentary elections. See also J.H. PLUMB, *THE ORIGINS OF POLITICAL STABILITY, ENGLAND 1675-1725* (1967) (discussing the growth of the electorate and the development of political parties).

59. See generally 11 H.C. J. 305 (1695) (articulating the hostility to the booksellers' monopolies and the objections raised to the proposed renewal of licensing in 1695). On the continuing influence of *Areopagitica* on the licensing debate in the late seventeenth century, see Ernest Sirluck, *Areopagitica and a Forgotten Licensing Controversy*, 11 *REV. ENG. STUD.* 260 (1960). At least two important tracts in the licensing controversy closely follow Milton's arguments and language. These are CHARLES BLOUNT, *REASONS HUMBLY OFFERED FOR THE LIBERTY OF UNLICENSED PRINTING* (1693), and MATTHEW TINDAL, *A LETTER TO A MEMBER OF PARLIAMENT* (1698).

60. James R. Sutherland, *The Circulation of Newspapers and Literary Periodicals, 1700-30*, 15 *LIBRARY* 110 (1934).

61. See *id.*

Harley, had learned to use the press to mobilize public opinion for their own purposes.⁶²

The Stationers' Company, together with such conservative forces as the Church of England, naturally sought the restoration of licensing. Ronan Deazley counts no less than twelve failed attempts to provide some form of statutory press regulation between 1695 and 1704.⁶³ The Company eventually settled for the Statute of Anne, enacted in the spring of 1710, which preserved at least some elements of the structure of the trade.⁶⁴ But whereas under the licensing regime literary property was in practice almost solely a stationers' matter, the statute gave private persons legal recognition by vesting literary property first in the author.⁶⁵ Furthermore, it departed radically from company practices by setting limits on the term of copyright: twenty-one years for books already in print, fourteen years for new books and the possibility of a second fourteen-year term if the author was still living at the end of the first.⁶⁶ At the end of the term of protection, a book would become available to all.⁶⁷

The most fundamental transformation brought about by the statute, however, relates to what it did *not* legislate; it made no provision whatsoever for State regulation of what could or could not be published.⁶⁸ Rather than defining the purpose of a printing act as the need to maintain good order in religion and government as both the Ordinance of 1643 and the Licensing Act of 1662 had done, the Statute of Anne spoke of the liberties that abusive printers and booksellers took with individual authors and proprietors who found their books and writings printed without their consent. The substitution of the individual for the State as the party in need of redress was a subtle, but momentous change. Furthermore, instead of presenting itself as primarily an act to prevent abuses, as did both the Ordinance of 1643 and the Licensing Act of 1662, the Statute of Anne was presented as affirmative legislation designed, as the title states, for "the encouragement of learning."⁶⁹ This is a phrase with a distinguished history that echoes, among other things, the title of

62. See J.A. DOWNIE, *ROBERT HARLEY AND THE PRESS* (1979).

63. RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY* 1-29 (2004).

64. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

65. See *id.*

66. See *id.*

67. See *id.*

68. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV., 309 (2008) (emphasizing another crucial lacuna in the statute; unlike the earlier printing acts, the statute makes no provision for the regulation of printing technology). Lee argues that this significant omission anticipates modern notions of press freedom, which should be understood broadly as encompassing the unregulated use of technology as well as content.

69. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

Francis Bacon's *Advancement of Learning* (1605) and Milton's comment in *Areopagitica* that licensing constitutes "the greatest discouragement and affront that can be offered to learning."⁷⁰

The purpose of licensing was to regulate and police what might be said in print in order to restrain the press in the interests of good order. The stated purpose of the Statute of Anne was to stimulate study and speech and to encourage the proliferation of discourse in the public sphere. Moreover, by vesting the copyright of a printed book initially in the author rather than the printer or bookseller, the statute presented the author as the person ultimately responsible for a book. Under the old regime of licensing, the printing of a book was still, in theory, a privilege that could be extended or not as the State decided. The statute, however, redefined copyright as a matter of right rather than privilege by automatically granting a copyright to the author by virtue of his literary endeavor.⁷¹ The statute gave legal reality to the public sphere, thus providing a regime in which individual authors, precisely as imagined by Milton, were encouraged to bring the fruits of their efforts into the public forum on no other authority but that of their reason, their learning, and their deliberation. For the traditional ideal of public order, the statute substituted the concept of private right; authors and proprietors had a right to control the printing and publishing of their own writings. For the traditional ideal of public decorum achieved through censorship and regulation, the statute substituted the concept of public vitality, the ideal of a public arena characterized by "much writing" and "many opinions."⁷²

VI. THE "HOLLOWING OUT" OF THE PUBLIC SPHERE

The old regime of licensing that empowered the Stationers' Company was a bargain between the booksellers and the State. The new regime of the Statute of Anne, as Ronan Deazley emphasizes, was a three-way bargain between authors, booksellers, and the reading public.⁷³ Authors were given legal recognition and limited monopoly rights; booksellers were given the opportunity to purchase and exploit these monopoly rights; and the public was assured that after the lapse of the limited term of protection, the works would become free and open to all. In setting term limits, the Statute of Anne thus created the literary commons that we know today as the public domain. But it was precisely the public domain that came under challenge in the period following

70. See MILTON, *supra* note 2, at 735.

71. See Statute of Anne, 8 Ann., c. 19 (1710).

72. See MILTON, *supra* note 2, at 743.

73. Deazley, *supra* note 63, at 46.

passage of the statute. In the eighteenth century, literary property debates, the great booksellers of London argued that the Statute of Anne was merely a supplement to an underlying common law right of property and that the term limits had no effect on their literary properties, which were properties in exactly the same sense as lands and houses. The London booksellers were countered by those who maintained that writings could not be property. They argued that the State might grant authors and their assigns a form of limited monopoly, but copyrights could not be properties in the same sense as material goods.⁷⁴ The eighteenth-century debates thus exposed a tension between property and discourse—or, more precisely, between commerce and discourse—that had been implicit from at least the 1640s. We can observe this tension in nascent form in the commercial metaphors that Milton employs in *Areopagitica*, when he warns: “Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks.”⁷⁵

The immediate legal issues in the literary property debate were resolved in 1774 in *Donaldson v. Beckett* when the House of Lords rejected the claim that literary property was perpetual.⁷⁶ However, *Donaldson* did not resolve the underlying tension between property and discourse, which has been characteristic of copyright since 1710. In the first half of the nineteenth century, for example, the tension reemerged in the copyright reform movement led by Thomas Talfourd under the guise of the author’s property right. Again, the claim was made that copyrights were no less property than physical goods and that, in principle, the author’s property right should last forever. This claim was countered by Thomas Babington Macaulay who spoke for the public interest in preserving the dissemination of knowledge. The result was a compromise: the term of copyright was reestablished as forty-two years or the life of the author plus seven years, whichever was longer.⁷⁷

The same tension recently surfaced in the United States in *Eldred v. Ashcroft*, where once again the length of the copyright term was at

74. See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 67-91 (1993) (discussing the logic of the debates).

75. See MILTON, *supra* note 2, at 736-37.

76. See *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.); *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

77. See CATHERINE SEVILLE, *LITERARY COPYRIGHT REFORM IN EARLY VICTORIAN ENGLAND: THE FRAMING OF THE 1842 COPYRIGHT ACT* (1999), for a complete treatment of Talfourd’s movement.

issue.⁷⁸ This important case concerned the constitutionality of the Copyright Term Extension Act of 1998, a revision of the copyright act that extended the basic term of protection to the life of the author plus seventy years.⁷⁹ The petitioners argued that this extended term was effectively indistinguishable from perpetual copyright and thus violated the constitutional clause granting Congress the right to protect copyrights for limited periods of time.⁸⁰ The United States Supreme Court rejected the petitioner's argument, holding that the new term of copyright might be overly long but that it was nevertheless limited. The Court did acknowledge that under some circumstances there could be a conflict between copyright and freedom of speech.⁸¹

The consequences for civil conversation of treating writing simply as property would be profound. As some of the participants in the eighteenth-century debates realized, such a position would allow copyright owners to regulate and limit public discussion much as State censors had done earlier.⁸² The Supreme Court's acknowledgement in *Eldred* of the potential for a conflict between copyright and the First Amendment reflects the continuing concern, at least in theory, with preserving vigorous civil conversation. Nonetheless, what we have seen in the last hundred and fifty years is an increasing emphasis on the proprietary aspect of copyright. This is a process that has accelerated in the United States since the Copyright Act revision of 1976, which eliminated the formality of registration so that copyright adheres from the moment of creation rather than the moment of registration.⁸³

The focus of eighteenth-century copyright was on labor. The author's labor in creative work formed the foundation of the right. Thus, copyright protected against literal copying, but not against adaptations, such as translations, because these involved additional labor. As late as 1853, a federal court rejected Harriet Beecher Stowe's claim that a

78. See 537 U.S. 186 (2003).

79. See *id.* at 192.

80. See *id.* at 187.

81. See *id.* at 221.

82. For example, when *Donaldson v. Beckett* was debated in the House of Lords in 1774, Lord Effingham urged the liberty of the press, pointing out that affirmation of a common-law right of literary property could provide a dangerous foundation for censorship. See *The Cases of the Appellants and Respondents in the Cause of Literary Property Before the House of Lords, in THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774*, 59 (Stephen Parks ed., 1975).

83. In an important new study of copyright in relation to the First Amendment, Neil Weinstock Netanel identifies the Copyright Act of 1976 as a turning point in American legal developments and notes the increasing tendency of U.S. courts to treat copyright as an absolute property rather than a limited entitlement. See NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008).

German translation of *Uncle Tom's Cabin*, which had been prepared for the Pennsylvania Dutch market, infringed her copyright.⁸⁴ Over the course of the nineteenth century, the focus of copyright, both in the United States and in Great Britain, shifted from a focus on labor to a focus on market value. A landmark in this shift in the United States is the famous case of *Folsom v. Marsh*, decided in 1841, in which Justice Joseph Story remarked that the central issue in deciding an infringement case was not whether an entire work had been copied, but whether so much had been taken that the value of the original was diminished.⁸⁵ This shift in focus, combined with the extension of copyright protection to translations and derivative works of all kinds, helps to identify a set of doctrinal transformations that relate to the process that Habermas called the “hollowing out” of the public sphere.⁸⁶

The economic, social, and political developments that have influenced these doctrinal changes, and contributed to the process of “hollowing out,” are far too complex to discuss here. As Habermas indicates, however, they have to do with the emergence in the nineteenth century of mass societies and mass markets and with the rise of very large scale commercial organizations to serve and exploit those markets. David Zaret, who has emphasized the degree to which the nascent public sphere in England was founded on commerce, challenges the pessimism that views commercialism and modern developments in communication as responsible for the eclipse of reason in public life and the decay of the public sphere.⁸⁷ Zaret is correct, I believe, to emphasize that the explosion of print in the 1640s was a commercial as well as a political phenomenon, and to remark that commercialism itself may not be the root of modern problems.⁸⁸ But it is not clear that his optimism about the public sphere is warranted. What he fails to take into account is the way in which changes in the fundamental contours of copyright since the eighteenth century have altered the environment of public discourse and

84. See *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

85. 9 F. Cas. 342 (C.C.D. Mass. 1841).

86. For important discussions of these doctrinal transformations, see Peter Jaszi, *Toward a Theory of Copyright: Metamorphoses of Authorship*, 1991 DUKE L.J. 455 (1991) (discussing how in nineteenth-century U.S. copyright doctrine the concept of authorship is emptied of content); BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911* (1999) (describing the nineteenth-century construction of the protected work as a unitary, closed object in English law); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008) (tracing, among other things, the shift in the focus in American doctrine from labor to market value).

87. See ZARET, *supra* note 12, at 275.

88. See *id.*

placed new kinds of commercially grounded burdens on cultural production and civic exchange.⁸⁹

Habermas maintains that the hollowing out of the public sphere was marked by an erosion of the distinction between public and private on which the institution of the public sphere depends.⁹⁰ Habermas also holds that under these circumstances a process of “refeudalization” occurred that led to the reappearance in modern society of social forms characteristic of the period of “representative publicness.”⁹¹ This process can be illustrated by considering the peculiar status of giant media conglomerates such as Viacom, the Walt Disney Company, or the News Corporation. Are these organizations private or public? Legally they are of course private, but in their vastness and their domination of the circulation of cultural and informational products of all kinds, they plainly have a public dimension as well. In fact, the very concepts of public and private do not quite apply to these entities. Likewise, the concepts of private and public did not quite apply to the early modern Stationers’ Company. The Stationers’ Company was private insofar as it had its own rules and officers, but it was also public insofar as it was granted the power to regulate nearly all of the printing and publishing in the realm. Chartered guilds like the Stationers’ Company were the creatures of a time before the precipitation of the modern dialectic of private and public. Modern media conglomerates, like Viacom, collapse that dialectic, producing uncanny echoes of the institutional past. They raise serious questions about whether the kind of dynamic public sphere that Milton portrayed in 1644 can be sustained for the future.⁹²

Zaret’s discussion of the modern public sphere fails to take account of changes in copyright doctrine. What I have omitted from my discussion is of course the Internet. Does the Internet provide a whole new dimension to the public sphere? Does the Internet—or, more precisely, digital technology—constitute a profound challenge to the effectiveness of copyright protection? As anyone who even casually checks blogs knows, the answer to the first question is yes. The Internet has obviously changed the public sphere. But the answer to the second question, digital technology’s challenge to copyright, remains unclear. As we have seen, the movie and recording industries, which are of course

89. See NETANEL, *supra* note 83, at 109-53 (providing a good overview of American copyright doctrine’s free speech burdens).

90. HABERMAS, *supra* note 3, at 141, 157.

91. See *id.* at 142, 195.

92. See also Mark Rose, *The Claims of Copyright: Public Purposes and Private Property*, in *MEDIA OWNERSHIP: RESEARCH AND REGULATION* 61 (Ronald E. Rice ed., 2008).

embedded in the giant media conglomerates, are fighting hard—and understandably so—to maintain control of their products in the context of the transformations that digital technology has wrought. The digital question is one that has political, legal, and technological dimensions. How it will play out is anyone's guess.