

Copyright, Originality, and the Public Domain in Eighteenth-Century England

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Recent efforts to explain the role of originality in the history of copyright law have argued that legal accounts of literary property in eighteenth-century England were based, at least tacitly, on aesthetic theories of creative genius. But while some commentators on aesthetics treated literary creativity and ownership as intertwined concepts, that linkage finds no corollary in contemporaneous legal doctrine. The 1710 Act of Anne prohibited piracy but did not regulate imitations, condensations, adaptations, anthologies, indexes, and similar partial copies.¹ The profusion of imitative texts testifies to a flourishing public domain that depended on the *absence* of a copyright theory grounded in literary creativity. Neither the law nor its exponents treated aesthetic originality as an ideal condition to which all writings should aspire, in theory, in order to justify their status as property, nor did any of the legal commentators suggest that works tinged with creativity merited more protection than their most pedestrian counterparts. Copyright applied equally to all publications, and provided a limited exception to the general rule that the various ingredients of any work belonged in the public domain. When the House of Lords ruled in 1774 that the Act of Anne limited the term of copyright to twenty-eight years, the public domain gained a new and important dimension, but that development expanded what was already a vital factor in the literary marketplace, rather than bringing it into being for the first time.²

As advocates of stronger copyright support have repeatedly invoked the figure of solitary, self-made authorial genius over the last two centuries to justify longer term limits and an ever-expanding scope for copyright protection, the public domain has diminished accordingly. The idea-expression dichotomy, central to modern copyright jurisprudence, itself reflects the fencing off of various textual elements which in the eighteenth century were freely available. When piracy is the only prohibited form of copying, it is pointless to ask whether a rewriting of a novel is a recapitulation of its ideas or an appropriation of its expression, because neither one constitutes infringement. Since around the middle of the nineteenth century the fulcrum has shifted, so that features like plot, character, and even style have become potentially eligible for copyright protection—and the drift of aesthetic theories into the legal realm helps to explain that development.³ But there is little reason to conclude that in the eighteenth century, originality (understood as novelty or creativity) played even a tacit role in the definition of literary property.

To question the significance of aesthetic originality in eighteenth-century copyright law is not to deny its importance in contemporaneous literary criticism. Whereas Renaissance English literary culture displayed comparatively little interest in attribution, plagiarism, and textual accuracy,⁴ these became matters of much greater concern to readers and writers during the century and a half beginning around the 1670s.⁵ By the second half of the eighteenth century, this discussion had led to the publication of numerous efforts to define and illustrate literary genius and originality, including Edward Young's *Conjectures on Original Composition* (1759), probably the best-known contribution to the discussion.⁶ But while Young could treat an author's originality as the

basis of his property in his work, contemporaneous legal thinkers did not gravitate so readily towards this explanation.⁷ Various novelists, poets, and critics may have shared Young's view, but among the commentators who argued about the legal basis and contours of copyright, the only ones to embrace any version of Young's argument were not advocates of literary property but its opponents.

The wide variance between the literary and legal meanings of "originality" has not been sufficiently acknowledged in scholarship on the history of copyright. The Act of Anne says nothing about originality, which helps to explain why many of the statute's legal exponents had nothing to say about the topic. While the literary concept was being elaborated in terms of exuberant creativity by writers like Young,⁸ the few legal commentators who invoked the term were concerned with the statute's bar on mimetic duplication. When Blackstone, for example, speaks of copyright protection for "original work[s]," he indicates that a written production should be counted as original so long as it is not a reprint of another text.⁹ This usage comports with one of the word's earlier senses—"[c]reated, composed, or done by a person directly; produced first-hand; not imitated or copied from another"—which the *Oxford English Dictionary* dates to the mid-seventeenth century. By contrast, the *OED* dates the usage of "original" as "novel or fresh in character or style" to the 1750s.¹⁰ An analysis that conflates these two senses of originality risks misunderstanding the meaning of copyright during its early development.

Such conflations fail to account for the contemporaneous case law, and they also misrepresent its significance for the literary culture of eighteenth-century England, whose legacy includes several highly imitative forms, such as parodic verse and the novel, that continue to flourish and that have figured crucially in defining the scope of copyright

protection and fair use. A view of novelty and ingenuity as the justification for authorial property maps onto a high-threshold definition of originality, which looks suspiciously on imitation as theft, not only from the perspective of moral rights but also from an economic perspective, in which imitations threaten to displace the source. Under the low-threshold definition, originality means only that the text has not been reproduced.¹¹ According to the literary philosophy that aligns itself with this definition, production inevitably depends on revision, and adapting a plot or a scene is simply a way to bring it to new readers, or to satisfy old readers in a new way.

In every era since the Restoration, examples of writers at any place on the spectrum are plentiful. At one end are jealously proprietary figures who insist that their genius is native and that their works reflect no influences. Ignoring the detail that genres, conventions, and stylistic techniques are all born of pre-existing models, these writers claim to owe no literary debts, but often police others' writings with an eagle eye for instances of misappropriation. Samuel Richardson, complaining about the piracy of *Sir Charles Grandison* in 1753, wrote that “[n]ever was Work more the Property of any Man, than *this* is [mine] . . . [I have] borrow[ed] not from any Author: The Paper, the Printing, [were] entirely at [my] own Expence . . . [The work is] *New* in every Sense of the Word.”¹² Richardson claimed to own the book's ideational aspects as absolutely as its physical aspects. His declaration refuses any awareness of the “gift[] that all artists receive, namely, a tradition and world they have not made.”¹³ Richardson's case is particularly striking because, while his novels were fresh and innovative in many ways, a careful review of the quotations in his fiction has shown that he relied on the eighteenth-century version of *Bartlett's* for most of his literary references.¹⁴ While that fact can

hardly be thought to reduce Richardson's ownership of the novels he published, it points up his dual role as author and user, and highlights his participation in a literary culture that produced such reference aids precisely because this dual role was commonplace.

At the other end of the spectrum are writers who treat adaptation and revision as essential for literary production, who recognize that their work is "embedded in a culture that nourishes and influences them, yet from which they derive their own voice."¹⁵ In *Tom Jones*, for example, Henry Fielding could style himself the "founder of a new province of writing," while later declaring that the writings of the ancients "may be considered as a rich common, where every [modern writer] hath a free right to fatten his muse."¹⁶ That both assertions carry an ironic charge does not remove the implication that novelty and imitation may coexist, that the public domain—the "rich common"—may support a thriving literary culture, sustaining "new province[s]" which, in turn, provide more fodder for future writers. Alexander Pope, similarly, defended "the liberty of *Borrowing*" by observing that "it seems not so much the Perfection of Sense, to say things that have *never* been said before, as to express those *best* that have been said *oftenest*." He added that "by being grafted upon others, [a writer's work] may yield variety. A mutual commerce makes Poetry flourish."¹⁷ Users' rights, though not styled as such, are clearly central to this "mutual commerce." The term "originality," then, may be decomposed into these two antithetical perspectives on the meaning of indebtedness in the literary universe. While some hold themselves above the disreputable business of borrowing and lending, others view originality as a quality that is perfectly capable of thriving amid such traffic. Rather than one word, we have a pair of homonyms that represent different understandings of how writing takes place and how it circulates.

In what follows, I start by showing that arguments in favor of a public domain were implicit in the efforts by Locke and others at the end of the seventeenth century to eliminate the Licensing Act. Next, I look at the debate over copyright law in the eighteenth century, emphasizing the limited scope of legal protection and the correspondingly wide reach of the public domain. Finally, I discuss the kinds of imitations that were allowed to flourish under this legal regime, and end with some brief remarks about how writers come to embrace the high-threshold view of originality and the belief in solitary and unaided genius that goes with it.

I. The Licensing Act and the Act of Anne

The Act of Anne is often described as England's first copyright statute. While it would ultimately provoke an unprecedented public debate over authorial rights as property rights, the statute did not mark the origin of a national copyright policy in English law, nor can it be credited as introducing a view of literary production as property. The statute's primary concern—the right of exclusive publication—had figured as an internal guild policy of the Stationers' Company since the sixteenth century.¹⁸ Crucial to the guild's operation was the convention of the publishers' "copy," the right to forbid others from printing any title already appropriated by a guild member. The first member to enter his copy in the Stationers' Register secured the sole right of publication, and was understood to hold the right in perpetuity. As John Feather has observed, this policy introduced, "in all but name, the concept of copyright," and shortly after its introduction "we have every indication that 'copies' were being treated as property."¹⁹

The convention moved from guild rule to legal requirement in 1637, when a Star

Chamber decree on printing specified that all publications had to be “entred into the Register Booke of the Company of Stationers.”²⁰ The decree prohibited the reprinting of any “Copy, book or books, or part of any book or bookes” already registered by another.²¹ The copy system now had the force of law. The Star Chamber decree remained in effect no longer than the Star Chamber itself, which was abolished in 1641, but the decree’s monopolistic powers were revived in various Parliamentary ordinances adopted during the Interregnum.²²

These ordinances, in turn, gave way to the 1662 Licensing Act. That act differed from the earlier policies, however, in the scope of its application. The Star Chamber decree, and the acts that followed it, had covered not only entire books but also any constituent “part”—a term that would seem, at a minimum, to cover extracts. The 1662 statute, by contrast, applied only to “any Booke or Pamphlet,”²³ implicitly leaving others free to reprint excerpts. To eliminate the bar on partial appropriations is to tolerate or even to encourage the forms of limited redaction undertaken by abridgements and anthologies. The 1662 statute thus relies on much the same view of literary property that would reappear nearly fifty years later in the Act of Anne, and that was generally accepted throughout the eighteenth century. Under the terms of both statutes, the book itself is the unit of property, and its components (excerpts, scenes, characters, style) are free for the copying.

In focusing its attention on piracy, the Licensing Act reflected the norms of Restoration literary commerce. Despite the language of the earlier prohibitions, there is no evidence that any seventeenth-century writers or publishers who excerpted or revised others’ writings were ever sued or proceeded against by other guild members,

even though anthologies and literary imitations were commonplace.²⁴ Accusations of plagiarism became increasingly common during the Restoration, but they seem to have served primarily as a means of asserting one's literary status, particularly among members of literary factions, who used this charge to signal their affiliation by attacking outsiders.²⁵ The decision to provide more limited coverage in the Licensing Act than in the Star Chamber decree and its interregnum successors, then, seems to reflect not so much a change in legal and social norms as simply the abandonment of an excessively broad provision that no one had bothered to enforce (and that perhaps no one had even noticed) in the first place. The basic assumption that others' writings were available for adaptation and revision remained unchanged throughout the seventeenth century. The literary culture of the day took it for granted that writers could make what use they liked of others' ideas, and also of what today would be deemed protected expression.

The Licensing Act was renewed periodically during the later seventeenth century, but met with heated opposition when it came up for renewal in Parliament during the 1692-93 session. While critics of press regulation had long argued against licensing as a form of censorship, the debate in 1692-93 also referred specifically to authors' rights. An anonymous pamphlet, probably submitted in late December, a few days after the Commons resolved to continue the act, declared that "[m]any learned Authors have been defrauded of their Rights . . . who, after many years Pains and Study . . . have been barred by surreptitious Entries made in the [Stationers'] Register."²⁶ This allegation of fraud was later confirmed by a member of the guild. On March 7, 1693, an affidavit was presented in the House of Lords from a stationer who testified that when he came to search the Register for his own entries in 1691, he "found several leaves rout out of the Register-

book about the date or time of the entry of most of the said copies,” and “saw several of his copies entered again to other persons.”²⁷ The following day, eleven members of the Lords opposed the renewal of the Licensing Act, translating this violation of stationers’ property rights into the language of authors’ rights. The policy, it was affirmed, “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.”²⁸ The opponents ultimately failed to block the act, but their criticisms may have been instrumental in limiting the renewal period to the unusually brief term of one year plus one session of Parliament.²⁹ When the act came up for renewal again in 1695, the opposition was much better organized—and they had the help of John Locke.

Locke had already shown some interest in the question of licensing during the 1692-93 debate. He owned several of the anti-licensing pamphlets, including the anonymous pamphlet that decried the stationers’ frauds against “learned Authors.”³⁰ While the proposal to renew the Licensing Act was pending, the issue figured prominently in his correspondence with his friends Edward Clarke and John Freke, two members of “the College,” a club Locke had founded several years earlier as a forum for political debate. Freke was a lawyer and Whig activist. Clarke, a Whig who represented Taunton in the Commons, would play a crucial role in the rejection of the Licensing Act in 1695. Through both men, Locke also maintained contact with the club’s patron, John Lord Somers, the Lord Keeper under King William.

Locke’s criticisms of the Licensing Act during the 1692-93 debate refer obliquely to authors’ rights and the public interest in having access to accurate and scholarly texts. On January 2, 1693, just over a week after the vote in Commons to renew the act, Locke

wrote to Clarke,

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 theirs and soe will not suffer fairer and more correct Editions than any thing they print here or with new Comments to be imported without compounding to them whereby these most usefull books are excessively dear to schollers and a monopoly is put into the hands of the company of ignorant and lazy stationers. . . . By this monopoly also of these ancient authors noe body here, that would publish any of them a new with comments or any other advantage can doe it without the leave of the learned judicious stationers, for if they will not print it themselves nor let any other be your labour about it never soe usefull . . . it is to noe purpose.³¹

Locke focuses here primarily on the rights of readers, forced to pay for “excessively dear” editions when “fairer and more correct” ones might be sold for less. What should be cheaply available to the public has been monopolized by the booksellers. Locke also hints at the injustice to scholarly editors, whose “useful[.]” “labour” in annotating classical writers goes for naught. These objections were prompted in part by the guild’s opposition to one of his own editorial projects—an edition of Aesop that Locke had planned in the early 1690s but did not publish until 1703.³² If these objections sound like the complaints of a curmudgeonly professor, lamenting the stationers’ low editorial standards, Locke was to reframe his argument significantly within a few years.

Clarke and his associates were unable to block the renewal of the Licensing Act in 1693, but when it came up for consideration again, in early 1695, they prevailed. A committee in the Commons brought in a resolution to renew the act on January 9, 1695.³³ In a memorandum probably sent off later that month to Clarke and Freke, Locke provided a point-by-point critique that dealt with pre-print censorship and the stationers’ monopolistic practices, and that also attacked the exclusionary system of copy registration, “[w]hereby it comes to passe that sometimes when a book is brought to be

entred in the register of the Company of Stationers, if they thinke it may turne to account, they entre it as theirs.”³⁴ Advocating an end to the stationers’ convention of perpetual copyright, Locke proposed a limited term, arguing that “noebody should have any peculiar right in any book which has been in print fifty years.”³⁵ Fixing the duration of copyright would mean that all books would eventually become available for users to edit, and would be affordable for the public.

When the renewal bill, which Locke had criticized, was brought to a vote on February 11, 1695, it was rejected.³⁶ A new committee was appointed “to prepare and bring in a Bill for better Regulating of Printing and Printing Presses,”³⁷ and this bill incorporated many of the objections Locke had sent to Freke and Clarke in January. After receiving a draft of the proposed bill, on March 14, Locke sent Freke and Clarke his own model, which included a clause “[t]o secure the Authors property in his copy.” Leaving a blank space where the agreed-upon period would be inserted, this clause specified that “noe book . . . shall within years after its first edition be reprinted . . . without Authority given in writeing by the Author.”³⁸

This suggestion found no place in the legislation presented in the Commons; in fact, the new bill included no provision at all for the protection of copies. If adopted, the bill would have eliminated the registration requirements that had served to protect the stationers’ copies for more than a century. Not surprisingly, the stationers objected, and the Lords, seeking to pacify them, appended to another bill, in the form of a rider, a clause that would simply have renewed the old Licensing Act.³⁹ The Commons removed the rider,⁴⁰ and in justifying that action, Clarke echoed Locke’s complaint about stationers who happen on a promising manuscript and “entre it as theirs.” However,

Clarke couched this objection in stronger and more suggestive terms: “They [the publishers] enter a Title to themselves, and their Friends, for what belongs to, and is the Labour and Right of, others.”⁴¹ Without articulating a full-fledged theory of literary property, Clarke’s protest joins labor and rights in a fashion that unambiguously recalls the principles underlying Locke’s theory of acquisition. Locke must at least have known about the contents of Clarke’s protest, and some forty years later the *Craftsman* would assert that the whole memorandum was “drawn up by the great Mr. *Locke*” himself.⁴² The immediate effect of this confrontation, in any case, was to ensure the elimination of the system of pre-print licensing and the copy-registration arrangements that accompanied it.

The stationers, however, refused to allow their copyright system to disappear so easily. A new bill for the regulation of printing, prepared by Edward Clarke and Robert Harley, was introduced on November 30, 1695.⁴³ This bill, which would have created an optional licensing system, also marks the first legislative effort in England to impose a limited term for copyright protection.⁴⁴ The extant drafts of the bill do not specify the proposed term of copyright protection; instead, like Locke’s memorandum of January 1695, they include blank spaces where the terms were to be inserted.⁴⁵ The bill initially seemed likely to pass, and on December 2 Locke thanked Clarke for his help, remarking that “[t]he Printing Act has been taken care of to its utmost and I thank you it is lodgd, and that’s well.”⁴⁶ Ultimately, however, the bill failed. Numerous attempts followed over the next fifteen years,⁴⁷ but not until 1710 did Parliament adopt a statute replacing some of the functions of the Licensing Act.

Seen against this backdrop, two aspects of the Act of Anne take on a different appearance. First, while the publishers may have meant for the author to serve as a

convenient repository for their own interests, the idea of authorial control over the manuscript dovetailed nicely with one of the reasons for dismantling the stationers' monopoly in the 1690s. Members of the bookselling industry may have used the call for authors' rights as a self-serving feint, but its appeal to those who heard the argument may also be traced to a fledgling Lockean theory that had already been aired during the previous decade. Second, the limitation of protection to no more than twenty-eight years, though perhaps inspired by hostility to legal monopolies, mirrored a kind of literary anti-monopolism. The editorial work that Locke had described in his correspondence promotes a form of public access that is not possible through abridgment or literary imitation. Moreover, the statute provided for a full twenty-eight-year term of protection only if the author was still living at the end of the first fourteen-year term. In practice, the bookselling industry successfully ignored the term limits up until the 1770s. The statute's provisions, however, established a scheme that complemented the extant view of users' rights, so that when the term limits came into force in 1774, the public domain gained a temporal aspect that had previously been lacking. Where users' access had formerly been limited to various aspects of works, now users would ultimately be able to use the entire work.

II. Originality in Eighteenth-Century Copyright Law

As we have seen, the Act of Anne regulated piracy, not imitations or excerpts. Partisans in literary feuds might accuse each other of illegal borrowing of plots, characters, and language, but those of a more doctrinal bent observed that the law did not touch such offenses. A commentator in 1767, for example, noted that most writers

“never stole any thing except lines and sentences, which by the bye is not made penal as yet by any statute.”⁴⁸ Samuel Richardson could declare in 1742 that the authors of a sequel to *Pamela* had “invaded the author’s literary property,” but the publication of such sequels was a routine part of the book trade.⁴⁹ Booksellers and magazine publishers took it for granted that the statute prevented verbatim reprints of entire books and permitted more partial uses—including the wholesale reprinting of newspaper and magazine articles, which did not qualify for copyright protection in the first place.⁵⁰ The mid-eighteenth century witnessed various suits over piracy, but the publication of imitations, anthologies, revisions, and the like proceeded with little fear of threat. Only in the case of abridgments was there any uncertainty, and even then only in the case of an abridgment that reprinted virtually all of the original book.

In *Gyles v. Wilcox* (1741), for example, Lord Hardwicke explained that “abridgments may with great propriety be termed a new book,” and that a rule “restrain[ing] all abridgments . . . would be of mischievous consequence.”⁵¹ In declaring that an abridgement is permissible only if it is a “real and fair” one, involving more than merely cosmetic changes, Hardwicke signaled his impatience with “mere evasion[s] of the statute,” but in practice his standard was easily satisfied. In the case at bar, the plaintiff objected to a legal treatise that, he claimed, “borrowed verbatim from Sir Matthew Hale’s *Pleas of the Crown*,” reproducing “the greatest part thereof in the very words thereof.”⁵² Hardwicke referred the case to a Master of the Court, who compared the two texts and found no infringement. Recalling the details eleven years later, Hardwicke said that the abridgment was deemed permissible because it was one-eighth the length of Hale’s book.⁵³ It is doubtful that Hardwicke remembered the case

accurately, given that the defendant's counsel had made the similar, but feebler, argument that Wilcox had left out "severall intire chapters" from Hale's 128-chapter treatise and had added "several chapters of [new] Material."⁵⁴ Even on Hardwicke's own reckoning, however, it was the book's condensed form, and not any creativity on the part of the abridger, that made it a "real and fair" abridgment.

In 1761, in *Dodsley v. Kinnersley*, Samuel Johnson's publisher unsuccessfully sued the owners of the *Grand Magazine of Magazines* for reprinting *Rasselas* with the moral reflections excised.⁵⁵ Again, the court explained that only a "fair abridgment" was permissible, and then concluded that the defendants had not reprinted enough of the book to be liable for infringement.⁵⁶ In *Strahan v. Newbery* (1774), an abridgment of Hawkesworth's *Voyages* was similarly held to be non-infringing, in an opinion that endorsed the practice of abridgment as "an act of understanding" that saves the reader's time.⁵⁷

There appear to be four or five eighteenth-century cases in which a defendant did not successfully defend his publication by characterizing it as an abridgment, but only the last case (whose outcome remains unclear) actually features an abridged text. In two cases decided in 1739, Lord Hardwicke granted injunctions barring any further publication after he concluded that in both instances, the defendant was attempting to use his magazine to publish an entire book serially, in installments.⁵⁸ In *Tonson v. Walker* (1752), the defendant printed Milton's *Paradise Lost*, having added twenty-eight notes to the fifteen hundred in Tonson's edition.⁵⁹ Walker's counsel initially took the position that *Paradise Lost* had fallen out of copyright, but after gaining no traction with that argument, he turned rather lamely to the theory that Walker's edition was a revision or

abridgment (“Dissatisfied with the text and notes, Walker planned a new edition from various sources.”)⁶⁰ Lord Hardwicke enjoined the publication until there could be a further hearing on the question of “whether the alterations make it a new work”—a hearing that Tonson’s counsel did not trouble himself to arrange. *Macklin v. Richardson* (1770) recalls the magazine cases of 1739: this time the defendant published the first act of *Love-à-la-Mode*, and planned to publish the second (and final) act.⁶¹ The defense relied primarily on the claim that because Macklin had arranged for the play to be performed publicly, and had not published it himself, he “gave a right to any of the audience to carry away what they could, and make any use of it.”⁶² As in Walker’s case, it was only after this argument failed that the defendant implausibly called his publication an abridgment.

Finally, in *Bell v. Walker and Debrett* (1785), the plaintiff objected to a one-volume abridgment of a five-volume autobiography by the actress George Anne Bellamy. After being presented with identical passages from the two books, Lord Thurlow stated that he was not ready to decide whether the defendant’s edition was a permissible abridgment or a piracy, but he had seen enough to merit a temporary injunction until the question could be resolved. The following month, the defendants’ counsel moved to dissolve the injunction, but there seems to be no record of the court’s final ruling. If the injunction remained in place, then *Bell* would mark the first instance in which a condensed version of a book was deemed to be equivalent to a piracy. The early nineteenth century offers clearer instances of this view. What is significant, however, is in *Gyles*, *Dodsley*, and *Strahan*—all of which featured direct and extensive copying—the courts declined to find infringement.⁶³ Not until well after the turn of the century did

courts begin to recognize anything resembling a right against the more attenuated kinds of imitation.⁶⁴

While some novelists, like Richardson, were outraged that the law did not reach this kind of conduct, many commentators on literary commerce found this state of affairs quite acceptable. In *A Vindication of the Exclusive Rights of Authors to Their Own Works* (1762), an anonymous pamphlet arguing for strong copyright protection, the author endorsed the practice of revision by rearrangement, objecting only to revisers who content themselves with “an *inconsiderable* addition or improvement,” such as “the supplying literal or verbal omissions.”⁶⁵ To qualify a text for copyright protection, the author explained, “it is not necessary that the ideas be original. It is sufficient, that by a new combination of known ideas, the author has produced a different composition.”⁶⁶ Here is a defense of copyright that shows no interest in novelty and genius.

That view was consistent with the understanding of copyright articulated by the leading legal commentators of the day.⁶⁷ In the quest to weld literary property and aesthetics, scholars frequently turn to Blackstone, but the *Commentaries* cannot easily support a high-threshold view of originality. Those who treat Blackstone as an exponent of creativity have relied primarily—and often exclusively—on Mark Rose’s influential study of eighteenth-century copyright law and literary culture, and so I focus here on Rose’s discussion. Central to this line of argument is Blackstone’s assertion that “[w]hen a man by the exertion of his rational powers has produced an original work, he has clearly a power to dispose of that identical work as he pleases, and any attempt to take it from him, or to vary the disposition he has made of it, is an invasion of his right of property.”⁶⁸ Explaining the significance of this passage, Rose concludes that “the

production of the discourse of original genius coincided with that of authorial property. The logical point of connection was the idea of value: both were concerned with the worth of texts.”⁶⁹ It is not difficult to see why some have taken Rose to mean that Blackstone himself invokes “the discourse of original genius.”⁷⁰ For Blackstone, however, a work is “original” so long as it is not a reproduction of another work. Nothing suggests that Blackstone, any more than the anonymous author of the *Vindication*, took the view that imitations and anthologies were lacking in value or worth.

Consider the passage from which this line is drawn: first, Blackstone says that an author has a right “in his own original literary compositions” and that “no other person without his leave may publish or make profit of the copies.” Unauthorized publication is the focus. Then we are told, in the line quoted earlier, that the author who produces an original work has the power to dispose of it as he likes. And finally, to clarify the nature of this “original work,” Blackstone explains that “the identity of a literary composition consists intirely in the *sentiment* and the *language*; the same conceptions, cloathed in the same words, must necessarily be the same composition.” If a second writer repeats those words, “it is always the identical work of the [first] author which is so conveyed, and no other man can have a right to convey or transfer it.”⁷¹ Someone who expresses the same conceptions in different words, then, has created an “original” work according to this definition, and is entitled to copyright protection. Lord Ellenborough uses the word in the same sense when he explains, in *Cary v. Kearsley* (1802) that a writer may “use a work [by another writer] to make extracts from it into any original work of his own.”⁷² On this view, a writer may convey another’s ideas in the cognitive sense without being liable for conveyance in the legal sense.

When Blackstone speaks of a prohibition against any effort to “vary the disposition” of the work, he might seem to contemplate a right against adaptation or imitation. But when a work is revised in this manner, it is no longer “cloathed in the same words.” Rather, the author’s right of disposition is the right to arrange for the book’s publication, which no one else may “vary” by printing copies without authorization (or, Blackstone adds, by “recital, [or] by writing”). Some thirty years later, John Trusler took up the question of adaptation, asking whether “compilations and abridgments [are] to be considered [original works],” and immediately answering in the affirmative:

They are all works of labour and invention. . . . [Even if some texts] may introduce the same matter, the arrangement may be different . . . [and even if] various writers and compilers . . . draw their materials from the same source, [they] not only vary in their arrangement of facts, . . . *but have cloathed their conceptions in different language*. . . . [E]ach man’s work stands distinct by itself, new and original in its kind.⁷³

Trusler’s gloss on Blackstone is consistent with the account in the *Commentaries*: in both cases, the term “original” is used in its low-threshold sense, and does not rely on any notion of novelty or creativity to rationalize the author’s property right.⁷⁴

In limiting his concern to imitations that repeat “the same conceptions [as another writer], cloathed in the same words,” Blackstone may find little kinship with the more expansive aesthetic theorists of his day, but he comes very close to the views of Samuel Johnson and Richard Hurd, who had both written on imitation from a forensic perspective some fifteen years earlier. Johnson, in a *Rambler* paper from 1751, observes that charges of plagiarism, “even when . . . false, . . . may sometimes be urged with probability” because writers use “a common stock of images, a settled mode of arrangement, and a beaten path of transition, . . . which produce the resemblance generally observable among contemporaries.”⁷⁵ After enumerating examples, Johnson concludes that a writer may not

be “fully convicted of imitation, except where there is a concurrence of more resemblance than can be imagined to have happened by chance; as where the same ideas are conjoined without any natural series or necessary coherence, or where not only the thought but the words are copied.”⁷⁶

Richard Hurd pursues the same theme, at greater length, in *A Discourse Concerning Poetical Imitation* (1751). Hurd explains that different writers of “genius” may produce very similar phrases, allusions, and comparisons, but these resemblances are not evidence of copying unless the texts include “*the same arrangement of the same words.*”⁷⁷ The standard of proof is so high because “the same ideas and aspects of things constantly admonish[] the poet of the same *resemblances* and *relations.*” Writers acting “under the influence of the same *national character*” and “liv[ing] together in the *same period of time*” may use “some considerable *similarity* of expression.” Hurd allows that similar texts may possibly be copies even when such starkly incriminating evidence is absent—but without verbatim repetition, it is impossible to be sure.⁷⁸

Elsewhere in the essay Hurd discusses “genius” in terms that resonate with those of his most energetic contemporaries, saying for example that a “true genius” has been “touched with a ray of celestial fire”—which does not prevent him, however, from treating genius and imitation together. Even deliberate imitations may outshine their sources, according to Hurd, because the imitator “may possess a stronger, and more plastic genius, and therefore be enabled to touch, with more force of expression, even those particulars, which he professedly imitates.”⁷⁹ As with Pope’s approval of the “mutual commerce [that] makes Poetry flourish,” Hurd treats imitation not as a vice but as something to be encouraged. Hurd, like Young, is concerned with “the idea of value”

and “the worth of texts,” but for Hurd those considerations are not premised on novelty. If Blackstone’s account of copyright in “original works” converges with an aesthetic theory, it is a theory that gives imitation a vital role in literary production.

That perspective is also evident in a letter to George Steevens in 1779, in which Blackstone explained that a modern rewriting of a classical text “may safely [be] pronounce[d] an imitation, for it is not I presume the same train of ideas that follow in the same description of an Ancient and a modern.” The same description yields a different meaning when the modern writer borrows from an ancient source. If one kind of copy may express the same conceptions in different words, another kind might use the same words, in a new context, to express different conceptions. In both cases the text is an “original work” according to the *Commentaries*. In the remainder of the letter, Blackstone filled two pages with parallel passages from Addison’s *Cato* and its Shakespearean and Latin sources, remarking that he took “pleasure [in] setting down some imitations [he] observed in [Addison’s play].”⁸⁰ Again, like Hurd, Blackstone emphasizes the productive potential of literary imitation.

Besides Blackstone, the other principal source usually cited to connect eighteenth-century copyright law with aesthetic originality is *An Argument in Defense of Literary Property*, published in 1774 by Francis Hargrave, a barrister and legal historian. Again, the scholarship that draws on Hargrave is based on Rose’s analysis.⁸¹ Rose quotes Hargrave at length, in a passage that is worth reproducing in full, not least because of its echoes of Blackstone:

The subject of literary property is a *written composition*; and that one written composition may be distinguished from another, is a truth too evident to be much argued upon. Every man has a mode of combining and expressing his ideas peculiar to himself. The same doctrines, the same opinions, never come from two

persons, or even from the same person at different times, cloathed wholly in the same language. A strong resemblance of stile, of sentiment, of plan and disposition, will be frequently found; but there is such an infinite variety in the modes of thinking and writing, as well in the extent and connection of ideas, as in the use and arrangement of words, that a literary work *really* original, like the human face, will always have some singularities, some lines, some features, to characterize it, and to fix and establish its identity; and to assert the contrary with respect to either, would be justly deemed equally opposite to reason and universal experience. Besides, though it should be allowable to suppose, that there *may* be cases, in which, on a comparison of two literary productions, no such distinction could be made between them, as in a competition for originality to decide whether both were really original, or which was the original and which the copy; still the observation of the possibility of distinguishing would hold in *all other* instances, and the Argument in its application to them would still have the same force.⁸²

Here are Blackstone's "sentiments" and "language" again, presented in terms that closely track the account in the *Commentaries*. Rose suggests that in referring to "a literary work *really* original, like the human face," Hargrave's usage is ambiguous: "Does Hargrave merely mean a composition that has not been copied? Or does he mean one that is novel, that exhibits a certain freshness of character?"⁸³ This ambiguity, however, seems to depend on the high-threshold sense of "originality." Throughout the passage, Hargrave treats originality in its low-threshold sense, insisting that human expression is so various, so "peculiar" to each individual, that some minimal degree of variation is inevitable. His analogy between the human face and an original work makes exactly this point: if two nearly identical faces can be differentiated by "some singularities, some lines, some features," then human identity, like literary originality, depends on minor differences rather than on the more demanding criteria of "novel[ty]" and "freshness of character." The confusion evidently stems from the phrase "a literary work *really* original," by which Hargrave does not mean a remarkably or outstandingly original work, but one that is actually original (in the sense of being independently created) as opposed to a reproduction holding itself out as an original.

The last line of the passage is also ambiguous, Rose explains, because Hargrave may be taken to mean either that some writings are “unindividuated” or that some texts resemble each other so closely as to make it “impossible to determine which is the original.”⁸⁴ But Hargrave has not set up a category of banal and nondescript writing, to be contrasted against meritorious works with singular attributes; rather, he has made a practical observation about limit cases. Hargrave’s “competition for originality” involves an effort to determine whether two texts were independently produced (“whether both were really original”), or whether one was based on the other. Such a “competition” may be difficult with nearly identical texts, but the problem is an uncommon one: “the possibility of distinguishing would hold in *all other* instances.”

Rose is right to note the contradiction: having begun by claiming that no two texts are alike, Hargrave now admits that some may be indistinguishable. But that contradiction need not be taken to mean that a “*really* original” work requires creativity, nor that Hargrave is concerned to differentiate “hack writer[s]” who are not capable of “produc[ing] distinct literary works” from those “with at least moderate powers of original genius.”⁸⁵ Far from seeking to raise some talented group to the literary firmament, Hargrave merely acknowledges that sometimes we may be incapable of *telling* whether a text was created independently—just as Hurd argues that our suspicions about copying are often incorrect, because some writings are in fact independent creations even though they look like duplicates of another text. The trivial variations that constitute originality in Hargrave’s view (“some lines, some features”) do not bespeak a requirement of creativity. Novelty figures nowhere in his argument, and indeed the conceptual problem that novelty would solve—the need to provide a basis for separating

duplicates from non-duplicates—is handled just as well by the notion of minor variation, which Hargrave explicitly adduces.

Once one looks for evidence of a link between aesthetic theories of creativity and legal theories of literary property, it is striking how rarely anyone invoked the concept of aesthetic originality during the eighteenth-century copyright debates. References to authorial labor abound in this literature, but there is little discussion of novelty—even by figures such as William Warburton, who as a lawyer, literary critic, and copyright advocate would seem an obvious candidate.⁸⁶ Among the contributions to the legal debate over copyright, the only extended discussion of aesthetic originality appears in *An Enquiry into the Nature and Origin of Literary Property* (1762), an anonymous pamphlet that attacks the concept of literary property as quixotic and incoherent.⁸⁷ Even if the law recognized this form of incorporeal property, the writer explains, few would be able to recover in court, because among “the Productions of modern Authors, [there are] very few . . . whose Sentiments are new or original. Authors who seek Redress for Invasion of their Property, must prove the Originality of their Sentiments.”⁸⁸ And even where recovery is possible, damages must be based on the singular features “wherein the excellency of the Book consists.” The value of a book of poetry, for example, depends on “the Elegance of Diction, and Propriety of Metaphors, . . . in the Richness of Invention, and turn of Thought,” while in fiction and drama, the value lies in “the Truth of Character, the Vein of Humour, the Sentiment and Conduct of the Story.” But these features, the author concludes, cannot be assigned any market value: “Juries would be puzzled, what Damage to give for the pilfering of an Anecdote, or purloining the Fable of a Play.”⁸⁹

Here at last we see aesthetic considerations emphatically adduced as the proper basis for literary property—but only because the commentator means to ridicule the whole enterprise. In the *Enquiry*, literary property is made to seem a bad deal for modern writers because on the one hand, they own only the original aspects of their own productions—which leaves much of their work available for appropriation by others—while on the other hand, those original aspects are so hard to identify, and the value is so hard to quantify, that any suit looks like a futile proposition. In short, aesthetic originality appears only as an imaginary and impossible prerequisite, advanced by a skeptic who means to question the basis for any claim whatsoever to authorial property. That attitude makes sense, because even a requirement for “modest powers of original genius” would have entailed a radical expansion of copyright’s scope beyond the terms specified in the Act of Anne and a corresponding diminution of the public domain.

Ironically, the catalogue of absurd conflicts evoked in the *Enquiry* as a threat has turned out to offer a prescient gloss on the development of copyright law during the nineteenth and twentieth centuries. Courts and legislatures have developed increasingly intricate distinctions and exceptions as they have looked beyond wholesale piracy to isolate smaller elements that qualify for protection, while continuing to insist they are not in the business of making aesthetic judgments. Thus the unthinkable task of having to evaluate an anecdote or a fable has found doctrinal footing in the protection now afforded to plots and plot devices. The problem of originality has become even more difficult in light of the U.S. Supreme Court’s 1991 opinion specifying that an original work must have “at least some minimal degree of creativity,” “some creative spark, no matter how crude, humble or obvious it might be.”⁹⁰ The *Enquiry*’s warning may have amused its

first readers but probably did not alarm them, because the pamphlet invented a precondition that had no legal role. In the interim, however, the conflicts rehearsed in the *Enquiry* have gained force—as vindications of authorial merit by those who embrace a high-threshold view of originality, and as evidence of doctrinal confusion by those who take the low-threshold view.

III. Imitation and Eighteenth-Century Literature

In addition to a copyright doctrine that showed no interest in aesthetic originality, the eighteenth-century literary marketplace testifies to an ongoing enthusiasm for many kinds of imitation and revision—forms of copying that publishers would have been reluctant to gamble on, if there were a likelihood that the books would be damasked and made into waste paper.⁹¹ These practices were not new; for the most part, they had been an essential part of literary commerce for centuries. Parodic poets, like their Elizabethan counterparts, showed no hesitation in recycling numerous verses from the poems they targeted, often changing only a few words here and there to make the heroic seem comic, bathetic, or simply idiotic.⁹² Novelists copied plots, scenes, characters, and jokes with the same rapidity and enthusiasm as dramatists during the previous century. The imitations that writers produced in both of these contexts may not have been innovative, but the fact that they continued to thrive for many decades after the passage of the Act of Anne has considerable significance for the modern forms of both genres.

Considering the omnipresence of parody in modern culture, the history of parody has received surprisingly little attention. However, in a study of parody in early modern England, Robert Mack carefully distinguishes the dominant forms of parody up to the end of the sixteenth century from the new forms that emerged during the decades before the

English Civil War. Mack notes that while “the fundamental, referential ‘idea’ and impulses of parody” were not new to English authors in the Jacobean period, in previous centuries parody tended not to target individual writers or texts but traditions, genres, schools, and “literary style[s] somehow divorced from any particular author.”⁹³ In Ben Jonson’s plays around the turn of the sixteenth century, Mack argues, we see the emergence of “wholesale and text-specific parodic appropriation.”⁹⁴ These plays, in which Jonson pillories his competitors by mimicking their words and throwing them back at the author, feature a “tense staccato quality of . . . rapid-fire exchange that . . . is almost nowhere to be found in the more established traditions of medieval verse satire.”⁹⁵

In the wake of Jonson’s efforts, imitative parody became one of the characteristic features of English literary culture—a feature whose growth increased rapidly after the Restoration, in response to the popularity of such landmark contributions as Buckingham’s verbally precise mockery of Dryden in *The Rehearsal* (1672) and John Philips’s bathetic revision of *Paradise Lost* in *The Splendid Shilling* (1701). As Richmond Bond notes, this change is also apparent from the evolving vocabulary used for poetic mockery:

Blount’s *Glossographia* . . . in 1656 gave *burlesque* as “drolish, merry, pleasant,” . . . [whereas] the *Glossographia Anglicana Nova*, 1707, added “or a mock Poetry” . . . Edward Phillips’s *New World of English Words*, 1658, defined *burlesque* as “merry, drolish,” *travested* as “shifted in apparel, disguised”; the sixth edition, by John Kersey in 1706, expanded both terms like the 1707 book cited above and introduced *parody* as “a Poetick Sport, which consists in putting some serious Pieces into Burlesk, and affecting as much as is possible, the same Words, Rhimes and Cadences.”⁹⁶

Finding oneself the object of this “Poetic Sport” was the price of literary fame, as Dryden discovered, for example, in the early 1680s when “Absalom and Achitophel” generated

numerous mocking attacks such as Samuel Pordage's "Azariah and Hushai."⁹⁷ Pope encountered much the same treatment in "Aesop at the Bear-Garden: A Vision . . . In Imitation of the Temple of Fame," by "Mr. Preston" (1715), and Giles Jacob's "The Rape of the Smock" (1717). Ambrose Philips was an especially popular target in the mid-1720s, as were Colley Cibber's odes to King George in the early 1730s.⁹⁸ By the mid-century, Gray's reluctance to publish his "Elegy in a Country Churchyard" (1751) proved fully justified, given that it provoked dozens of mocking lampoons, replete with insulting lines like: "For Science frowned not on his humble Birth / And smooth-tongued Flattery marked him for her own."⁹⁹

The growing cultural emphasis on aesthetic originality over the last two hundred years, however, has produced an increasing hostility to imitative writing in some quarters. In 1994 the U.S. Supreme Court suggested that verbal similarity might, by itself, support a finding of infringement: "Once [the parodist has used] enough . . . to assure identification [of the source], how much more is reasonable will depend, say, on the extent to which the . . . overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original." This formulation might be thought to set out a two-part test (first, ask whether the work is essentially parodic, and if not, then assess the risk of market substitution), but on the previous page, the opinion treats the amount taken as itself a determinant of market substitution: "the amount and substantiality of the portion used will . . . tend to reveal[] the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives."¹⁰⁰ Thus rather than allowing the parodic purpose to excuse a greater amount of borrowing, the test suggests that (at some threshold, at least),

the quantity used may simply be regarded as too great, and that finding then points to the conclusion that the work, regardless of any parodic elements, is not essentially a parody but instead is a market substitute. Under this analysis, many parodists of the eighteenth century would have fared poorly. In justifying its reasoning the Court purports to rely on eighteenth-century literary culture, invoking Johnson's maxim that "[n]o man but a blockhead ever wrote, except for money."¹⁰¹ But it hardly follows that parodies—even wholesale parodies—usurp the source's place in the market. As Johnson observed elsewhere, two books on the same subject might "do good to one another," because "[s]ome will buy the one, some the other, and compare them: and so a talk is made about a thing, and the books are sold."¹⁰²

A concern with market substitution would also have constrained the production of eighteenth-century fiction. It had long been conventional among writers to exploit others' successes by recycling their plots. This practice was to prove especially popular among eighteenth-century novelists as they discovered the market niche. And because the novels' bid for readers often depended on the affiliation with an earlier work, it was common to advertise the genetic relationship. *Yorick's Sentimental Journey Continued*; *Pamela in High Life*; *Gulliveriana: Or, a Fourth Volume of Miscellanies, Being a Sequel to the Three Volumes Published by Pope and Swift*; *Charlotte, or, a Sequel to the Sorrows of Werter*; *Delineations of the Heart: or, the History of Henry Bennett, a Tragic-comi-satiric Essay, Attempted in the Manner of Fielding*—all of these appealed to potential readers by capitalizing on a popular title or author. Today, these might be treated as infringements of the original author's plot or characters. The same could be said for the imitations that J.M.S. Tompkins finds in later eighteenth-century recyclings

of Richardson: “The abduction of Miss Byron from the masquerade, Mr. B.’s disguised attempt on Pamela, Clarissa’s home-coming to the stony-hearted Harlowe family, these are the patterns from which are drawn the chief incidents of scores of books, with remarkably little variation, and sometimes with a literal closeness.”¹⁰³ Another form of novelistic imitation may be seen in the proliferation of works following the model of a newly popular subgenre, such as the novel of sentiment, the gothic, the it-narrative, and the Jacobin novel. Even when these books do not wear their literary lineage on the title page, their plots and characters readily indicate the source of inspiration.¹⁰⁴ The penchant for treading over familiar ground led to a vast quantity of fiction that today goes unread even by the most diligent historian of the novel, but that is hardly surprising, since the conditions that make for a flourishing public domain are conditions that foster literary production in general.

Nowhere is the importance of the public domain clearer, perhaps, than in the Fielding-Richardson rivalry. *Shamela*’s title and many of its sentences represent only slight variations from *Pamela*, while *Joseph Andrews* names itself as *Pamela*’s sibling. If the *Pamela-Shamela* controversy were to arise today in the United States, Fielding’s contribution would likely be treated as an infringement under the ruling cited earlier. Though certainly not seeking to provide the same kind of satisfaction as Richardson, Fielding would have been delighted if *Shamela* had put an end to *Pamela*’s sales. To a court trying to predict the future, the extent of Fielding’s copying would be more than sufficient to demonstrate the risk of market substitution. Similarly, *Joseph Andrews*, with its various references to the correspondence between Joseph and his sister, might run afoul of the doctrine that treats characters as a form of protected expression.¹⁰⁵ The

broader understanding of the public domain in the eighteenth century provided the crucible for the debate over the novel's moral aims and means of representation—a debate that had formative consequences for the development of the genre.

In addition to parodic and imitative writing, some writers built their careers on collecting and condensing others' works. John Trusler, author of one of the treatises cited earlier,¹⁰⁶ is a particularly instructive example. Trusler published numerous abridgements and compilations, including *Principles of Politeness, Being a Compilation from Lord Chesterfield's Letters* (1775); *A Descriptive Account of the Islands Lately Discovered in the South Seas* (1778; an abridgment of Captain Cook's *Voyages*); *A Concise View of the Common and Statute Laws of England* (1784; an abridgment of Blackstone's *Commentaries*); *A Compendium of Useful Knowledge* (1784); *A Compendium of Sacred History* (1797; an abridgement of Stackhouse's *History of the Bible*); and *Detached Philosophic Thoughts of the Best Writers, Ancient and Modern* (1810). Along the way—as if to underscore his interest in the principle of minimal differentiation that separates the abridgment from the piracy—he was also one of the first English writers to produce a thesaurus (*The Difference, Between Words, Esteemed Synonymous, in the English Language*, 1766) and a rhyming dictionary (*Poetic Endings, or a Dictionary of Rhymes*, 1783). That Trusler worked so energetically to mine others' works helps to explain why he would have cared to insist that compilations and abridgments should be regarded as original, for purposes of copyright protection. But while he may have had a more significant stake in the answer than the other legal commentators who addressed this issue, his view was consistent with theirs.

This description of eighteenth-century literary culture returns us to the question of

why modern scholars might find a greater emphasis on aesthetic originality than the contemporaneous legal discussion seems to support. There is no doubt that writers like Richardson and Young were eager to associate creativity and property (though it is hardly clear that they were prepared to discuss the issue with any kind of legal precision, or that they could have responded to the remarks in *An Enquiry into the Nature and Origins of Literary Property* about the prerequisites for the property right and its limits). To anyone who comes to the legal debate after being immersed in eighteenth-century literature, the views of novelists and poets are likely to color the whole question, and to provide the backdrop for any legal references to originality. Moreover, theories of aesthetic originality have been so massively influential since the early nineteenth century that to modern eyes, any reference to originality seems necessarily to include some element of creativity. This is why ambiguities can appear to arise in the writings of commentators like Blackstone and Hargrave, even when their arguments are perfectly consistent with the low-threshold notion of originality that they invoke throughout.

Not only do we have difficulty separating originality and creativity, but, as it turns out, we also delude ourselves into believing that a high-threshold originality requirement would be a painless one for writers to live by. A recent study by a team of cognitive scientists shows that we find it harder to recognize our creative debts to others than to believe in our own creative power.¹⁰⁷ Participants in the study were asked to propose new uses for familiar items; then all of the ideas were gathered and divided into several groups. Next, the participants were asked to rate one set of ideas (Group 1) according to their practicality, and to suggest improvements for another set of ideas (Group 2). One week later, the participants were given lists with items from both groups, and were asked

which ones they had proposed. When reviewing an idea from Group 2 in its unimproved state, the participants were three times more likely to claim it as theirs than when reviewing an idea from Group 1. Once they had performed the imaginative work of revision—the Lockean “mixing” of labor—people were more likely to take credit for the idea in its original form.¹⁰⁸ This study suggests that even when authorial claims about novelty sound exaggerated, they may represent the author’s sincere belief. But the author’s sincerity does not diminish her reliance on the public domain. Rather, it explains why writers who argue for a high-threshold copyright regime may fail to understand that reducing the rights of users would have devastating effects on their own productivity.

If our eagerness to exaggerate our own role in any creative endeavor accounts in part for this tendency, another explanation, paradoxically, involves the low-threshold view of originality that these writers disdain. Even *Feist*, with its demand for “some minimal degree of creativity,” hardly threatens to deny protection to any work intended as a creative effort by its author. The publication that flunked *Feist*’s “originality” standard was a phone book, and no court has suggested that the standard does anything to disqualify certain novels, restaurant reviews, or blog postings from copyright protection. As long as the aim to be creative is sufficient, and questions of aesthetic merit do not enter into the analysis, writers remain free to take from the public domain without needing to ask themselves whether a more demanding criterion for originality would have limited their opportunities.

A significantly heightened originality requirement, if imposed tomorrow, would serve to deny copyright protection to new works that fail to display sufficient creativity, while leaving intact the protection already afforded to existing works. Over the

last century and a half, a similar effect has been achieved, not through any significant revision of the threshold originality requirement, but instead by recharacterizing the elements of the work that qualify for protection, or what amounts to the same thing, by recharacterizing what counts as copying. The anonymous author of *An Enquiry into the Nature and Origin of Literary Property* could imagine a work that had no original aspect except for “the Conduct of the Story,” so that only that slender reed could sustain a claim for damages against a verbatim reproduction of the work, and there could be no compensation for any of the other copied elements. In modern copyright law, conversely, once a work has been deemed “derivative” because it copies a single protected element of another work, the derivative work may be regarded as thoroughly indebted to the source. Together, an increasingly fine-grained specification of what constitutes protected expression and an ever-longer term of protection have produced the same kind of effect, though not on the same order of magnitude, as a redefinition of originality. Precisely because this change was not effected through the latter route, it is still possible for writers to regard themselves as thoroughly innovative even as they work with borrowed tools. When these writers continue to object that that their highly original works are being unfairly appropriated, the response cannot involve a more demanding originality requirement, because that solution will always be regarded as doctrinally unworkable. So long as these complaints are heeded, then, the only possible solutions involve an ever more atomized view of the work’s elements and an ever-growing copyright term.

Notes

Thanks to Ronan Deazley, Trevor Cook, and Holger Schott Syme for their helpful suggestions.

¹ An Act for the Encouragement of Learning, 8 Anne c. 19 (1710).

² The same point is implicit in Tilar J. Mazzeo's observation that "[t]he primary obstacle to the development of copyright law during the first part of the [eighteenth] century . . . was the widespread cultural belief that knowledge should be held in common by all members of society, in order to ensure the development of civilization." Mazzeo, "Plagiarism, Composition Pedagogy, and the History of the Book," *Pacific Coast Philology* 40, no. 2 (2005): 92. For a useful analysis of the public domain's role in copyright law generally, see Jessica Litman, "The Public Domain," *Emory Law Journal* 39 (1990): 965-1023. As Litman explains, "the public domain is the law's primary safeguard of the raw material that makes authorship possible" (967).

³ See, e.g., Susan Eilenberg, "Mortal Pages: Wordsworth and the Reform of Copyright," in *Strange Power of Speech: Wordsworth, Coleridge, and Literary Possession* (New York: Oxford University Press, 1992), 193-212; Bradley Deane, *The Making of the Victorian Novelist: Anxieties of Authorship in the Mass Market* (New York: Routledge, 2003), 39-43; Clare Pettitt, *Patent Inventions: Intellectual Property and the Victorian Novel* (Oxford: Oxford University Press, 2004), 60-80.

⁴ G.W. Pigman III, "Versions of Imitation in the Renaissance," *Renaissance Quarterly* 33, no. 1 (1980): 1-32; Stephen Orgel, "The Renaissance Artist as Plagiarist," *ELH* 48, no. 3 (1981): 476-95; Harold Ogden White, *Plagiarism and Imitation During the English Renaissance* (Cambridge, Massachusetts: Harvard University Press, 1935).

⁵ Laura Rosenthal, *Playwrights and Plagiarists in Early Modern England: Gender, Authorship, Literary Property* (Ithaca, New York: Cornell University Press, 1996); Paulina Kewes, *Authorship and Appropriation: Writing for the Stage in England, 1660-1710* (Oxford: Clarendon Press, 1998); Brean S. Hammond, *Professional Imaginative Writing in England, 1670-1740: "Hackney for Bread"* (Oxford: Clarendon Press, 1997); Paulina Kewes, ed., *Plagiarism in Early Modern England* (New York: Palgrave Macmillan, 2003).

⁶ Whether Young's essay had much influence on his contemporaries is another question. According to Martin William Steinke, Young's *Conjectures* "did not attain . . . much significance in their own country" and the book "was appreciated far more in Germany." Steinke, *Edward Young's "Conjectures on Original Composition" in England and Germany* (New York: Stechert, 1917), 14-15. James Sambrook, similarly, notes that "Young's treatise became well-known in Germany" and "enjoyed renewed influence in England when its ideas were reimported by Coleridge." Sambrook, "The Psychology of Literary Creation and Literary Response," in *The Cambridge History of Literary Criticism*, ed. Hugh Barr Nisbet, 9 vols. (Cambridge: Cambridge University Press, 1989), 4:630. For other discussions of genius in eighteenth-century aesthetics, see Gilberta Golinelli, "The Concept of Genius and Its Metamorphoses in Eighteenth-Century English Criticism," *Textus* 18, no. 1 (2005): 189-204; John Hope Mason, "Thinking about Genius in the Eighteenth Century," in *Eighteenth-Century Aesthetics and the Reconstruction of Art*, ed. Paul Mattick, Jr. (Cambridge: Cambridge University Press, 1993), 210-39; George J. Buelow, "Originality, Genius, Plagiarism in English Criticism of the Eighteenth Century," *International Review of the Aesthetics and Sociology of Music* 21, no. 2 (1990): 117-28; Paul Kaufman, "Heralds of Original Genius," in *Essays in Memory of Barrett Wendell by His Assistants* (Cambridge, Massachusetts: Harvard University Press, 1926), 191-217, esp. 200-07.

⁷ Edward Young, *Conjectures on Original Composition in a Letter to the Author of Sir Charles Grandison* (London: Millar, 1759), 53-54. Young advises his reader to "prefer the native growth of thy own mind to the richest import from abroad"; the writer who relies on his native talents will find that "[h]is works . . . stand distinguished; his the sole Property of them; which Property alone can confer the noble title of an *Author*." See also Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Massachusetts: Harvard University Press, 1993), 117.

⁸ For example, Young writes that "[t]he mind of a man of Genius is a fertile and pleasant field, pleasant as *Elysium*, and fertile as *Tempe*; it enjoys a perpetual Spring. Of that Spring, *Originals* are the fairest Flowers: *Imitations* are of quicker growth, but fainter bloom" (Young, *Conjectures*, 9). For similar treatments of originality, see William Duff, *An Essay on Original Genius; and Its Various Modes of Exertion in Philosophy and the Fine Arts, Particularly in Poetry* (London: Dilly, 1767); William Duff, *Critical Observations on the Writings of the Most Celebrated Original Geniuses in Poetry* (London: Becket, 1770); Alexander Gerard, *An Essay on Genius* (London: Becket, 1771); and the sources cited in note 77 below.

⁹ William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon Press, 1765-69),

2:405-06. For further discussion, see pages 17-19 below.

¹⁰ The two definitions appear respectively under uses 5.a. (which the OED traces to 1650) and 6.a (traced to 1756).

¹¹ A classic articulation appears in *University of London Press v. University Tutorial Press*, [1916] 2 Ch. D. 601, 608-09: “The word “original” does not in this connection mean that the work must be the expression of an original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought [T]he Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.” As discussed below, on p. 33, the U.S. Supreme Court raised the threshold for originality in the ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), which held that an original work must have “some minimal degree of creativity.”

¹² *The Case of Samuel Richardson, of London, Printer, with Regard to the Invasion of His Property in The History of Sir Charles Grandison* (London, 1753), 2-3.

¹³ Wendy J. Gordon, “Render Copyright unto Caesar: On Taking Incentives Seriously,” *University of Chicago Law Review* 71, no. 1 (2004): 77.

¹⁴ Michael E. Connaughton, “Richardson’s Familiar Quotations: *Clarissa* and Bysshe’s *Art of English Poetry*,” *Philological Quarterly* 60, no. 2 (1981): 183-95. Bysshe’s compilation included famous poetic extracts (often of twenty lines or more), arranged topically, along with a rhyming dictionary and a treatise on versification. The book, which went through nine editions between 1702 and 1762, itself attests to the importance of anthologies in eighteenth-century literary culture.

¹⁵ Abraham Drassinower, “Taking User Rights Seriously,” in *In the Public Interest: The Future of Canadian Copyright Law*, ed. Michael Geist (Toronto: Irwin Law, 2005), 466.

¹⁶ Henry Fielding, *The History of Tom Jones*, ed. John Bender and Simon Stern (1749; Oxford: Oxford University Press, 1996), 68 (Book II, chap. 1), 540 (Book XII, chap. 1).

¹⁷ Pope to William Walsh, 2 July 1706, in *Alexander Pope: Selected Letters*, ed. Howard Erskine-Hill (Oxford: Oxford University Press, 2000), 13. Pope’s remarks in this letter offer a new light on his famous couplet, “True wit is nature to advantage dressed / What oft was thought but ne’er so well expressed.”

¹⁸ See John Feather, “From Rights in Copies to Copyright: The Recognition of Authors’ Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries,” *Cardozo Arts & Entertainment Law Journal* 10, no. 2 (1992): 455-73; reprinted in *The Construction of Authorship: Textual Appropriation in Law and Literature*, ed. Martha Woodmansee & Peter Jaszi (Durham, North Carolina: Duke University Press, 1994), 191-209.

¹⁹ Feather, “From Rights in Copies to Copyright,” in *The Construction of Authorship*, ed. Woodmansee and Jaszi, 197. As evidence for this view, Feather mentions “transfers [of ‘copies’] by purchase, inheritance and gift, subdivision into shares, and similar commercial activities,” and notes that “[a]s early as 1579, a copy was used as security for a debt” (197-198). For another version of this argument, see John Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain* (London: Mansell, 1994), 18.

²⁰ *A Decree of Starre-Chamber, Concerning Printing* (London: Barker, 1637), signatures B2r-B2v.

²¹ *A Decree of Starre-Chamber*, signatures C2r-C2v.

²² Frederick Seaton Siebert, *Freedom of the Press in England, 1476-1776: The Rise and Decline of Government Controls* (Urbana: University of Illinois Press, 1952), 165-233.

²³ 13 & 14 Car. 2, c. 33 § 6 (1662).

²⁴ On excerpting and anthologizing during this period, see John H. Astington, “Dramatic Extracts in the Interregnum,” *Review of English Studies* 54, no. 217 (2003): 601-14; Leah Price, *The Anthology and the Rise of the Novel: From Richardson to George Eliot* (Cambridge: Cambridge University Press, 2000), 15-16; Barbara M. Benedict, *Making the Modern Reader: Cultural Mediation in Early Modern Literary Anthologies* (Princeton: Princeton University Press, 1996); Adam Smyth, “Profit and Delight”: *Printed Miscellanies in England, 1640-1682* (Detroit: Wayne State University Press, 2004); Arthur Ellicott Case, *A Bibliography of English Poetical Miscellanies, 1521-1750* (Oxford: Bibliographical Society, 1935). On literary imitations during the seventeenth century, see the sources cited in notes 4 and 5. Focusing mainly on poetry and ballads, William St Clair has shown that there were fewer anthologies than one might expect, and he concludes that some members of the bookselling industry may have agreed not to abridge or anthologize each other’s publications. St Clair, *The Reading Nation in the Romantic Period* (Cambridge: Cambridge University Press, 2004), 66-74, 490-98.

²⁵ Neither Rosenthal nor Kewes (cited in note 5), frames the politics of Restoration plagiarism in these

terms, but their examples—particularly those involving Dryden, Shadwell, and Settle—bear out the point. See Rosenthal, *Playwrights and Plagiarists*, 44-49; Kewes, *Authorship and Appropriation*, 52-54. Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit, and Power* (Toronto: University of Toronto Press, 2001), 134-35, discusses *tu-quoque-ism*, a particular form of literary feuding in which one partisan uses the accusation of plagiarism against a rival, who responds by detecting the accuser's thievery.

²⁶ *Reasons Humbly Offered to be Considered before the Act for Printing, be Renewed* (1692). Raymond Astbury, "The Renewal of the Licensing Act in 1693 and Its Lapse in 1695," *Library* 33, no. 4 (1978), 300 n. 19, assigns the leaflet to "late December" 1692.

²⁷ *Manuscripts of the House of Lords, 1692-93* (Historical Manuscripts Commission, Fourteenth Report, Appendix, Part VI, 1894), 381 (affidavit of Peter Parker).

²⁸ *Journal of the House of Lords*, 15:280 (March 8, 1693). The argument appears in the course of an effort to amend the Licensing Act by stipulating that entry in the Stationers' Register should not be required so long as the book's printer and author included their names on the title page. For further discussion of this proposal, see Siebert (note 22 above), 260.

²⁹ *Journal of the House of Commons*, 10:847; *Journal of the House of Lords*, 15:280 (March 8, 1693). In its two most recent versions, the act had remained in effect for fourteen and eight years respectively.

³⁰ See John Harrison and Peter Laslett, *The Library of John Locke*, 2nd ed. (Oxford: Clarendon Press, 1971), 214 (item 2390).

³¹ Locke to Edward Clarke, 2 January 1693, in *The Correspondence of John Locke*, ed. E.S. De Beer, 8 vols. (Oxford: Clarendon Press, 1976-1989), 4:614-15.

³² For Locke's discussions of the project in his letters, see Locke to Edward Clarke, 18 February 1687, *Correspondence*, 3:128-32; Locke to Edward Clarke, 23 November 1691, *Ibid.*, 4: 331-32; Awnsham Churchill to Locke, 17 November 1703, *Ibid.*, 8:121. See also Robert B. Horwitz & Judith B. Finn, "Locke's Aesop's Fables," *Locke Newsletter* 6 (1975): 71-88; James L. Axtell, *The Educational Writings of John Locke* (Cambridge: Cambridge University Press, 1968), 271 n. 2.

³³ *Journal of the House of Commons*, 11:200 (Jan. 9, 1695).

³⁴ *Correspondence*, 5:786. See also 5:785 (noting that since the Commons made the recommendation for renewal on January 9 and rejected it on February 11, the memorandum "probably belongs about January").

³⁵ *Ibid.*, 5:787. Later in the memorandum, Locke offers a variation on this proposal, suggesting that for "Authors that now live and write it may be reasonable to limit their property to a certain number of years after the death of the author or the first printing of the book as suppose 50 or 70 years." *Ibid.*, 5:791.

³⁶ *Journal of the House of Commons*, 11:228 (February 11, 1695).

³⁷ *Ibid.*

³⁸ See John Freke and Edward Clarke to Locke, 14 March 1695, *Correspondence*, 5:291, 5:795; see also *ibid.*, 5:796 (including clause vesting "a priviledg in the Author of the said book his executors administrators and assignes of solely reprinting and publishing the said book for years from the first edition thereof").

³⁹ *Manuscripts of the House of Lords, 1693-95* (Historical Manuscripts Commission, 1900), 540 (April 3, 1695); *Journal of the House of Lords*, 15:532 (April 8, 1695) ("An Act for continuing and making perpetual several Laws therein mentioned").

⁴⁰ *Journal of the House of Commons*, 11:301 (April 12, 1695).

⁴¹ *Journal of the House of Commons*, 11:306 (April 17, 1695); see also *Journal of the House of Lords*, 15:545 (April 18, 1695). For another discussion of this protest in terms of Lockean approaches to copyright, see Alfred C. Yen, "Restoring the Natural Law: Copyright as Labor and Possession," *Ohio State Law Journal* 51 (1990): 523.

⁴² *Craftsman* 281 (November 20, 1731). Some historians have also ascribed Clarke's protest directly to Locke. See, e.g., Laurence Hanson, *Government and the Press, 1695-1763* (London: Oxford University Press, 1936), 1.

⁴³ *Journal of the House of Commons*, 11:343 (November 30, 1695).

⁴⁴ The stationers, presumably anxious about the limited-term copyright provision, petitioned Parliament on December 5, declaring themselves "very much concerned in the consequences of the . . . bill." *Journal of the House of Commons*, 11:354.

⁴⁵ See Cambridge University Library Manuscripts, shelfmark Oo.vi.93, folios 45r-46v ("no person or persons hath or shall have any sole property or sole Right of printing any Book pamphlet portrait or paper for any further or longer tyme than years to be accounted from an ensuing the first printing of the

same”). A later draft of the bill is included among the papers of Archbishop Tenison at Lambeth Palace Library (shelfmark Codices Tenisoniana, 640:17).

⁴⁶ Locke to John Freke and Edward Clarke, 2 December 1695, *Correspondence*, 5:471.

⁴⁷ See Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Oxford: Hart, 2004), 10-29; Feather, *Publishing, Piracy, and Politics* (cited above in note 19), 51-63; and John Feather, “The Book Trade in Politics: The Making of the Copyright Act of 1710,” *Publishing History* 8 (1980): 19.

⁴⁸ Archibald Campbell, *The Sale of Authors: A Dialogue, in Imitation of Lucian’s Sale of Philosophers* (London: [s.n.], 1767), 5. Similarly, an anonymous essayist observed in 1751 that “there is no statute law enacted against this kind of theft.” *The Student: Or, The Oxford and Cambridge Monthly Miscellany* (Oxford: Newbury, 1751), 2:211. Arthur Murphy, a playwright and a barrister, found himself unable to decide about the permissibility of the “Kind of Imitation . . . which consists in adopting the Sentiments and Phrases of others,” concluding that its “Legality is yet a Question.” *The Gray’s-Inn Journal*, no. 16 (February 3, 1752/3, reprinted in *The Gray’s-Inn Journal*, 2 vols. (London: Vaillant, 1756), 1:107. For more on Murphy and copyright law, see Richard W. Schoch, “‘A Supplement to the Public Laws’: Arthur Murphy, David Garrick, and *Hamlet*, with Alterations,” *Theatre Journal* 57, no. 1 (2005): 21-32; Don Nichol, “Arthur Murphy’s Law: The Man Who Won the First Decisive Battle in the Literary Property Wars,” *Times Literary Supplement* 4855 (April 19, 1996): 15-16; and Judith Milhous and Robert D. Hume, “Profits from Play Publication: The Evidence of *Murphy v. Vaillant*,” *Studies in Bibliography* 51 (1998): 213-29.

⁴⁹ David A. Brewer, *The Afterlife of Character, 1726-1825* (Philadelphia: University of Pennsylvania Press, 2005) documents numerous example of such sequels; see also Thomas Keymer and Peter Sabor, “Literary Property and the Trade in Continuations,” in “*Pamela*” in *the Marketplace: Literary Controversy and Print Culture in Eighteenth-Century Britain and Ireland* (Cambridge: Cambridge University Press, 2005), 50-82; Betty A. Schellenberg, “‘The Measured Lines of the Copyist: Sequels, Reviews, and the Discourse of Authorship in England, 1749-1800,’” in *On Second Thought: Updating the Eighteenth-Century Text*, ed. Debra Taylor Bourdeau (Newark: University of Delaware Press, 2007), 25-42, esp. 26, 29-30.

⁵⁰ Iona Italia notes that the Act of Anne “only applied to publication in volume form and did not affect periodicals,” and that many magazines “were scissors-and-paste operations, offering little or no original material . . . Many of the same tales, letters, poems, and essays were reprinted on numerous occasions in many different publications.” Italia, *The Rise of Literary Journalism in the Eighteenth Century: Anxious Employment* (New York: Routledge, 2005), 20, 21. (See Italia 110-114 for further elaboration of this point.) As Christine Y. Ferdinand observes, “Even more than other periodicals, the magazines capitalized on this practice [of reprinting articles], taking the name—*magazine*—from this characteristic.” Ferdinand, *Benjamin Collins and the Provincial Newspaper Trade in the Eighteenth Century* (Oxford: Clarendon Press, 1997), 146.

⁵¹ *Gyles v. Wilcox*, 26 Eng. Rep. 489, 490 (Ch. 1740). Jane C. Ginsburg suggests that by establishing a “fair abridgment doctrine,” *Gyles* shows that copyright protected more than the anti-piracy provisions of the Act of Anne, so that authors’ rights were greater (and the public domain correspondingly smaller) than the statute’s terms would imply. Ginsburg, “‘Une Chose Publique’?: The Author’s Domain and the Public Domain in Early British, French, and US Copyright Law,” *Cambridge Law Journal* 65, no. 3 (2006): 647-48. The language of *Gyles* might appear to carry that implication, but in practice, the “fair abridgment doctrine” created only the most miniscule limitation on the public domain. The abridgment cases generally display a presumption that the work is available for other writers to use.

⁵² These arguments from the counsels’ pleadings (now housed at the Public Records Office in Kew) are quoted by Deazley in *On the Origin of the Right to Copy*, 82.

⁵³ “In *Gyles v. Wilcox*, the abridgment contained 35 sheets, the original 275; it was referred to an award, and held a fair abridgment.” *Tonson v. Walker*, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

⁵⁴ Deazley, *On the Origin of the Right to Copy*, 82. No copies of Wilcox’s publication seem to have survived.

⁵⁵ “[Dodsley’s] argument rested on the fact that the best parts, the moral reflections, had been edited from the abridgment and only the plot remained. This was his only course of action because in 1761 the one [potentially] successful argument against the abridgment [was] that the abridgment devalued rather than enhanced Johnson’s novel.” William J. Howard, “Literature in the Law Courts, 1770-1800,” in *Editing Eighteenth-Century Texts*, ed. D.I.B. Smith (Toronto: University of Toronto Press, 1968), 87. See also

William F. Patry, *The Fair Use Privilege in Copyright Law* (Washington, D.C.: BNA, 1985), 8 n.11.

⁵⁶ 27 Eng. Rep. 270, 271 (Ch. 1761).

⁵⁷ *Strahan v. Newbery*, 98 Eng. Rep. 913 (Ch. 1774). For a discussion of the facts and the background to the litigation, see Mark Leeming, “Hawkesworth’s *Voyages*: The First ‘Australian’ Copyright Litigation,” *Australian Journal of Legal History* 9, no. 2 (2005), 159-73. The action is styled merely as “Curia Cancellaria” (i.e., “Court of Chancery”) in Lofft’s report, and has been designated by others variously as “Newbery’s Case” and “Hawkesworth v. Newbery.” Strahan, who was the published or Lofft’s report, evidently preferred not to mention his role in the litigation. See Leeming, 172.

⁵⁸ The two cases—*Austen v. Cave* and *Hitch v. Langley*—are discussed in Deazley, *On the Origin of the Right to Copy*, 79-80. In the first case, Hardwicke observed that piracies are impermissible “whether you print all at once or not.” *Ibid.*, 80.

⁵⁹ *Tonson v. Walker*, 36 Eng. Rep. 1017, 1020 (Ch. 1752).

⁶⁰ *Ibid.* Deazley explains the parties’ litigating positions and the previous twenty years’ worth of Chancery case law that Tonson’s counsel invoked (and recharacterized) in order to sabotage his opponent’s argument based on the term limits in the Act of Anne. Deazley, *On the Origin of the Right to Copy*, 133-36.

⁶¹ *Macklin v. Richardson*, 27 Eng. Rep. 451, 452 (1770). Richardson’s main argument was that because Macklin had arranged for the play to be performed publicly, and had not published it himself, he “gave a right to any of the audience to carry away what they could, and make any use of it.” *Ibid.* It was only after this argument failed that Richardson called his publication an abridgment. For further discussion of the background to this case, see W. Matthews, “The Piracies of Macklin’s *Love-à-la-Mode*,” *Review of English Studies* 10, no. 39 (1934): 311-18.

⁶² *Ibid.*

⁶³ It should also be noted that in *Read v. Hodges* (Ch. 1740), the court ultimately refused to enjoin the publication of a one-volume abridgment of the plaintiff’s three-volume biography of Peter the Great. The court granted a temporary injunction against the publisher of the abridgment, but then compared the two publications and lifted the injunction. The case was not published in a reporter but is discussed in Deazley, *On the Origin of the Right to Copy*, 81-82.

⁶⁴ *Millar v. Taylor*, 98 Eng. Rep. 205 (K.B. 1769) (per Willes, J.) (explaining that the category of “new works” protected by the statute includes “bona fide imitations, translations and abridgments”). For fuller discussion of the eighteenth-century case law on abridgements and the like, see Deazley, *On the Origin of the Right to Copy*, 79-85; Melissa de Zwart, “A Historical Analysis of the Birth of Fair Dealing and Fair Use: Lessons for the Digital Age,” *Intellectual Property Quarterly* 1 (2007): 74-79; Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge: Cambridge University Press, 2005), 254-56. On the origins of derivative rights, see L. Ray Patterson, “*Folsom v. Marsh* and Its Legacy,” *Journal of Intellectual Property Law* 5 (1998): 431-52.

⁶⁵ *A Vindication of the Exclusive Rights of Authors to Their Own Works* (London: Griffiths, 1762), 14. This explanation finds a striking parallel in the delineation of “originality” in *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339 (para. 35), in which the Court held that the reporter’s headnotes in judicial decisions were protected by copyright because they exhibited “skill and judgment,” but that the reporter’s rendition of the decisions themselves were not protected, because “the publishers add[ed] only basic factual information . . . [and] correct[ed] minor grammatical errors and spelling mistakes. Any skill and judgment . . . involved in making these minor changes and additions . . . are too trivial to warrant copyright protection.” On the treatment of originality in *CCH* by contrast with *University of London Press* and *Feist*, see Drassinower, note 15 above, and Drassinower, “Sweat of the Brow, Creativity, and Authorship: On Originality in Canadian Copyright Law,” *University of Ottawa Law & Technology Journal* 1, no. 2 (2004): 105-133.

⁶⁶ *A Vindication of the Exclusive Rights of Authors*, 9. In a book review, William Kenrick approved this view, observing that “he who obtaineth the copy of a book, may appropriate the stock of ideas contained therein, and, by opposing such sentiments, may give birth to a new doctrine.” *Monthly Review* 27 (1762): 183. Writing twelve years later, in the wake of the *Donaldson* opinion, Kenrick observed that under the statute, “it does by no means appear that *abstracts, abridgments and compilations* (of which the greater number of new books now published consist) are at all contrary to law.” William Kenrick, *An Address to the Artists and Manufacturers of Great Britain* (London: Domville, 1774), 65 (emphasis in original). For more on Kenrick and his views on literary recycling, see Brewer, *The Afterlife of Character*, 12, 87-95.

⁶⁷ Oren Bracha similarly observes that “[t]he image of the romantic original author was not even uniformly accepted in theory [in eighteenth-century England]. In copyright doctrine it was hardly present.” Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* (S.J.D. diss., Harvard Law School, 2005), 234.

⁶⁸ Blackstone, *Commentaries*, 2:405-06, cited in Rose, *Authors and Owners*, 115.

⁶⁹ Rose, *Authors and Owners*, 115.

⁷⁰ For example, in the course of a very cogent discussion of the process by which “literature became a form of commerce [so that] writers had a new reason to display their uniqueness,” John Hope Mason draws on Rose’s discussion of Blackstone and Hargrave. Mason, *The Value of Creativity: The Origins and Emergence of a Modern Belief* (London: Ashgate, 2003), 109-110 and 265 nn.33-34. Similarly, Catherine Fisk cites Rose’s discussion for the view that in this discussion of the “original work” Blackstone was “stat[ing] the classic mixed-labor and genius-based justification for copyright.” Fisk, “Authors at Work: The Origins of the Work-for-Hire Doctrine,” *Yale Journal of Law & the Humanities* 15, no. 1 (2003), 12. Others have concluded that Blackstone would protect not only the language of the text but also the author’s style. See, e.g., Hannibal Travis, “Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment,” *Berkeley Technology Law Journal* 15, no. 2 (2000), 782; and Richard R. Yeo, *Encyclopaedic Visions: Scientific Dictionaries and Enlightenment Culture* (Cambridge: Cambridge University Press, 2001), 203. Finally, some have concluded more generally, on the basis of Rose’s discussion, that novelty was regarded as a prerequisite for legal ownership of the work. See, e.g., David Higgins, *Romantic Genius and the Literary Magazine* (London: Routledge, 2005), 5, 152 n.16; Martin A. Kayman, “Lawful Writing: Common Law, Statute and the Properties of Literature,” *New Literary History* 27, no. 4 (1996), 774, 783 n.46; Ellen Gardiner, *Regulating Readers: Gender and Literary Criticism in the Eighteenth-Century Novel* (Cranbury, NJ: University of Delaware Press, 1999), 39.

⁷¹ Blackstone, *Commentaries*, 2:405-06.

⁷² *Cary v. Kearsley*, 170 Eng. Rep. 679, 679 (K.B. 1802).

⁷³ John Trusler, *An Essay on Literary Property* (London: Printed for the author, 1798), 15 (emphasis added).

⁷⁴ Blackstone even went so far as to endorse the practice of abridgment, helping Lord Chancellor Apsley to conclude, in the case of Hawkesworth’s *Voyages* (see p. 15 & n.37 above), that Newbery’s version was “allowable and meritorious.” According to Lofft’s report of the case, Apsley sought Blackstone’s aid, and after “spen[ding] some hours together,” they concluded that in spite of the verbatim repetition of material from the source, Newbery’s abridgment eliminated various “unnecessary and uninteresting circumstances” and was “not an act of plagiarism upon the original work, nor against any property of the author in it.” *Strahan v. Newbery*, 98 Eng. Rep. 913 (Ch. 1774).

⁷⁵ *Rambler* 143 (July 30, 1751). Hurd’s essay, published two months earlier (see note 76 below), may have inspired Johnson’s.

⁷⁶ *Ibid.* Johnson returned to theme, and the legal rhetoric, in *Adventurer* 95 (Oct. 2, 1753), reprinted in *The Adventurer* (London: Payne, 1753), 2:145-50. Similarly, Boswell, in an essay published a quarter-century later in the *London Magazine*, wrote that “the sameness or similarity which we frequently find between passages in different authors cannot be with absolute certainty ascribed to its proper origin unless where there is a passage of considerable length in one author, which we can discover in the very same words in another author.” James Boswell, *The Hypochondriack*, ed. Margery Bailey, 2 vols. (Stanford: Stanford University Press, 1928) 1:276 (essay originally published July 1779).

⁷⁷ Richard Hurd, *Q. Horatii Flacci Epistola ad Augustum. With an English Commentary and Notes. To which Is Added, a Discourse Concerning Poetical Imitation* (Cambridge: Thurlbourn, 1751), 186 (italics in original). Hurd’s book was published on May 21, 1751; see Sarah Brewer, ed., *The Early Letters of Bishop Richard Hurd, 1739-1762* (Woodbridge, Suffolk: Boydell Press, 1995), 223 n. 2. Hurd would return to these issues in *A Letter to Mr. Mason; on the Marks of Imitation* (London: Dodsley, 1757), which in turn provoked Edward Capell’s *Reflections on Originality in Authors, Being Remarks on A Letter to Mr. Mason on the Marks of Imitation: In Which the Absurd Defects of That Performance Are Pointed out, and the Absolute Uncertainty of Imitation in General Is Demonstrated in Various Instances* (London: Horsfield, 1766). For more on Hurd, see Richard Terry, “‘In Pleasing Memory of All He Stole’: Plagiarism and Literary Detraction, 1747-1785,” in *Plagiarism in Early Modern England*, ed. Paulina Kewes (New York: Palgrave, 2003): 181-200; and Bertrand Goldgar, “Imitation and Plagiarism: The Lauder Affair and Its Aftermath,” *Studies in the Literary Imagination* 34 (2001): 1-16. John W. Draper provides a useful

summation of changing attitudes towards literary imitation in “Aristotelian ‘Mimesis’ in Eighteenth Century England,” *PMLA* 36, no. 3 (1921): 372-400, esp. 386-87.

⁷⁸ Hurd, *Discourse Concerning Poetical Imitation*, 177, 183. For more examples of the same argument, see Arthur Murphy’s *Gray’s-Inn Journal* essay, cited above in note 48, and Joseph Warton, *Adventurer* 63 (June 12, 1753), reprinted in *The Adventurer* (London: Payne, 1753), 1:373-78.

⁷⁹ Hurd, *Discourse Concerning Poetical Imitation*, 114, 112.

⁸⁰ *The Letters of Sir William Blackstone, 1744-1780*, ed. W.R. Prest (London: Selden Society, 2006), 178 (April 1, 1779). Thanks to Wilf Prest for bringing this letter to my attention. In identifying these parallel passages, without adducing them as evidence of plagiarism or lack of wit by the later author, Blackstone was engaging in a popular literary pastime that is also illustrated in Hurd’s and Johnson’s examples. Its very popularity suggests, again, that originality as novelty was not the only measure of poetic excellence.

⁸¹ In addition to the sources cited in note 68, see, e.g., Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), 62-63, and Rebecca Elisabeth Connor, *Women, Accounting, and Narrative: Keeping Books in Eighteenth-Century England* (New York: Routledge, 2004), 144-45.

⁸² Francis Hargrave, *An Argument in Defence of Literary Property*, 2nd ed. (London, 1774), 6-7. Cited in Rose, *Authors and Owners*, 125.

⁸³ Rose, *Authors and Owners*, 126.

⁸⁴ *Ibid.*, 126.

⁸⁵ *Ibid.*, 127.

⁸⁶ See Warburton’s anonymous *A Letter from an Author to a Member of Parliament Concerning Literary Property* (London: Knapton, 1747). As noted above, on p.17, another pro-copyright pamphlet, *A Vindication of the Exclusive Right of Authors to Their Own Works*, expressly rejects the idea that originality is a prerequisite for copyright.

⁸⁷ *An Enquiry into the Nature and Origin of Literary Property* (London: Flexney, 1762). For more on this pamphlet see Don Nichol, “Warburton (Not!) on Copyright: Clearing up the Misattribution of *An Enquiry into the Nature and Origin of Literary Property* (1762),” *British Journal for Eighteenth-Century Studies* 19, no. 2 (1996): 171-82. The pamphlet has occasionally been misattributed to Warburton; Nichol speculates that Arthur Murphy may have been the author. See also Chris Mounsey, *Christopher Smart: Clown of God* (Lewisburg, Pennsylvania: Bucknell University Press, 2001), 262-64, which considers the possibility that Christopher Smart was the author, and discusses Smart’s relations with William Flexney, the pamphlet’s publisher.

⁸⁸ *Enquiry*, 12.

⁸⁹ *Ibid.*, 13-14. Similarly, Lord Kames, declining to find a common-law copyright in *Hinton v. Donaldson*, pronounced Hogarth to be “the only truly original author which this age has produced in England,” and concluded that a doctrine protecting original works would entail a prohibition against taking the author’s “ideas, his sense and meaning, which is really his literary property, from him.” Kames sarcastically added, citing the example of Bays, the plagiarist in Buckingham’s *The Rehearsal*, that this view of literary property could amount to a prohibition against “stealing wit from conversation.” James Boswell, *The Decision of the Court of Session, upon the Question of Literary Property; in the Cause [of] John Hinton of London, Bookseller, Pursuer; against Alexander Donaldson* (Edinburgh: Donaldson, 1774), 24, 25.

⁹⁰ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (internal quotation marks and citation omitted). *Feist*’s treatment of originality has provoked extensive discussion; some of the most useful contributions include Diane Leenheer Zimmerman, “It’s an Original! (?): In Pursuit of Copyright’s Elusive Essence,” *Columbia Journal of Law & the Arts* 28, no. 2 (2005): 187-212; Daniel J. Gervais, “*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law,” *Journal of the Copyright Society of the USA* 49 (2002): 949-81; and Russ VerSteeg, “Rethinking Originality,” *William & Mary Law Review* 34, no. 3 (1993): 801-83.

⁹¹ Under 8 Anne c. 19, subsec. II, infringing publications were to be turned over to the “proprietor or proprietors thereof, who shall forthwith damask, and make waste paper of them.”

⁹² According to Richard Terry, “The Augustan Age was first great age of parody, the period in which it became both prolific and mainstream.” Terry, “The Circumstances of Eighteenth-Century Parody,” *Eighteenth-Century Life* 15, no. 3 (1991): 76.

⁹³ Robert L. Mack, *The Genius of Parody: Imitation and Originality in Seventeenth- and Eighteenth Century English Literature* (New York: Palgrave, 2007), 72, 73.

⁹⁴ Ibid., 72.

⁹⁵ Ibid., 74.

⁹⁶ Richmond P. Bond, *English Burlesque Poetry, 1700-1750* (Cambridge, Massachusetts: Harvard University Press, 1932), 19.

⁹⁷ Mack, *The Genius of Parody*, 147, 153-56.

⁹⁸ Bond, *English Burlesque Poetry*, 276-77, 290-91 (Pope); 325-29 (Philips); 357-58, 363-64, 369-70 (Cibber). Moyra Haslett remarks that “[i]n the disputatious print culture of the eighteenth century, parodies, burlesques, and absurd imitations were deployed more frequently than any other kind of attack.” Haslett, *Pope to Burney, 1714-1779: Scriblerians to Bluestockings* (New York: Palgrave Macmillan, 2003), 228.

⁹⁹ Marcus, “Epitaph,” *London Chronicle*, July 27-29, 1769, 103. For more examples (such as “An Elegy Wrote under a Gallows,” 1770, “Hackfall: An Elegy,” 1772), see Clark Sutherland Northup, *A Bibliography of Thomas Gray* (New Haven: Yale University Press, 1917), 123-44.

¹⁰⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁰¹ Ibid., 584, citing James Boswell, *The Life of Johnson*, ed. G.B. Hill, 6 vols. (Oxford: Clarendon Press, 1934), 3:19.

¹⁰² James Boswell, *Journal of a Tour of the Hebrides* [with Samuel Johnson, *A Journey to the Western Islands of Scotland*], ed. Allan Wendt (Boston: Houghton Mifflin, 1965), 162 (entry for March 20). As a poet, critic, journalist, and editor who knew a good deal about the economics of publishing, Johnson expressed shifting views on literary property and the public domain that are not easily summarized in a pair of quotations. For more extensive discussion, see Edward A. Bloom, “Samuel Johnson on Copyright,” *Journal of English and Germanic Philology* 47, no. 2 (1948): 165-72; Alvin Kernan, *Samuel Johnson and the Impact of Print* (Princeton: Princeton University Press, 1987), 101-02; and Kevin Hart, *Samuel Johnson and the Culture of Property* (Cambridge: Cambridge University Press, 1999), 71.

¹⁰³ J.M.S. Tompkins, *The Popular Novel in England, 1770-1800* (London: Constable, 1932), 34. To show how readily the examples come to hand, Tompkins documents her point with six novels published in the space of six years—1771 to 1776 (34 n. 1).

¹⁰⁴ For example, reviewers of gothic novels in the 1790s complained widely about the “vapid and servile imitations” of Ann Radcliffe’s fiction, as Lauren Fitzgerald notes in “The Gothic Villain and the Vilification of the Plagiarist: The Case of *The Castle Spectre*,” *Gothic Studies* 7, no. 1 (2005): 5.

¹⁰⁵ For discussion of the doctrine, see Francis M. Nevins, Jr. “Copyright + Character = Catastrophe,” *Journal of the Copyright Society of the U.S.A.* 39 (1992): 303-344.

¹⁰⁶ See note 73 above.

¹⁰⁷ Louisa-Jayne Stark, Timothy J. Perfect, and Stephen E. Newstead, “When Elaboration Leads to Appropriation: Unconscious Plagiarism in a Creative Task,” *Memory* 13, no. 6 (2005): 561-73; see also Louisa-Jayne Stark and Timothy J. Perfect, “Elaboration Inflation: How Your Ideas Become Mine,” *Applied Cognitive Science* 20, no. 5 (2006): 641-48.

¹⁰⁸ As the authors put it, “real-life plagiarists inevitably think about appropriated ideas and accordingly invest considerable time and efforts in these ideas.” Stark et al., “When Elaboration Leads to Appropriation,” 562.