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on intellectual
property

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Richard A. Posner

*The law & economics of
intellectual property*

Legal disputes over intellectual property have exploded in recent years. No field of law is in greater ferment. And in no field of law have judges and scholars experienced more difficulty recently in getting their bearings.

The increase in intellectual property litigation was made inevitable by the rise of the information economy, an economy built on intellectual property – which is now, incidentally, America’s largest export. Recognition of the importance of intellectual property in the current American scene is one of the things that lie behind the seemingly relentless expansion of intellectual property rights in modern law.

Two illustrations of that expansion: the copyright term has been repeatedly enlarged in recent years, to the point where copyrights are as a practical mat-

ter nearly perpetual. And the new “business method” patents create the potential for inventors of new methods of doing business to obtain enormous monopoly power (imagine if the first person to think up the auction had been able to patent it); such patents also create a reward greatly in excess of the cost of the invention.

The emergence of new technologies has further caused the law to lose its bearings, and this in two respects. First, one of the most important of these new technologies, computer software, is characterized by high monopoly potential conjoined with an extreme disparity between the cost of creation and the cost of making and distributing copies, which indeed approaches zero whenever the copy is made electronically and is distributed over the Internet. Property rights in software may enable its creators to reap enormous profits by charging prices that inhibit distribution, while denying property rights may, in the interest of discouraging excessive investment in software creation and of maximizing distribution, kill the goose that lays the golden eggs by depriving the creators of software of the profit opportunities needed to finance that creation. That is the essential dilemma in crafting a sensible, efficient regime of intellectual property rights.

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Second, the products of the new technologies are sometimes hard to fit into the law's pigeonholes. Computer software is a kind of text, which implies that copyright is the proper regime; a kind of machine, which implies that patent is the proper regime; and a kind of algorithm, which traditionally has not been protected by either body of law. In biotechnology, the creation of new forms of life by genetic engineering poses acutely the question of just what should be regarded as patentable technology.

A further example of how new technologies can confound legal classifications is again drawn from computer software. Software manufacturers increasingly are bypassing the limitations (discussed below) on the duration and scope of copyrights by selling directly to their customers, pursuant to contracts that limit the customer's rights in the software more tightly than copyright would do. The significance of intellectual property rights, as of rights to physical property, is that they are enforceable against strangers. A trespass is enjoined even if the trespasser never promised not to enter your land. But if the only people who have access to your property happen to be people with whom you have a contract, you can regulate their access by means of contract and forget about property law.

The information economy and its associated novel technologies arose against the background of a mature system of intellectual property law, one that had evolved over centuries out of ancient concepts developed to deal with tangible property. To understand the law of intellectual property, and the muddle we're now in, you must first understand the law of physical property and the social objectives of that law.

When lawyers speak of a "property right," say to a parcel of land, they mean

simply that the holder of the right is entitled to invoke the aid of the state to prevent anyone from entering upon the land without his consent. There are all manner of qualifications of this right (eminent domain, for example – the landowner can't prevent the government from taking his land for a public use, although he can insist that the government pay him just compensation for the taking), but they can be ignored.

What cannot be ignored is why property rights are granted – what social functions they serve. Two are paramount. First, without exclusive rights to the use of tracts of land or other valuable physical objects, these properties would be overused – if anyone has the right to graze his cattle on a pasture, the pasture will be overgrazed and hence depleted prematurely, because each cattle owner will tend to ignore the costs that the grazing by his cattle imposes on the other users of the pasture. Second, without exclusive rights, there will be insufficient incentives to invest in improving property: if you cannot be assured of being able to reap where you have sown, you won't sow, and the land will lie fallow.

It is understood, however, that the social benefits of property rights must be balanced against the costs. When property has little value relative to the costs of creating or enforcing a property right, the right is withheld. Here is a homely example: owners of shopping centers do not charge a price for parking in the shopping center's parking lot. In effect, the owner declines to enforce his property right in the lot, treating it instead as the common property of the shopping center's customers, like a common pasture. This is because charging a fee for entry to the lot, while it would have an economizing effect (the lot could be smaller if access to it were rationed by

price, just as tolls limit highway traffic), would cost more than it would be worth; part of the cost would be discouraging people from shopping at the center.

We can follow these themes into the law of intellectual property, but with important qualifications. One is that, in contrast to the grazing example, the use of intellectual property by one person usually doesn't diminish its value to other users. That's because the copies of such property can be multiplied indefinitely at little added cost. If I read a book, I do not deprive others of the use of the intellectual property constituting that book, because they can buy and read other copies without interfering with me. Indeed, widespread use of intellectual property can actually increase the value of the property; in effect, additional copies have negative cost, when the value they confer is taken into account. A popular book or movie becomes a focus of discussion; the more popular it is, the more "copies" of it (in effect) there are, the greater the value.

There is an interesting exception, however, concerning what is called the "right of publicity," confusingly classified as part of the "right of privacy." A person has a right not to have his name or likeness used for advertising or other commercial purposes without his consent. This is a right particularly valued by celebrities. Should there be such a right? Does it have useful incentive effects, comparable to the effect of granting property rights to land to create the incentive to cultivate the land? And even if it does, what should happen when the celebrity dies? Should the right die with the celebrity, on the theory that he will no longer be "incentivized" by it to cultivate his image and that therefore anyone should be free to use his name and likeness in advertis-

ing? The answer is No, for the same reason that property rights are recognized even in "natural" pastures, that is, pastures not created or improved by investing, unlike ordinary farmland: there would be overuse. The advertising value of the celebrity would be reduced if the celebrity's name and likeness could be attached to an indefinite number of different products. There can be "congestion" even of intellectual property. And this is true whether or not the celebrity is still alive.

Still, in general, the use of intellectual property by one person does not reduce the value of its use by another. Stated differently, the marginal cost of intellectual property – the cost of adding one more user of it – is very low. As I noted earlier, it is essentially zero in the case of computer software, which can be delivered to a new user over the Internet – and it can even be negative.

This has led some students of intellectual property to think it would be desirable to make such property available for free to anyone who wanted to use it, since, in general, optimum output is achieved by equating price to marginal cost, and in the case of much intellectual property this means setting the price at (or only trivially above) zero – or even subsidizing distribution.

But as is now well understood, such a policy would be disastrous. It would kill the incentive to create the intellectual property in the first place, outside of the relatively rare cases in which the creators have powerful nonmonetary incentives to create such property, or in which its creation is financed other than by sale or lease of the property (by taxation, for example, or charitable donation – such as the patronage of authors by wealthy people, in the old days). We need not suppose that most creative people are greedy to realize that if they can-

not obtain a pecuniary benefit from producing intellectual property they will not be able to finance the costs (including the costs of their time) required to produce it.

And so the state defines, recognizes, and enforces property rights in intellectual property. The most important such rights are copyrights and patents, the former a property right in expression, the latter a property right in useful ideas. A third very common form of intellectual property, trademarks, is misnamed, and I will not discuss it extensively. Trademarks are merely identifiers, designed to protect consumers from being misled regarding the origin or quality of particular products or services. There are many interesting legal and economic issues concerning trademarks, but they are not centrally issues of property. Also of importance in the broad domain of intellectual property is the right of publicity, which I've already mentioned, and trade secrets, which are an alternative to patents as a method of protecting innovations from being copied without compensation to the inventor. But I will not discuss trade secrets.

Copyrights and patents are both limited in duration, unlike rights in physical property, and an initial question is why? There are several answers, and they point to the fundamental differences between physical and intellectual property.

One answer is the tracing problem, which looms large in the definition and enforcement of intellectual property generally. Items of physical property are visibly distinct; this is true even of adjacent parcels of land, once the boundary has been mapped and fenced. But one piece of intellectual property is not visibly distinct from others; it is identified only by comparison with others. Two copies of the same book are physically distinct, but the intellectual property

contained in them is identical. Worse, two different books may be sufficiently similar to raise a question of whether the intellectual property in one was appropriated by the author of the other. If copyright were perpetual, James Joyce or his publisher would have become embroiled in litigation with the heirs of Homer over whether *Ulysses* infringed the *Odyssey*, and Leonard Bernstein with the heirs of Ovid over whether *West Side Story* infringed *Pyramus and Thisbe* (not to mention *Romeo and Juliet* and *A Midsummer Night's Dream*, themselves arguably infringements of Ovid's story). If patents were perpetual, heirs of Leonardo da Vinci would be litigating over rights to basic aircraft technology.

The tracing problem is more serious for copyrights than for patents. The Patent and Trademark Office contains descriptions of patents classified by subject matter, and it is feasible though often difficult to search through these descriptions and identify the patents that a proposed new patent may infringe. But it is impossible as yet to search through the entire body of copyrighted materials. That is one reason why copyright protection is more limited than patent protection. A copyright is infringed only if it is copied; if it is duplicated innocently, there is no infringement. A patent is infringed by being duplicated, even if the duplication was innocent – a case of independent discovery.

Even in the case of copyright, however, the tracing problem is really rather superficial. If copyright owners were required to renew their copyrights periodically by filing a notice of renewal in a public registry, it would be simple enough for creators of new intellectual property to determine whether a given work was in the public domain.

There is a more serious concern with giving the owner of intellectual property

too expansive a right. If copyright were perpetual, Ovid's heirs would probably win their suit against Leonard Bernstein; Shakespeare's heirs certainly would (*West Side Story* is based directly on *Romeo and Juliet*) – except they might lose in turn to Ovid's heirs! This means that cutting off copyright protection after a specified period shorter than eternity not only limits tracing costs, but also reduces the pecuniary gain to the owner of the copyright.

There are two reasons why that might be a good thing. First, intellectual property presents a more serious problem of what economists call “rent seeking” than physical property does. A “rent,” in economics, is not a rental; it is an excess of revenue over cost. It is pure profit, which is to say profit in excess of the cost of capital (which is not “profit” in an economic sense but merely another cost of doing business). Rent seeking can be bad from a social standpoint because it can lead to excessive investment.

An example is a hunt for buried treasure. If the treasure has a value of \$10 million, which will be awarded to the first finder, there will be a race to be first that may eat up the entire profit. Suppose that the cost to a particular finder of finding the treasure by April 1, 2002, would be \$1 million. Would-be finders might incur much greater costs in vying to find it sooner – for example, a finder who was confident that by expending an additional \$8 million he could win the race by finding the treasure on March 31 would consider the expenditure worthwhile, since it would yield him a profit of \$1 million. But the additional cost incurred to win the race would be wasted from a social standpoint, because the social benefit of finding the treasure a day earlier would be negligible.

The problem of rent seeking is no longer acute in the case of the historical-

ly most important form of property, land, because virtually all land is owned. (The situation was quite otherwise in the age of exploration and discovery of new continents.) There would be no rent-seeking problem in the buried-treasure example if someone owned the treasure and were merely offering a reward to the finder – the owner would set the reward at a level designed to obtain the finding service at least cost.

But, as noted, the problem of rent seeking is acute in the “land grab” phase of development – and that is the phase we're perpetually in with regard to intellectual property. For remember that intellectual property is created rather than found, which means that if rights to intellectual property are defined too broadly, the rents generated by them will be so great that excessive resources will be drawn into efforts to be the first to create a valuable piece of intellectual property and thus to obtain the property right to it. Limiting the duration of the property right is one way of cutting down its value to the owner and thus reducing the amount of rent seeking.

But, once again, this concern must not be exaggerated. Because of discounting to present value (that is, the preference for money now over the same sum of money years or decades hence), the difference in value to the creator of intellectual property of, say, a seventy-five-year term and a thousand-year term would actually be very slight, because the present value of a dollar not to be received for seventy-five years (or one hundred or one thousand years) is very slight.

A second reason for wanting to limit the potential reward to owners of intellectual property rights is the previously noted effect of those rights in limiting the distribution and hence use of intellectual property. The fees that the owner of intellectual property charges for its

use deflect some users to other products that may cost society more to produce (remember that the marginal cost, the cost of adding one more user, of intellectual property is often close to, at, or even below zero), resulting in a loss of efficiency. Some of those users, moreover, may be other creators of intellectual property, so that expansive intellectual property rights may actually reduce the creation of intellectual property – an important and counterintuitive point to which I'll return.

Against all this must be weighed the incentive effects of allowing the property owner to obtain revenue from property that may have cost him a great deal to create. But it doesn't follow that he has to be able to collect fees *in perpetuity* in order to recoup his investment. Perpetual fees may result in a reward that exceeds the cost of creating the property in the first place, thus resulting in a needless restriction of the use of the property along with the wasteful expenditures caused by rent seeking.

It is true, as I have said, that because most people discount future income steeply, the excess reward that perpetual fees would confer on creators of intellectual property is somewhat illusory. Few people will work harder today to generate some additional income to their heirs (if any) a century hence. But this means that perpetual fees have very little upside in creating incentives for the creation of intellectual property; the tracing costs, and the effect of perpetual copyright in complicating the use of existing intellectual property as an input into new intellectual property, become decisive objections to perpetual rights.

Disregarded in this analysis, however, is the point made earlier in connection with the right of publicity – the potential congestion cost if valuable property is unowned. For example, if anyone can

use the character of Mickey Mouse, the public may become tired of him, and his value may drop to zero. Suppose, moreover, that to create a demand for an old expressive work requires a current investment. What publisher would incur the expense and risk of developing a demand for an eighteenth-century author whose works were long out of copyright if the publisher acquired no property right in the works, so that if his expenditures succeeded in creating a demand for them, any other publisher could publish the works without incurring the expense that he had incurred? In both the Mickey Mouse case and in this case, there is overuse because of lack of property rights, but in the first case it leads to the value of the intellectual property plummeting, and in the second case it impairs the incentive to invest in intellectual property.

The solution might be a system of indefinitely renewable copyrights. The initial grant might be for twenty-five years, renewable thereafter every five years. A stiff fee would assure that most works returned to the public domain. But those works requiring continuing investment or careful management to avoid consumer exhaustion would continue to be owned property.

Copyrights and patents are limited in other ways besides duration. The copyright owner is permitted to copyright only the expressive dimension of the work and not the basic ideas or motifs. Even if copyright were perpetual, Homer's heirs could not demand a royalty for every epic poem written, since the idea of the epic poem (or of rhyme or particular rhyme schemes, or of a story of a war to recover an abducted beauty) would be considered to fall on the idea side of the idea/expression divide. Similarly, patents are limited to ideas that are useful (in the sense of practical, utilitari-

an), novel, and nonobvious, and so are not available for the fruits of basic research, such as Euclidean geometry, Planck's constant, or $e = mc^2$.

If basic scientific findings were patentable, the tracing problem would be particularly acute. Even more important, patents on basic research would sometimes generate grossly excessive revenues, relative to costs, which in the case of much basic research are low.

Similarly, if valuable applications of scientific theory (as distinct from basic research) – “inventions” or new technology – could be patented in perpetuity, one untoward result would be to limit the use of inventions, and another might be to draw excessive investment into innovation. Bear in mind that the patent process, like my hypothetical hunt for buried treasure, is a race. Whoever crosses the finish line first, if only by a day, receives the entire value of the patent, not the value of accelerating the invention by one day. So we want to make sure that the rewards of owning a patent are not so huge that they operate to suck a disproportionate fraction of society's scarce resources into efforts to accelerate the pace of invention.

As for allowing basic ideas, themes, motifs, character types, and so forth to be copyrighted, the effect in increasing the incentives to create new literature, art, and entertainment by increasing the financial rewards would be more than offset by the effect in discouraging that creation by forcing every new writer to negotiate permission with the heirs of long-deceased predecessors. Literature, art, and entertainment to a great extent play variations on a rather simple, stock set of themes, plots, character types, and so forth. The distinction, the quality, of creative expression lies precisely in the variations, and we want to encourage these by permitting the creators to draw freely on the stock.

A complication is created by the merger of “idea” and “expression” in some forms of modern art, such as Andy Warhol's *Brillo Box*, a work of art that is such not by virtue of any novel or distinctive expression – it is indistinguishable from an ordinary box of Brillo – but solely by virtue of its being treated as art by collectors and museums. In effect, this kind of art is simply the idea of treating an everyday object as a work of art.

I have thus far depicted the basic challenge in the fine-tuning of intellectual property rights as striking the right balance between the interest in encouraging the production of intellectual property and the interest in promoting its widespread use, though I have noted some other concerns as well (such as overinvestment and tracing costs).

But one of the most interesting characteristics of intellectual property, which differentiates it sharply from physical property, is that – paradoxically – limiting intellectual property rights may often be necessary to maximize the creation of intellectual property – in which event the conflict between the creation interest and the use interest disappears. I have given examples of this important point already. Consider now the “fair use” doctrine of copyright law, which permits in specified circumstances some copying of a copyrighted work without having to obtain the owner's consent. An example is quoting from and summarizing a copyrighted book in a review of the book. Suppose such copying required the consent of the book's author or publisher. Then book reviews would lack credibility, since readers would know that the reviewer had a strong incentive to review the book favorably lest publishers refuse to consent to his quoting from subsequent books, or charge him an exorbitant fee for permission to quote. Publishers and authors as a group (though maybe not the publishers and

authors of the worst books) would be hurt by a system that deprived readers of the information contained in reviews by people not beholden to the publisher. The publishing industry would lose the most credible form of advertising of its wares.

Similarly, but more fundamentally, anyone familiar with the practices of both authors and inventors knows that most intellectual property, even of a distinctly innovative sort, builds heavily on previous intellectual property (*Ulysses* is again an example). The existing stock of ideas and expression is, to a great extent, the raw material from which new intellectual property is fashioned.

The cheaper a producer's raw materials, the cheaper the final product and so the greater the output. If Joyce had had to negotiate with Homer's heirs over the use of material from the *Odyssey* in his book, it would have taken him longer to write the book; if negotiations had broken down, he might not have been able to write it at all.

We want, therefore, a process by which intellectual property, having been legally protected in order to create the proper incentives, can eventually be returned to the public domain, there to be available as cheap raw material for future creators of intellectual property. This is another important reason for limiting both the duration of intellectual property rights and their scope.

The economic analysis sketched in this paper is simple, largely intuitive, commonsensical, and, I venture to suggest, fairly uncontroversial. To summarize it, granting property rights in intellectual property increases the incentive to create such property, but the downside is that those rights can interfere with the

creation of subsequent intellectual property (because of the tracing problem and because the principal input into most intellectual property is previously created intellectual property). Property rights can limit the distribution of intellectual property and can draw excessive resources into the creation of intellectual property, and away from other socially valuable activities, by the phenomenon of rent seeking.

Striking the right balance, which is to say determining the optimal scope of intellectual property rights, requires a comparison of these benefits and costs – and really, it seems to me, nothing more. The problems are not conceptual; the concepts are straightforward. The problems are entirely empirical. They are problems of measurement.

In addition, we do not know how much intellectual property is in fact socially useful, and therefore we do not know how extensive a set of intellectual property rights we should create. For all we know, too many resources are being sucked into the creation of new biotechnology, computer software, films, pharmaceuticals, and business methods because the rights to these different forms of intellectual property have been too broadly defined.

Unfortunately, the empirical problems are acute – and little progress has been made as yet toward their solution. We urgently need more empirical evidence. The task is daunting, for it requires that we be able to estimate both the social gains from additional intellectual property of different types and the social costs of trying to induce the creation of the additional intellectual property by means of adjustments in the regime of intellectual property rights.

Carla Hesse

*The rise of intellectual property,
700 B.C. – A.D. 2000:
an idea in the balance*

The concept of intellectual property – the idea that an idea can be owned – is a child of the European Enlightenment. It was only when people began to believe that knowledge came from the human mind working upon the senses – rather than through divine revelation, assisted by the study of ancient texts – that it became possible to imagine humans as creators, and hence owners, of new ideas rather than as mere transmitters of eternal verities.

Besides being distinctively modern, intellectual property is a dense concept, woven together from at least three complex strands of jurisprudence – copyright, patent, and trademark – each with its own sources in premodern custom and law, and each with its own trajectory into our own era.

Still, copyright, and the complementary concepts of authors' rights and literary property in continental law – the

focus of this essay – are at the core of the modern concept of intellectual property. It was here in the eighteenth century that the language of “ideas” and “property” first came into contact with one another, and first forged a legal bond. And it was here, too, that the very idea of a property right in ideas was most sharply contested – at the outset, and to the present day.

“From the Heliconian Muses let us begin to sing...” Thus begins Hesiod's *Theogony*, and many other texts of the ancient Greek world. The poet spoke the words of the gods, not his own creations. Knowledge, and the ability to make it manifest to man, was assumed to be a gift, given by the muses to the poet. Alternatively, Plato thought that all ideas were held from birth in the mind, where they had transmigrated from earlier souls. Ancient Greeks did not think of knowledge as something that could be owned or sold. A scribe could be paid fees for his labor, an author awarded prizes for his achievement, but the gift of the gods was freely given. And thus the libraries of the ancient academies were not sold, but were instead transmitted as gifts to the teacher's most worthy successor. Socrates held the Sophists in contempt for charging fees for their learning.

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A tour of the other great civilizations of the premodern world – Chinese, Islamic, Jewish, and Christian – reveals a striking absence of any notion of human ownership of ideas or their expressions. In the *Lun-Yii*, or *Analects*, compiled in China in the fifth century B.C., the philosopher Confucius is recorded as saying, “I transmit rather than create; I believe in and love the Ancients.” The measure of the greatness of a Chinese scholar was not to be found in innovation, but rather in his ability to render or interpret the wisdom of the ancients, and ultimately God, more fully and faithfully than his fellows. Wisdom came from the past, and the task of the learned was to unearth, preserve, and transmit it. Confucian thought despised commerce and thus also writing for profit; authors practiced their craft for the moral improvement of themselves and others. Reputation, and especially the esteem of future generations, was its own reward, even if it might, incidentally, bestow the worldly gifts of patrons upon its bearer.¹

This is not to suggest that there was no commerce in books in China. In the land that invented movable type, a book trade flourished as early as the eleventh century. Still, Chinese authors had no property right to their published words. The contents of books could not be owned. Not even the particular expressions an author might employ could be claimed as his. Chinese characters were thought

to have come from nature, and no human being could make a claim upon them that would exclude their usage by others. Only the paltry vessel – the paper and ink of a manuscript or a printed book that bore the ideas and expressions – could be bought or sold.²

Throughout the Islamic lands, too, there was no concept of intellectual property for many hundreds of years. All knowledge was thought to come from God. The Koran was the single great scripture from which all other knowledge was derived. A text that embodied the word of Allah, it belonged to no one. There were guardians of its true meaning, to be sure – the great Imams who formed schools at the sites of the most important temples. But the principle means of transmitting Koranic knowledge was oral recitation – from teacher to student, in an unbroken lineage from Muhammad himself to his disciples, and from these chosen few forward through the generations. The word “Koran” itself means “recitation,” and oral transmission of the living word was always to be preferred over a written transcription. The book was merely an instrument, a lowly tool, to facilitate faithful memorization of the word, and manuscripts were continuously checked and rechecked against oral memory to ensure their accuracy and the authority of their lineage. The Islamic belief that oral recitation, rather than written transcription, best preserved the word of God and kept it pure across the generations meant that the technology of printing was very slow to penetrate into Islamic lands, and it was only widely adopted throughout the Middle East with the advent of the mass newspaper press in

¹ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law and Chinese Civilization* (Stanford, Calif.: Stanford University Press, 1995), esp. 25–29. I would like to thank the National Humanities Center in Research Triangle Park, N.C., for its support of the research and writing of this essay. I would also like to thank Thomas Laqueur and Robert Post for their comments and criticism.

² *Ibid.*

the nineteenth century.³

To be sure, a certain notion of legal “authorship” did emerge from Islamic scribal practices. But a concept of intellectual property did not. *Shari’a* law against “imposture” or “fraud” was used to prevent the unauthorized appropriation of the reputation or authority of a great teacher through false attribution of written texts.⁴ But the teacher did not own the ideas expressed within his books. A thief who stole a book was thus not subject to the punishment for theft – the amputation of his hand. Islamic law held that he had not intended to steal the book as paper and ink, but the ideas in the book – and unlike the paper and ink, these ideas were not tangible property.⁵

The Judeo-Christian tradition elaborated a similar view of knowledge. Moses received the law from Yahweh and freely transmitted it to the people chosen to hear it. And the New Testament sanctified the idea of knowledge as a gift from God in the passage of the Book of Matthew in which Jesus exhorts his disciples, “Freely ye have received, freely give” (10:8). Medieval theologians interpolated this passage into the canon law doctrine “Scientia Donum Dei Est,

3 Johannes Pedersen, *The Arabic Book*, trans. Geoffrey French (Princeton, N.J.: Princeton University Press, 1984; original publication: Copenhagen, 1946); William A. Graham, “Traditionalism in Islam: An Essay,” *Journal of Interdisciplinary History* XXIII (3) (Winter 1993): 495–522; Francis Robinson, “Technology and Religious Change: Islam and the Impact of Print,” *Modern Asian Studies* 27 (1) (1993): 229–251.

4 Sayed Hassan Amin, *Law of Intellectual Property in the Middle East* (Glasgow: Royston, 1991), 3.

5 The *Hedaya* 92 (1795), cited in Steven D. Jamar, “The Protection of Intellectual Property under Islamic Law,” *Capital University Law Review* 21 (1992): 1085.

Unde Vendi Non Potest” (Knowledge is a gift from God, consequently it cannot be sold).

Selling something that belonged to God constituted the sin of simony. University professors, lawyers, judges, and medical doctors were thus admonished not to charge fees for their services, although they might receive gifts in gratitude for the wisdom they imparted.⁶

Indeed, the language of gift-giving permeated all forms of knowledge exchange in the premodern period, and nowhere more so than in the dedicatory prefaces to books through which authors sought patronage in recompense for the symbolic offering of their works. Thus, even as books were increasingly bought and sold after the advent of print in Europe in the fifteenth century, and even as writers began to sell their manuscripts to printers for a profit, there remained a dimension of the book, its spiritual legacy, that lay beyond the grasp of market relations.⁷ The author might lay claim to the manuscript he created, and the printer to the book he printed, but neither could claim to possess the contents that lay within it. The Renaissance elevated the poet, the inventor, and the artist to unprecedented social heights, but their “genius” was still understood to be divinely inspired rather than a mere product of their mental skills or worldly labors.

In the sixteenth century, Martin Luther could thus preach confidently in his *Warning to Printers*, “Freely have I received, freely I have given, and I want

6 Gaines Post et al., “The Medieval Heritage of a Humanistic Ideal: ‘Scientia Donum Dei Est, Unde Vendi Non Potest,’” *Traditio* 11 (1955): 195–234.

7 Natalie Z. Davis, “Beyond the Market: Books as Gifts in Sixteenth Century France,” *Transactions of the Royal Historical Society*, ser. 5, 33 (1983): 69–88.

nothing in return.” Well into the eighteenth century the idea of the writer as God’s handmaiden held sway. Alexander Pope, in 1711, still conceived of the poet as a reproducer of traditional truths rather than an inventor of new ones, and Goethe could write fairly of the German poets of the early eighteenth century that “the production of poetical works was looked upon as something sacred. It was considered almost simony to accept or to bargain for payment of them.”

This theologically informed moral revulsion to the idea of an individual profit motive in the creation and transmission of ideas continued to circulate in the United States well into the nineteenth century. Francis Wayland, the president of Brown University in the 1830s, wrote in his college textbook *The Elements of Moral Science* that “genius was given not for the benefit of the possessor, but for the benefit of others.”⁸ And an intellectual of no less stature than George Bancroft added a Hegelian twist to the Christian tradition, writing in 1855 that:

Every form to which the hands of the artist have ever given birth, spring first into being as a conception of his mind, from a natural faculty, which belongs not to the artist exclusively, but to man. . . . Mind becomes universal property; the poem that is published in England, finds its response on the shores of Lake Erie and the banks of the Mississippi.⁹

The virtually universal proscription of private ownership of ideas in the pre-

8 Francis Wayland, *The Elements of Moral Science* (London: The Religious Tract Society, n.d. [1835]), 275.

9 George Bancroft, *Literary and Historical Miscellanies* (New York: Harper & Brothers, 1855), 412, 427.

modern world did not, of course, mean that ideas flowed freely within premodern regimes. It fell to God’s agents upon the earth to determine how much of the knowledge putatively transmitted from God was actually divine in origin, as well as how widely and by whom such knowledge should be circulated within their kingdoms, empires, and cities. Rulers forged alliances with religious authorities to control the production and circulation of ideas and information – both spiritual and technical – within their realms. Throughout the world, the early modern period witnessed the emergence of elaborate systems of prepublication censorship, state-licensed monopolies to control the burgeoning printing and publishing trades, and the use of royal letters of patent or “privileges” to give exclusive monopolies for the printing and publication of authorized texts. Technical inventions came to be regulated by a similar system of exclusive state licensing.

In China, as early as the Tang dynasty (A.D. 618–907), the legal code prohibited the transcription and distribution of a wide range of literature in order to protect the emperor’s prerogatives and interests. The first known ordinance regulating publication was that of the Emperor Wen-tsing, in 835, forbidding the private publication of almanacs. An extensive regulatory apparatus was created around the industry of printing under the Sung dynasty (960–1179), and official government printing houses were established in the major cities. Exclusive state privileges were implemented for categories of sensitive literature, from astrological charts, prognostications, and almanacs to official promulgations, dynastic histories, and civil-service examination literature. Private printing houses could register a particu-

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lar work with Imperial officials and receive an exclusive privilege to print and sell it.

But privileges were not a form of property right in the modern sense. They were a grace, extended by the pleasure of the authorities, and they were revocable at any time. By the eighteenth century a comprehensive system of prepublication censorship and licensing, even of private writing, was in place throughout Imperial China.¹⁰

European monarchies, empires, and city-states created similar legal and institutional structures in response to the introduction of the new technology of printing in the 1450s. Less than a hundred years later, the Reformation rent western Christendom. With the spread of ideological division, regulation of the printed word intensified rapidly. Rulers granted commercial monopolies, or “privileges,” in exchange for submission to state censorship and control. The earliest European initiative occurred in the Republic of Venice in 1469, where Johann Speyer was granted an exclusive monopoly on printing in Venetian territories for a period of five years.¹¹ The practice of granting exclusive privileges to print in a particular city, to print a particular text, or to print a particular category of texts (schoolbooks, laws, Latin texts, etc.) spread rapidly from Venice throughout the Italian states, and from there to France and England.

England presents an exemplary case. The first royal grant of a privilege to the book trade was the creation of the title

of “King’s Printer,” which was given to one William Facques in 1504. This position afforded him the exclusive right to print royal proclamations, statutes, and other official documents. By 1557 the English crown reorganized the guild of printers and publishers known as the “Stationers’ Company” and gave them a virtual monopoly over printing and publishing, both in London and in the kingdom as a whole. In 1559, as part of her attempt to resolve the religious controversies that wracked the realm, Elizabeth I issued an injunction against publication of any text unless it had been licensed by censors appointed by the crown. The Stationers’ Company kept a registry of licensed books and the crown could, in principle, extend or revoke a license at will and limit it for whatever term it deemed appropriate. Rights to profit from a book derived not from property in ideas, but from a “privilege” extended by royal “grace” alone.¹²

These licenses were “copied” into the registry book of the guild and soon came to be treated by members of the guild as exclusive rights to print a particular “copy.” Though created by royal prerogative, these “copy” rights were bought, sold, and traded amongst guild members, as though they were a form of perpetual property. By the 1570s, four prominent members of the Stationers’ Company came to have a monopoly control, through “letters patents” that they claimed as their perpetual property rights, over the most lucrative books in print: Christopher Barker, the Queen’s Printer, controlled the Bible, the New Testament, the Book of Common Prayer, and all statutes, proclamations, and other official documents; William Serres

10 Chan Hok-Lam, *Control of Publishing in China: Past and Present* (Canberra: Australian National University, 1983), 2–24.

11 Leonardas Vytautas Gerulaitis, *Printing and Publishing in Fifteenth-Century Venice* (Chicago: American Library Association; London: Mansell, 1976).

12 John Feather, *Publishing, Piracy and Politics: A Historical Study of Copyright in Britain* (London: Mansell, 1994).

had a monopoly on private prayer books, primers, and schoolbooks; Richard Tottel had a monopoly on common law texts; and John Day laid claim to alphabet books, the Catechism, and the Psalms in meter.

A similar process of consolidation of great publishing empires, founded upon monopolistic claims rooted in royal privileges, occurred throughout Christian Europe. By the middle of the seventeenth century, the Paris Book Publishers and Printers Guild, like its brethren in London, had used its strategic proximity to the royal court to achieve a monopoly on the most valued ancient and religious texts as well as the most lucrative contemporary publications.¹³ Each of the more than three hundred German principalities and cities developed its own particular mechanisms to censor books, distribute privileges, and regulate guilds.

An author might sell a manuscript to a licensed publisher for a one-time fee, but the real material rewards for the composition of a book came from the anticipated royal or aristocratic patronage that might redound, indirectly, to the writer from its publication. Authors could not publish their own books, and unless they obtained a privilege in their own name, they were denied any profits from the sale of their books. These went to the publishers alone. State-licensed monopolies on texts, on technical inventions, and on the means of reproducing them successfully wedded the commercial interests of publishers, printers, and other technical entrepreneurs to the ideological needs of absolutist states to control the knowledge that circulated in their realms.

¹³ Henri-Jean Martin, *Livre, pouvoirs et société à Paris au 17^{ème} siècle (1598–1701)* (Geneva: Droz, 1969).

Throughout the early modern world the development of commercial printing and publishing thus first occurred through a system of state-licensed monopolies, sanctioned by religious ideologies, that made no mention at all of intellectual property rights. The prevailing theories of knowledge and of political legitimacy made such rights inconceivable.

In the 1700s, cultural life in Europe underwent a dramatic transformation. A shift from intensive to extensive reading and the rise of a middle-class reading public led to an explosion of print commerce in the eighteenth century. In England, it is estimated that annual book production increased fourfold over the course of the eighteenth century. France, too, saw a marked increase in the literacy rate and a dramatic increase in the demand for modern secular literature.

Everywhere, observers noted the change. Whereas in 1747 Johann Georg Sulzer lamented that in Berlin “the general public does little reading,” a half-century later Immanuel Kant recorded a literary world transformed: “This incessant reading has become an almost indispensable and general requisite of life.” Kant’s observations were confirmed by others: “People are reading even in places where, twenty years ago, no one ever thought about books; not only the scholar, no, the townsman and craftsman too exercises his mind with subjects for contemplation.” Increasing literacy and the emergence of a large middle-class readership throughout Europe in the first half of the eighteenth century put unprecedented strains upon a system of publication that had been predicated on the notion that there was a fixed amount of divine or ancient

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knowledge to be known, transmitted, and interpreted.¹⁴

These developments put enormous pressure on traditional notions of authorship. The increased demand for printed matter, and especially for modern secular literature (in particular, novels, theatrical works, and self-help manuals of various sorts), tempted an increasing number of young men (and women) to aspire to become writers. And they were writers of a new sort – oriented more toward the commercial potential of their contemporary readership than toward eternal glory. For the first time, in the eighteenth century, writers like Daniel Defoe in England, Denis Diderot in France, and Gotthold Lessing in Germany began to try to live from the profits of their pens rather than from elite patronage. And, not surprisingly, they began to make claims for better remuneration for their products. Older notions that a fixed “honorarium” or fee was an appropriate reward for the composition of a manuscript gave way to bolder assertions that the author deserved a share in the profits earned from his creative labor.

Rather than selling a manuscript to a publisher, authors increasingly sought simply to sell the “rights” to a single edition. With greater frequency, secular authors began to claim that they were the creators of their own works rather than the mere transmitters of God’s eternal truths. As they came to view themselves as the originators of their work, they also began to claim that their

creations were their own property, as susceptible to legal protection and as inheritable or saleable as any other form of property. Daniel Defoe wrote in 1710, “A Book is the Author’s Property, ’tis the Child of his Inventions, the Brat of his Brain: if he sells his Property, it then becomes the Right of the Purchaser.” Authors thus began to assert that their works were their own property, transmissible by contract to others if the authors desired, but that authors should no longer be constrained to sell their manuscripts in order to see them published.

The rise in public demand for printed matter also led to a dramatic expansion in the practice of literary piracy. Sensing unsatisfied market demand and acutely aware of the artificial inflation in the price of some books due to publishers’ perpetual privileges, less-scrupulous printers and booksellers throughout Europe paid diminishing heed to the claims to exclusive perpetual privileges on the best-selling and most lucrative works. Cheap reprints, produced most frequently across national frontiers or in smaller provincial cities, began to flood urban markets. Publishers of pirate editions successfully represented themselves as champions of the “public interest,” against the monopolistic members of the book guilds. Why, they argued, should any particular publisher have an exclusive claim on a work whose authors or heirs were no longer living – indeed, on many works composed before the invention of printing? Did not the greater good of making enlightening works widely available at a low cost eclipse the selfish interests of individual publishers?

By the middle of the eighteenth century, the traditional system of publication was everywhere in shambles. First in England, and then in France and Ger-

14 W. H. Buford, *Germany in the Eighteenth Century: The Social Background of the Literary Revival* (Cambridge: Cambridge University Press, 1965); Albert Ward, *Book Production, Fiction and the German Reading Public, 1740–1800* (Oxford: Oxford University Press, 1974); Roger Chartier, *The Order of Books* (Stanford: Stanford University Press, 1994).

many as well, calls for reform of the regulation of the book trade were coming from all parties involved. Readers wanted cheaper books. Government legislators sought to increase commerce and to encourage a more educated population within their realms. Foreign and provincial publishers – most notably in Scotland, Switzerland, and secondary French cities like Lyon – clamored against the perpetual monopolies of the London and Paris Book Guilds on the most lucrative books. Authors wanted their property rights in their compositions recognized as absolute and perpetual. And even the privileged guild publishers, especially in Hamburg, Leipzig, Frankfurt am Main, London, and Paris, hoped to see their traditional privileges recognized as perpetual property rights that could be defended against pirates in the courts.

Satisfying and sorting out these conflicting claims provoked a host of pressing new questions: Were ideas in fact a gift from God, as traditional authorities had claimed, or were they the property of those who made them manifest, as authors now asserted? Was a “privilege” a “grace,” or was it rather the legal ratification of an anterior, natural right to property? Upon what basis could the governments of nations or cities restrict or confirm traditional privileges? Could a secular foundation be articulated for the regulation of the publication and circulation of ideas?

The reform of the publishing industry in Europe thus entailed a rethinking of the basis and purpose of knowledge. A variety of European thinkers entered into a momentous debate about the origins and nature of ideas. As a result, a series of philosophical (or, more specifically, epistemological) problems were shown to lie at the heart of what at

first glance seemed merely to be questions of commercial policy.

One influential view – that authors have a natural property right in their ideas – was articulated first in England and associated with two key texts: John Locke’s *Second Treatise* (1690) and Edward Young’s *Conjectures on Original Composition* (1759).

In his *Treatise*, Locke famously wrote that “every Man has a *Property* in his own *Person*. This no Body has any right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.” Three generations later, the poet Edward Young, writing with the assistance of the novelist Samuel Richardson, asserted that the author contributed more than simply his labor to a book – he imprinted its contents with his original personality. According to Young, the labor of an author was thus of a higher order than the labor of an inventor, never mind the labor of a farmer, for the author not only worked upon nature, but produced something from himself, which bore the indelible stamp of a unique personality. While limits might be imposed upon patents for mechanical inventions, products of the mind – bearing the personhood of their author – ought to belong perpetually to their creator. Intellectual property, an invention of the eighteenth century, thus burst into the world claiming to be real property in its purest form.

Young’s reflections, like those of John Locke before him, constituted a dramatic secularization of the theory of knowledge. If all knowledge was derived from the senses working upon nature, as Locke had argued in the *Essay Concerning Human Understanding* (1689), there was no role left for divine revelation. In the secular epistemology of Locke, inspiration is internalized and redefined as cognition. Young in turn applied Locke’s

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epistemology to argue that cognition emanates from the workings of a unique mind. The individual personality supplanted God as the divine font of knowledge.

The new British accounts of knowledge began circulating almost immediately on the Continent. Young's *Conjectures on Original Composition* was rapidly translated into German and went through two editions there in the two years after it first appeared in English. Meanwhile, in France, both Locke and Young were widely influential. In 1726, for example, the French jurist D'Hericourt seized upon Locke's critical passage to argue in court on behalf of perpetual book privileges for authors, asserting that products of the mind are "the fruits of one's own labor, which one should have the freedom to dispose of at one's will" and forever. One could own one's ideas just as one owned land that one had cleared with one's own labor. D'Hericourt concluded that a royal book privilege was not merely a grace accorded by the king, to be granted or revoked at his will, but rather a legal confirmation of an anterior natural property right, secured by the author's labor.¹⁵ The author could sell or retain those rights as he or she wished. Once sold, they belonged to the publisher in perpetuity.

The same argument was taken up again by the encyclopedist Denis Diderot in 1763, after he was commissioned by the Paris Book Guild to write a *Letter on the Book Trade*. In Diderot's words, we can hear the resonance of both Locke and Young:

What form of wealth *could* belong to a man, if not the work of the mind... if not

15 Raymond Birn, "The Profit in Ideas: *Privilèges en librairie* in Eighteenth-Century France," *Eighteenth-Century Studies* 4 (2) (1971): 131–168.

his own thoughts... the most precious part of himself, that will never perish, that will immortalize him? What comparison could there be between a man, the very substance of a man, his soul, and a field, a tree, a vine, that nature has offered in the beginning equally to all, and which the individual has only appropriated though cultivating it?¹⁶

Like Young, Diderot argued that products of the mind are more uniquely the property of their creator than land acquired through its cultivation. Literary property should, therefore, be even less susceptible to social regulation than land.

It was Gotthold Lessing, the greatest writer of the German Enlightenment, who most forcefully developed the notion of the author's unique personality as a source of property rights in ideas. In a 1772 essay, *Live and Let Live*, Lessing proposed a reorganization of the German book trade that attacked the foundations of the old system. He challenged directly the traditional ban on profits received from writing:

What? The writer is to be blamed for trying to make the offspring of his imagination as profitable as he can? Just because he works with his noblest faculties he isn't supposed to enjoy the satisfaction that the roughest handyman is able to procure?... Freely hast thou received, freely thou must give! Thus thought the noble Luther... Luther, I answer, is an exception in many things.

From Lessing forward, German writers clamored insistently for recognition of their claims upon their writings as a form of unique, perpetual, and inviolable property.

16 Denis Diderot, *Oeuvres Complètes*, 15 Vols. (Paris: 1970), 5:331 (my translation).

A generation later, Johann Gottlieb Fichte, a philosopher and disciple of Kant, probed the complexities of the problem even more deeply. Fichte posed a difficult question: if creations of the mind were indeed “property,” what exactly was immaterial property? Clearly it did not simply consist of a physical manuscript, since the author or the publisher could no longer claim such an object to be unique once it had been reproduced through printing. Literary property seemed to lack the singular physical form that characterized other forms of real property. But this was not the only difficulty with the idea of a property in ideas. After all, a great many people seemed able to share the same ideas, and it seemed intuitively just that as many people as possible should be permitted to express freely the same ideas independent of one another.

Fichte’s solution to his puzzlement proved widely influential. For an idea to be regarded as a piece of real property, Fichte argued, it had to be assigned some distinguishing characteristic that allowed one person, and no other, to claim it as his own. That quality, he suggested in 1791 in his essay *Proof of the Illegality of Reprinting: A Rationale and a Parable*, lay not in the ideas per se, but rather in the unique “form” in which an author chose to express these ideas. Once published, the ideas in a book belonged to all – but the singular form of their expression remained the sole property of the author. Even ideas that had been “in the air” could become a piece of property through the unique way in which an author expressed them. Fichte’s distinctions – between the material and the immaterial book, and between the content and form of ideas – were to be critical in establishing a new theory of copyright based on the natural right to property in the unique expres-

sions of ideas, rather than in the ideas themselves.¹⁷

Not everyone shared the enthusiasm of Fichte and Diderot and Edward Young for the nascent concept of intellectual property. Some viewed the widespread movement toward securing an author’s property rights as nothing more than a new metaphysics and a thinly veiled campaign to protect the monopolies of book publishers. In the 1770s, a zealous German mercantilist went so far as to defend the piracy practiced by some German book publishers:

The book is not an ideal object... It is a fabrication made of paper upon which thought symbols are printed. It does not contain thoughts; these must arise in the mind of the comprehending reader. It is a commodity produced for hard cash. Every government has a duty to restrict, where possible, the outflow of its wealth, hence to encourage domestic reproduction of foreign art objects.

In 1776, the French mathematician and philosopher Condorcet expressed even deeper reservations, for philosophical rather than commercial reasons. Writing in direct response to Diderot’s *Letter on the Book Trade*, Condorcet disputed his Lockean line of argument: “There can be no relationship between property in ideas and [property] in a field, which can serve only one man. [Literary property] is not a property derived from the natural order and defended by social force; it is a property founded in society itself. It is not a true right; it is a privilege.”

Ideas, Condorcet asserted, are not the creation of a single mind. Nor are they a

17 Martha Woodmansee, “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’” *Eighteenth-Century Studies* 17 (1984): 425–448.

gift from God to be regulated by royal authority. Ideas inhere in nature and are equally and simultaneously accessible to all. Ideas are intrinsically social: they are not produced by individuals alone; they are the fruit of a collective process of experience.

Moreover, Condorcet could see no social value in granting individual claims upon ideas. Since true knowledge was objective, particular claims on ideas could consecrate nothing more than mere style, what Fichte had called “form.” Condorcet, as a man of science rather than literature, had little use for style. Style merely distorted nature’s truths, and to encourage the individuation of ideas was simply to encourage pleasant fictions and personal gain rather than the pursuit of knowledge and the public good: “It is uniquely for expressions, for phrases, that privileges exist. It is not for the substance of things. . . . Privileges of this sort, like all others, are inconveniences that diminish activity by concentrating it in a small number of hands. . . . They are neither necessary nor useful, and . . . they are unjust.”

While Diderot, Lessing, and Fichte celebrated romantic originality, Condorcet sought to ground public literary culture in scientific rationalism. The model of publication based upon authors’ property rights could, according to Condorcet, be replaced with the model of periodical subscriptions, like the *Journal des Savantes*. People could subscribe to useful publications and the authors could be remunerated as salaried employees or freelance writers for a nonprofit organization. More important than his specific policy suggestion was Condorcet’s claim that if ideas, as social creations, were to be recognized as a form of property, it must not be on the basis of an individual natu-

ral right but rather on the basis of the social utility of a property-based regime.

Condorcet thus erected a second, alternative pillar for the modern notion of intellectual property: social utilitarianism.

The tension within Enlightenment epistemology left those policymakers concerned with the book trade on the horns of a philosophical dilemma. Did knowledge inhere in the world – or in the mind? To what extent were ideas discovered – and to what extent were they invented?

Condorcet argued that knowledge was objective and thus fundamentally social in character, belonging to all. Diderot, along with Young, Lessing, and Fichte, viewed ideas as subjective, originating in the individual mind and thus constituting the most inviolable form of private property.

Two strains of legal interpretation developed from these competing philosophical doctrines. Those legal thinkers who sided with the objectivist position of Condorcet elaborated the utilitarian doctrine that there was no natural property in ideas, and that granting exclusive legal rights to individuals for unique forms of their expression could only be justified because such an arrangement was the best legal mechanism for encouraging the production and transmission of new ideas, a manifest public good. Conversely, those who sided with Locke, Young, Diderot, Fichte, and the subjectivist camp argued that there was a natural right to perpetual property in ideas and that legal recognition of that right was simply the confirmation in statute of a universal natural right. The utilitarian position thus understood the public interest as the highest aim of the law, while natural-rights proponents argued that the sanctity of the individual

creator should be the guiding principle of any legislator.

Over the course of the eighteenth century, every European country witnessed a series of legal battles over which of these principles would prevail. Vested interests on both sides of the debate vied to capture the legislative advantage. The English were the first to take up the question after the lapsing of the Licensing Act in 1695, which had regulated the book trade and censorship. Intending to end prepublication censorship by suppressing the obligation to submit to prior licensing before publication, Parliament inadvertently also called the whole system of privileges into question. If a work were not registered prior to publication, no mechanism existed to protect literary privileges against pirate editions. The Stationers' Company clamored for recognition of their traditional privileges as perpetual property rights, while pirate publishers insisted that the lapsing of the act meant that all previously published works were now free for all to reprint.

Parliament finally filled the legal vacuum in 1710, when the so-called Statute of Anne definitively separated the question of censorship from that of literary property. The statute ruled that authors, and those who had purchased a manuscript from an author, would have an exclusive right to publish the work for fourteen years (the term that had previously been established for patents on mechanical inventions). This right could be renewed for an additional fourteen years. But after this period (of fourteen or twenty-eight years), the work became part of the public domain, and anyone was free to publish it. As a result, all of the monopolies held by the Stationers' Company on classical texts were abolished. In effect, the Statute of Anne – its full title, appropriately enough, was “A Bill for

the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof” – represented an uneasy compromise between the position of the Stationers' Company and the advocates of authors' natural rights on one side and the position of the pirate publishers and advocates of “the public interest” on the other.

Needless to say, neither side was entirely satisfied with this compromise. The contradictory philosophical assumptions it codified left plenty of room for subsequent court challenges. A series of cases that pitted London publishers against foreign rivals – *Tonson v. Collins* in 1760, and *Millar v. Taylor* in 1769 – led briefly to a recognition of perpetual property rights in the unique expression of an idea. But *Donaldson v. Becket* in 1774 reversed this decision, and definitively established as British law the compromise concept of a “limited property right” in the unique expression of an idea.

The *Donaldson v. Becket* decision was crucial in two respects. First, despite the dissenting voice of eighteenth-century England's most distinguished jurist, William Blackstone, it established the “encouragement of learning” as the highest aim of the laws regulating books. Second, even though copyright was acknowledged to be a natural right rooted in common law, the *Donaldson v. Becket* decision held that copyright in practice hinged on government legislation. In England, the utilitarian doctrine of a higher public good trumped the idea of intellectual property rooted in natural right.¹⁸

18 Mark Rose, *Authors and Owners. The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993).

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In early America, both natural rights and utilitarian doctrines were debated within the British colonies, and colonies differed as to which theory formed the basis of their laws.¹⁹ The Statute of Anne, as ratified by the *Donaldson v. Becket* decision, became the basis for the relevant clause in the Federal Constitution of 1787: “Congress shall have the power . . . to promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This article in turn became the basis of the United States Copyright Statute of May 31, 1790. The author or inventor was acknowledged as an individual with special claims upon his own ideas – but the public good dictated that those claims be limited. In America, as in England, there thus remained a persistent tension between a natural-rights justification for perpetual copyright claims, rooted in common law, and statutory limits that preempted, but did not abolish, those anterior rights.

A similar tension in French legal thinking provoked a parallel set of court battles. At the beginning of the eighteenth century, the French crown, hoping to strike a compromise between Parisian publishers and their provincial competitors, had declared that privileges were not a form of perpetual property, as the Parisian publishers claimed, but rather “a grace founded in justice”; as a result, privileges could be limited, renewed, or even revoked, at the king’s will. This ruling permitted the crown

19 See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), esp. 180–202; and Jane C. Ginzburg, “A Tale of Two Copyrights: Literary Property in Revolutionary France and America,” *Tulane Law Review* 64 (5) (May 1990): 991–1031.

officers administering the book trade considerable latitude in redistributing privileges. The ruling did little, however, to undermine the monopolies of the Paris Book Guild, or to forestall a growing flood of books illegally produced by provincial and foreign printers.

In 1777, the French crown, confronted with mounting criticism, was forced to revise the system of privileges. While still refusing to recognize the concept of “literary property,” the king for the first time granted authors their own category of privileges (*privilèges d’auteur*). These new privileges were to be perpetual and inheritable, like any other form of personal property. However, once an author sold a manuscript to a publisher, the publisher’s claim would be limited to ten years, with the possibility of a single renewal. This meant that the publisher’s privileges were to be restricted at the same time as unlimited privileges were extended to authors. The Paris Book Guild, predictably enraged, refused to acknowledge the new law and essentially went on strike against crown officials until the Revolution in 1789.

The Revolution changed everything. “Freedom of the press” was declared and literary privileges abrogated. The royal administration of the book trade was abolished, and so were the Parisian book guilds. Authors were now widely celebrated not as private creators and possessive individuals, but rather as civic heroes, servants of public enlightenment.²⁰

Hoping to establish the French book trade on a new, secular footing, the Abbé Sieyès in 1791 proposed passing a “Law on the Freedom of the Press” that he had written with the help of Condorcet,

20 Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789–1810* (Berkeley: University of California Press, 1991).

among others. Like the English Statute of Anne, the Sieyès law recognized authors' texts as a form of property, originating with their creators, and susceptible to legal protection; yet at the same time, the Sieyès law reflected Condorcet's concern for the "public interest" by limiting exclusive claims upon literary property to the lifetime of the author, plus ten years.

In the heated climate of revolutionary Paris, the law proposed by Sieyès satisfied no one. Many journalists rejected any law that threatened to limit the free circulation of texts. Revolutionary pamphleteers denounced it as a resurrection of discredited feudal privileges. Veteran book publishers demanded a restoration of their former rights and privileges.

It was only in 1793, after the Paris Book Guild had ceased functioning as a lobbying group, and after the seizure of power by the Jacobins, that the National Convention was able to pass a slightly revised version of the Sieyès law, now touted as a "Declaration of the Rights of Genius." The law of July 19, 1793, became the basis for all subsequent literary property law in France. It ratified the compromise proposed by Sieyès in 1791 and, like the British *Donaldson v. Becket* decision of 1774, enshrined the concept of a limited property right as the best means to strike a balance between remunerating authors and protecting the public interest in the advancement of learning.

In these years, a great many German writers and intellectuals closely followed the debate over intellectual property in France. Since there was no unified German state until 1870, there was no centralized authority to regulate the book trade. Still, a number of individual German states did pass laws similar to the revised Sieyès law. In 1794, for exam-

ple, the largest German state, Prussia, revised its general legal code to reaffirm the privileges of publishers, but also to extend similar privileges to authors.

During the Napoleonic period, when the French civil code was imposed on many German states, even more principalities followed the French model: Baden was the first German state to grant real copyright to authors (1806, 1810), and the phrase *Rechten des Urhebers* (authors' rights) was first used in Bavaria in 1813. Beginning with the Congress of Vienna in 1815, authors' rights were increasingly and more uniformly recognized in German law. It was not, however, until 1870 that Imperial Germany successfully adopted a uniform copyright law similar to those of the French and the English.²¹

It is no coincidence that the English phrase "intellectual property" should first appear in 1845, according to the *Oxford English Dictionary*. By then, a broad consensus had emerged that "copyright" should strike a balance between the interests of the intellectual property owner and the public good: authors and inventors could profit from their works and their ideas, but only for a limited span of time.

But this is by no means the end of the story. Because the modern laws regulating intellectual property rest on a largely unexamined set of contradictory philosophical assumptions, these laws have been uniquely vulnerable to challenge – not least by the continuing rise of new methods of distributing ideas and information across national boundaries. As a result, the philosophical tensions at the heart of modern concepts of intellectual

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21 Reinhard Wittmann, *Geschichte des deutschen Buchhandels: ein Überblick* (Munich: Verlag C. H. Beck, 1991).

property have been played out on an increasingly global scale, reworking the balance between private rights and the public interest, often in dramatic new ways.

The industrial revolution created an international market for literary works and mechanical inventions – and so created a new need for a regime of international intellectual property rights. By the middle of the eighteenth century, French competition with Belgian and Swiss publishers had led to the first major international copyright treaties. In 1858, a Congress of Authors and Artists convened by Victor Hugo held its first meeting in Brussels in an effort to formulate a truly international basis for the universal protection of authors' rights. Unable to secure agreement on such a universal regime, the congress instead enunciated a doctrine of "national treatment," asking each nation to extend the legal protections it offered to domestic writers and inventors to foreign writers and inventors as well.

A generation later, in 1886, a series of conferences held in Berne led to the signing by ten European nations of the first international copyright treaty.²² Despite the doctrine of "national treatment," the process of internationalizing copyright protection tended to strengthen universalist claims for protection of inviolable natural rights against statutory limits imposed by particular nations on utilitarian grounds. This progressive shift in the legal spectrum toward the enforcement of natural rights has led to a steady strengthening of private intellectual property right claims over the doctrine of the public interest. Thus, over the course of the nineteenth and

twentieth centuries the private claims of holders of authorial rights or copyrights have been repeatedly extended from the initially modest ten to fourteen years after the author's death to the current terms of fifty and sometimes seventy-five years after the author's death in most countries with liberal copyright regimes.

Positions on copyright were clearly not the product of disinterested jurisprudential reflection. By the nineteenth century it became clear that nations that were net exporters of intellectual property, such as France, England, and Germany, increasingly favored the natural-rights doctrine as a universal moral and economic right enabling authors to exercise control over their creations and inventions and to receive remuneration. Conversely, developing nations that were net importers of literary and scientific creations, such as the United States and Russia, refused to sign on to international agreements and insisted on the utilitarian view of copyright claims as the statutory creations of particular national legal regimes. By refusing to sign international copyright treaties, the developing nations of the nineteenth century were able to simply appropriate the ideas, literary creations, and scientific inventions of the major economic powers freely.

The United States offers an exemplary case. As it evolved from being a net importer of intellectual property to a net exporter, its legal doctrines for regulating intellectual property have tended to shift from the objectivist-utilitarian side of the legal balance toward the universalist-natural-rights side. In early-nineteenth-century America the first great publishing houses in New York, Philadelphia, and Boston built fantastic fortunes on unauthorized, and unremunerated, publication of British writers. They

22 Peter Burger, "The Berne Convention: Its History and Its Key Role in the Future," *Journal of Law and Technology* 3 (1) (Winter 1988).

justified their practices on the utilitarian grounds that copyright was statutory and that it was in the American public interest to have great works available for the cheapest possible prices.²³ *Harper's Monthly*, for example, was created exclusively from unauthorized reproductions of copy from British magazines. In 1843 a copy of Charles Dickens's *A Christmas Carol* sold for six cents in the United States, while in England it cost the equivalent of two dollars and fifty cents.²⁴ The Reverend Isaac K. Funk, founder of Funk and Wagnalls, made his initial fortune by pirating Ernst Renan's *The Life of Jesus*. Against these large publishing and printing businesses a movement for American recognition of international copyright claims emerged by the 1830s, led largely by American writers and fellow advocates of a nativist American culture who felt that without international copyright indigenous writers could not compete with their British counterparts in the American literary market. They drew increasingly upon the rhetoric of authors' universal natural rights, and they appealed on patriotic grounds to Congress to act to encourage American letters by preventing cheap reprints of unauthorized British texts.

Not surprisingly, despite repeated petitions to Congress from distinguished writers in both America and England, this movement was repeatedly thwarted by the more intensive lobbying of the American publishing industry in the name of the public interest. Thus the Sherman and Johnson publishing house of Philadelphia sent the following pro-

test to the Senate and the House in 1842:

All the riches of English literature are ours. English authorship comes to us free as the vital air, untaxed, unhindered, even by the necessity of translation, into the country; and the question is, shall we tax it, and thus impose a barrier to the circulation of intellectual and moral light? Shall we build up a dam to obstruct the flow of the rivers of knowledge?²⁵

Knowledge was there for the taking if the grab could be justified by the public good. A radical version of Condorcet thrived in mid-nineteenth-century America. By the 1870s the American debate became sharply focused. On one side, trade protectionists, printers' unions, and publishing houses whose fortunes were rooted in pirating British literature argued against any international agreement. On the other side, advocates of indigenous authors allied themselves with partisans of free trade and international copyright, claiming universal natural rights of authorship.

A critical shift in the political balance occurred in the 1880s as the older American publishing houses on the east coast began to see their profits eroding in the face of a new generation of mass penny-press publishers, expanding especially in the midwestern states, who undercut their costs and reached yet wider markets. In the face of this challenge the older houses reshaped their business strategies and their arguments about intellectual property. They now realized that they would be better positioned than the new generation of publishers to sign exclusive copyright agreements with foreign authors that would be enforceable within the United States. The signing of the Berne Convention in

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23 Aubert J. Clark, *The Movement for International Copyright in Nineteenth-Century America* (Washington, D.C.: The Catholic University of America Press, 1960).

24 Sidney Moss, *Charles Dickens' Quarrel with America* (Troy, N.Y.: Whitson Pub. Co., 1984).

25 Cited in Clark, *The Movement for International Copyright*, 77.

Europe in 1886 added further momentum to a shift in the views of major publishing houses like Harper's and Scribner, who recognized the advantage of the movement for American adherence to some form of international agreement, at least with England. American theologians, including the Reverend Isaac Funk, now denounced the "national sin of literary piracy" (which had allowed him to make his fortune on his pirated *Life of Jesus*) as a violation of the seventh commandment.²⁶ And their voices resounded on the floor of Congress. Although Congress refused to sign the Berne Convention on the grounds that American law did not recognize authors' natural rights, in 1891 an international agreement with England for reciprocal copyright protection was finally signed by Congress.

By the opening of the twentieth century, as America came to be a full-fledged competitor in international commerce in intellectual property and a net exporter of intellectual property, American legal doctrine began to move toward an increasing recognition of unique authorial rights rooted in the sanctity of the personality of the creator, rather than simply in commercial privileges extended for utilitarian ends. The personality theory of intellectual property had been present in the Anglo-American tradition since the eighteenth century, but the single most important source for this shift in principle was the Supreme Court decision written by Justice Holmes in *Bleistein v. Donaldson* (188 U.S. 239) in 1903.²⁷ The case involved the commercial repro-

duction of images used in a circus poster. The argument of the defendant, Donaldson, was that the images were of such a generic nature as to contain insufficient originality to qualify as artistic creation susceptible to copyright protection. The Holmes court demurred, arguing that the courts were not to be put in the role of literary or artistic critics, that is, judges of the artistic merit of a work, and that moreover, any created image "is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."

Through the Holmes decision the rhetoric of authorial originality and natural rights – the Defoe, Diderot, and Lessing side of the Enlightenment debate – made its way into American jurisprudence at the very moment when America began to supplant Europe as the hegemonic global economic power. The course of twentieth-century American copyright law – from *Bleistein v. Donaldson* through United States adherence to the Berne Convention in 1988 to the Digital Millennium Copyright Act of 1995 – has been a story of the steady strengthening of the proprietary rights of intellectual property owners at the expense of public access and interest.²⁸ It is a history of the tipping of the balance in the founding principles of eighteenth-century intellectual property law away from the aim of public utility through "encouragement of learning" toward the enhancement of private commercial gain.

26 Henry Van Dyke, *The National Sin of Literary Piracy* (New York: Charles Scribner's Sons, 1888).

27 Robert C. Post, "Reading Warren and Brandeis: Privacy, Property, and Appropriation," *Case Western Reserve Law Review* 41 (3) (1991): 658–662.

28 James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1996); and Jessica Litman, *Digital Copyright* (Amherst, N.Y.: Prometheus Books, 2001).

The tension between utilitarian interests and authors' natural rights has also played itself out in modernizing societies beyond the United States and Western Europe. Developing nations, which are net importers of cultural goods and technology, find themselves in the position of the United States in the nineteenth century. And the tendency has been for these nations to hold fast to the utilitarian claim that the national public interest should come before recognition of the natural right to property in international copyright, patent, or trademark claims asserted by exporting nations.

In Russia and China the eighteenth-century battles were fought in much the same terms, although with different actors. Theocratic authority gave way to secular power within a Marxian framework, which drew upon the Lockean notion that new ideas and inventions were the result of the mind working upon natural resources. This led to a labor theory of intellectual production that was assimilable to the Marxist notion of the labor theory of value. But Marx gave it a twist *à la* Condorcet. He argued that labor was inherently social rather than individual in nature, even in the case of mental labor, when the mind worked alone with its own resources. In his early manuscripts, Marx suggested that this was because the creating individual was the product of social experience – he owed his livelihood and education to the society that produced him. Because he worked with natural resources that should belong to all, his mental labors were social, and hence the products of them should belong to society as a whole. The people, in the form of the revolutionary people's state, were thus to lay claim to the right to exploit the creations of individual authors and

inventors.²⁹ The early Bolsheviks thus famously “nationalized” a list of great Russian writers following the 1917 revolution. And Chinese authorities during the Cultural Revolution promulgated the following popular saying: “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”

The story of intellectual property in Russia and China, despite brief experiments with liberal property-based regimes in the early twentieth century, has essentially been a story of the devolution of a monopoly on ideas and inventions from theocratic regimes to communist states. In both the Soviet and Chinese communist regimes, however, there was an increasing recognition of the necessity to create nonproperty-based incentives for individual authors and inventors. A system of state-issued awards, prizes, and privileges became the socialist mechanism for encouraging creation and invention. The Soviet Union created a system of “Authors' Certificates” that recognized individual contributions to the public good, and the Chinese, after the Cultural Revolution, followed suit. While the state retained the power to exploit, or not exploit, the contributions of these individuals, the certificates made their bearers eligible for material rewards and for remuneration from the profits generated by their creations. In socialist coun-

29 John N. Hazard, *Communists and Their Law* (Chicago: University of Chicago Press, 1969), 243–268; Serge Levitsky, *Introduction to Soviet Copyright Law* (Leyden: A. W. Sythoff, 1964); Michael A. Newcity, *Copyright Law in the Soviet Union* (New York: Praeger Publishers, 1978); Alford, *To Steal a Book is an Elegant Offense*.

tries, the logic of utilitarianism – married to a state monopoly on the distribution of knowledge – led to a system of public patronage of authors and inventors rather than a recognition of their individual property rights.

Islamic states have followed yet another path. These states have remained theocracies, and so *shari'a*, or Koranic law, remains the highest authority, even for secular potentates. Koranic property law traditionally applied only to tangible things that could be apprehended by the five senses. It is notoriously silent on the question of ownership of ideas.³⁰ In Islamic jurisprudence, however, where the Koran is silent, governments are permitted to make a new law, as long as it does not explicitly conflict with Koranic injunctions. As a consequence, in the twentieth century a body of intellectual property law has emerged in most Islamic states, based on Western legal codes.

These Western-style copyright laws have recently come under new scrutiny by Muslim jurists, and a lively debate has emerged between legal scholars as to whether any concept of ownership of ideas is compatible with *shari'a*. Some scholars argue that the concept of “intellectual property” is inherently incompatible with the Koranic injunction against the ownership of anything intangible, suggesting that it will only lead to private monopolies of some individuals over knowledge. Others make the distinction between ideas and their tangible expression and defend the modern concept of copyright.³¹

30 Steven D. Jamar, “The Protection of Intellectual Property under Islamic Law,” *Capital University Law Review* 21 (1992): 1079–1106; Sayed Hassan Amin, *Law of Intellectual Property in the Middle East* (Glasgow: Royston, 1991).

31 See Simon Buckingham, “In Search of Copyright in the Kingdom,” *Middle East Executive*

Because these states remain essentially theocratic in nature, however, the law has preserved the state’s right to censor all publications as it deems necessary, and to assert the broad discretionary power of the government to set limits on the terms and duration of an author’s or inventor’s rights in relation to his creations. In Iran, for example, the duration of private copyright claims is set at thirty years after the author’s death. The state then retains an exclusive right on the creation for another thirty years before it is made accessible to the public at large. Moreover, Islamic states in general do not extend copyright protection to non-nationals, although some bilateral agreements have been signed between Arab nations. In the international arena, Islamic law has thus tended toward the utilitarian position that the state’s interest is higher than any notion of the universal natural rights of authors or inventors.

In the closing decades of the twentieth century the outlines of a serious conflict over the nature and scope of intellectual property have emerged in the international arena. In general, developing nations – including not only China, Taiwan, Russia, and the Middle Eastern states, but African and South American nations as well – have employed the utilitarian argument, derived from Condorcet, that intellectual property is inherently social in nature and that the state has the right to limit the individual claims of its citizens as well as others in the name of the public good. This argument is used, as it was in nineteenth-century America, to justify these nations’ refusal to recognize copyright and patent claims by nonnationals.

Reports, 8 May 1988, and Mufti Taqi Usmani, “Copyright According to Shariah,” *Albalagh, an Islamic E-Journal* (23 April 2001).

Conversely, the United States and Western Europe have witnessed a shift in their jurisprudential traditions away from the utilitarian side of the eighteenth-century intellectual property balance and toward an unprecedented strengthening of the doctrine of the universal natural rights of authors and inventors to the exclusive commercial exploitation of their creations and inventions. And since the 1970s the United States and Western European nations have been increasingly aggressive in using trade sanctions and international trade agreements to coerce developing nations to recognize precisely this view of intellectual property rights.³²

32 Alford, *To Steal a Book is an Elegant Offense*; Zachary Aoki, "Will the Soviet Union and the People's Republic of China Follow the United States' Adherence to the Berne Convention?" *Boston College International and Comparative Law Review* 13 (Winter: 1990): 207–235; and Natasha Roit, "Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity," *Loyola Entertainment Law Journal* 6 (1986): 53–71.

The consequences of this evolution in Western, and especially American, intellectual property law are troubling for several reasons. Most immediately, in the global arena questions of patents on AIDS drugs, stem cells, and ethnobotanical practices are morally urgent. The dominance of the natural-rights view leads to immediate suffering and to the appropriation of local knowledge for international gain. The loss of a legal balance in the global arena risks giving monopolistic power to exporter nations. Equally important, it puts at risk the liberal political balance between individual gain and the public good that was the foundational aim of the intellectual property laws within Western democratic polities themselves. The cultural and scientific health of Western democracies in the future will depend on a public renewal of the animating mission of the Enlightenment concept of intellectual property: to dismantle commercial monopolies on the circulation of thought and to spread knowledge freely among our citizenry.

The rise of intellectual property, 700 B.C. – A.D. 2000

Adrian Johns

Pop music pirate hunters

It is the beginning of a new century, and the music industry is facing a crisis. New technology and innovative business practices are challenging the copyright principles that have underpinned the industry for as long as anyone can remember.

Taking advantage of a revolutionary process that allows for exact copying, “pirates” are replicating songs at a tremendous rate – on the order of a million copies a year. The public sees nothing wrong in doing business with them. Their publicity, after all, speaks of an orthodox music industry that is monopolistic, exploitative of artist and public alike, and devoted to the production of shallow commercial tat.

The pirates, by contrast, are ostenta-

tiously freedom-loving. They call themselves things like the People’s Music Publishing Company, and sell at prices anyone can afford. They are, they claim, bringing music to a vast public otherwise entirely unserved. Many of them are not businesses on the traditional model at all, but homespun affairs staffed by teenagers and run out of bedrooms and even pubs.

In reaction, the established industry giants band together to lobby the government for a radical strengthening of copyright law – one that many see as threatening to civil liberties and principles of privacy. And in the meantime they resort to underhand tactics to take on the pirates. They are forced to such lengths, they say, because the crisis of piracy calls the very existence of a music industry into question.

Sound familiar? If so, it is not because this is a description of the troubles facing today’s entertainment goliaths as they confront libertarian upstarts like Napster and MP3.com. In fact, this was the roiling battleground of music publishing in the earliest years of the twentieth century, not the twenty-first. In those years the industry faced a piratical threat more serious than any before or – until recently – since. How that threat materialized, how it flourished,

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and how the industry fought back comprise a story with no little relevance for today's highly charged situation.

At the beginning of the twentieth century the music industry was premised on the sale of printed sheet music. The publishers producing such music did so on a truly enormous scale. Perhaps twenty million copies a year were printed in Britain alone, and the best-known pieces sold in the hundreds of thousands. Most of the businesses dominating this field were family firms committed to upholding traditional standards of taste and aesthetic value. Not just concerned to exploit the value of "dots" (as musical notation was termed), they proudly nurtured personal as well as professional relationships with artists such as Stanford and Elgar. Most of their sales were of a relatively small number of wildly successful songs, which, as they were fond of pointing out, cross-subsidized the many that were only modestly successful or that failed outright. The details of pricing, however, were regarded as confidential, and this encouraged rumors that the firms acted in concert to keep them artificially high. They actually sold songs at about a shilling and fourpence each, which does not seem exorbitant – unless you knew that a pirate would sell you the same song for twopence.¹

Two profound changes made such piracy possible, one of them technological, the other cultural.

The first was the development of photolithography. This allowed pirates for the first time to reproduce what was for all intents and purposes an exact copy of

an original. Gone were the typographical errors of earlier pirated versions of sheet music; it often took an expert to tell a reproduction from the original.

The second crucial development was the late-Victorian appearance of "piano mania." As middle- and lower-class incomes rose, money became available for leisure, and in the last quarter of the nineteenth century a number of novel ways of spending it came into being. Pianos were among the most notable. Suddenly every aspiring family wanted what one commentator called "that highly respectablising piece of furniture." The social character of music changed radically as professional virtuosity diverged from, and increasingly disdained, a burgeoning realm of amateurs trained by an equally burgeoning – and utterly unregulated – crowd of "professors." By 1910 there was one piano for every ten people in Great Britain.

Where pianos went, piano music had to follow. The result was a huge new demand among middle- and lower-class amateurs for sheet music – the cheaper the better.²

Music piracy had long existed, of course. Indeed, until the 1770s music was conventionally regarded as lying beyond the purview of copyright altogether, so publishers sold unauthorized reprints freely.³ By the late nineteenth century, legislation had eliminated that kind of freedom. But the new mass market transformed the nature and implications of piracy, making such laws practically moot. The implications extended from

1 D. W. Krummel, "Music Publishing," in N. Temperley, ed., *Music in Britain: The Romantic Age, 1800–1914* (London: Athlone, 1981), 46–59.

2 Cyril Ehrlich, *The Piano: A History*, rev. ed. (Oxford: Clarendon Press, 1990), 88–107.

3 David Hunter, "Music Copyright in Britain to 1800," *Music and Letters* 67 (1986): 269–282.

music-hall songs to works by Massenet, Sullivan, Gounod, and Mascagni. In the early 1900s, pirates copied any music that was genuinely popular, be it a Puccini aria or a Sousa march.

But if it was a mass market that drove piracy, what made it almost respectable was a widespread sense of resentment within musical circles. The music publishing companies, represented as a group by the Music Publishers Association (MPA), had encountered growing complaints from all sides. In 1899, a new association was formed to publish music on behalf of composers themselves. It aimed to give its members “the full benefit of any financial reward” from their efforts, in contrast to the music publishers’ practice of absorbing “nearly all the financial benefits.” On the other side of the industry, retailers too complained – about high prices, trade secrecy about the setting of those prices, and publishers supplying material to rivals at preferential rates. There was, then, a ready audience for the argument that the world of music publishing needed shaking up.

The problem facing the music publishers was not one of legal principle. The difficulty lay in enforcing the law. Although copyright violation, be it of books or sheet music, was illegal in Great Britain, it was a civil offense, not a criminal one. This meant that tracking down perpetrators was largely a matter for their victims. They had the right to search for copies, but not to enter private premises to do so – unless the pirates themselves admitted them, which was, obviously, unlikely. And even if they did succeed in getting hold of pirated music, the most they could hope for was the destruction of their haul. Any award of costs was likely to prove futile, since the hawkers and hacks they

apprehended tended to disappear before hearings, or else to claim poverty. There was no power to impose fines.

While all this was not a great problem for book publishers, since a book represented a relatively substantial capital investment and its seizure was consequently a serious matter for the pirate, for music publishers it was utterly insufficient. Each title amounted to only a sheet or two, and pirates freely allowed them to be seized *en masse*. The publisher would then find the pirate back on the streets within hours, clutching fresh bundles of stock. No wonder, then, that some among the publishers came to the conclusion that they needed to go beyond the law.

In January of 1902, the publisher David Day, of Francis, Day & Hunter, resolved to act. Day was already known for his hard line against piracy: in 1897 he had been described as “the mildest mannered man that ever cut the throat (so to speak) or scuttled the ship of the piratical song printer.” But what he planned now was far more risky than any strategy previously undertaken.

Hiring the services of a detective agency, he mounted his own raid on a piratical warehouse. The raid was almost certainly illegal, but the amazed occupants offered no resistance. Day walked off with five hundred copies of pirated sheet music. He and his men then moved to “attack” a north London cottage where hawkers gathered to pick up pirated copies. Pretending to be hawkers themselves, they seized fifteen thousand copies more. An unfortunate barrow boy yielded another four thousand. Yet another eight thousand came from a hawker’s house, twenty thousand from chambers in the City. Cock-a-hoop, Day

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sat back and waited to see what the pirates would do.⁴

What they did, as it turned out, was nothing. Day had got away with it. Word of the victory then spread fast. An anonymous “antipirate” spelled out a plan: that the publishers should systematically recruit “commandos” modeled on Day’s raiding party, each comprising twenty or so men ready to target markets in London and beyond. It was a grimly appropriate word, coming as it did from South Africa, since many of the songs over which the publishers and pirates were fighting were jingoistic ditties for the Boer War. And before long the leading firms were indeed embarking on such a policy.

To that end, Day founded a new industry trade association, the Musical Copyright Association (MCA), becoming its president and plucking a junior clerk from Francis, Day & Hunter, John Abbott, to be secretary. Abbott found himself charged with devising an offensive against the pirates – an offensive that would skirt the fringes of illegality, that would be launched (it seems) against the advice of the MCA’s own lawyers, and that would depend for its success upon the reluctance of the pirates themselves to have recourse to the courts.

Abbott went about his task with alacrity. He rapidly recruited a small army of retired policemen and others with “some knowledge of the pugilistic art.”⁵ The campaign against the pirates

now began in earnest. Hawkers were confronted on the streets, distributors challenged in their premises and pubs, and printers raided in their cellars and garrets. Agents seized copies numbering in the hundreds of thousands.

Such vast numbers demanded attention, and in response Parliament passed a new musical copyright law. It came into force in October of 1902. Intended to strengthen Abbott’s hand, the new law permitted the police, on being given a written request by a victim of piracy, to seize pirated sheets without waiting for a warrant. For the first time, antipiracy actions would become official police business.

The police moved fast to put this new power into practice. At the same time Abbott’s agents spread out across the country. The level of seizures soon rose dramatically. In the following three months, 750,000 pieces of sheet music were stored in police stations, awaiting the bonfire.

But behind that impressive mass of material lay a plan that was deeply flawed. For one thing, not all pirates proved to be as quiescent as those encountered by Day. Some challenged the agents’ authority to act – an authority that was not materially improved by the new musical copyright law. Hawkers, for example, brought assault charges against the commandos, and sometimes won. Then, in August of 1902, a homeowning pirate found himself confronted in his doorway by half a dozen MCA men, who pushed their way into the house and threatened to “drop” him if he resisted. Although they found three thousand pirated copies of sheet music, the resulting case was of assault, not piracy, and the MCA found itself rebuked. Its policy, the magistrate ruled, exceeded legal limits; it amounted to “organized hooliganism.” The remark

4 James Coover, comp., *Music Publishing, Copyright, and Piracy in Victorian England* (London: Mansell, 1985), 84–85. Coover’s collection of primary source excerpts is the essential entry point to this story. In what follows, most of the material that does not come from Preston’s scrapbook may be found in Coover, although it has generally been checked against originals.

5 John Abbott, *The Story of Francis, Day & Hunter* (London: Francis, Day & Hunter, 1952), 31.

was to be much cited by opponents of the campaign in succeeding months. As such cases mounted up, it began to appear that the whole offensive might backfire. Assault, after all, seemed to many to be an altogether more serious crime than piracy.

At the same time, British music lovers expressed growing skepticism that the publishers were acting in anyone's interest but their own. Perhaps British music would be better off with the pirates.

Stories of composers fleeced by the publishers multiplied. Retailers too saw little benefit in high prices, and the very success of the pirates in selling vast numbers of copies showed that selling cheap could pay. Perhaps, remarked one, the crisis would compel a proper assessment of the worth of the retail network, "now that the publisher is in his death grapple with the pirates."

Embarrassingly enough, in several cases pirates turned out to be ex-MPA or MCA agents who said that they had been forced to turn pirate by the excessive prices charged by the legitimate publishers. "I can't help myself," said one such; "the publishers charge such an enormous price for their copies." Their inside knowledge had in the end only helped them become better pirates.

But the greatest problem was that the seizures were proving far more inconvenient to the police than they were damaging to the pirates. Pirates could quickly collect or print more copies of sheet music. Meanwhile, police stations were becoming warehouses for hundreds of thousands of useless pieces of sheet music. None of that music seemed to be going to the incinerators, and the flow of piracies was not being staunched. The stations were simply filling up with paper.

The reason for this was that the law

insisted on a hearing before destruction, and most hawkers disappeared without answering the summons. The seized copies thus fell into a legal limbo. Finally, in February of 1903, four months after the law had gone into effect, the Metropolitan Police had to suspend its enforcement. The implication was clear: the new statute was an exercise in futility. With no power to search private premises – magistrates were still ruling in favor of the pirates on this – and no fining of offenders, the pirates were scarcely being discomfited by the seizures.

With the campaign floundering and public criticism mounting, some in the trade saw a need to change tack. Day himself broke ranks first. He found himself forced to announce in the *Daily Mail* the launch of Francis, Day & Hunter's new sixpenny music series, which would reissue songs at a price far more competitive with that of the pirates.

A direct result of the combination of pianos and piracy, this new series was a radical departure for the trade. It amounted, one songwriter said, to "an admission of the claims made by the defenders of the pirates that publishers have been robbing the public." It was the "day of cheap music at last," hailed the piratical Popular Music Stores of Doncaster. For once, "the elect in the musical world must recognize the increasing desire of the masses to share in the refining pleasures of high-class music." Even the staunchly pro-publisher trade journal *Musical Opinion* announced the coming of a "revolution" in music publishing. Meanwhile, the MCA, its initial successes paling, fell silent. The pirates were on the verge of winning their war.

For want of a better strategy, the publishers decided to return to what Abbott called their "'smash and grab' method."

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With the MCA more or less discredited, the older trade body, the Music Publishers Association (MPA), came back to the fore. And with it came the MPA's new agent in the fight against piracy, an MCA veteran named William Arthur Preston.

Like Abbott, Arthur Preston had been an employee of one of the big music publishers. In his case it was Boosey and Company, where he had worked since about 1890. But from late 1903 he enjoyed effective command of antipiracy efforts on behalf of the MPA. In this capacity he traveled the length and breadth of Britain and Ireland, seeking out pirates and dragging them through the courts. Apparently indefatigable, Preston single-handedly revived the publishers' offensive, extending it to the furthest provinces.

He did so in three distinct campaigns. The first was a sweep across the north of England and the Midlands, beginning in Liverpool in December of 1903. The second then concentrated on London itself and its suburbs. The third took in the south, ranging from the Medway towns in the east to Plymouth in the far west. In addition, Preston traveled to Dublin, Belfast, and Londonderry to hunt down pirates in Ireland, and even made a detour to the Isle of Man. There can have been few men who saw more of the British Isles in 1904–1905 than Arthur Preston.

Preston kept a remarkable scrapbook recording his progress.⁶ This scrapbook makes possible a detailed reconstruction of both the practice of piracy and the tactics he used to counter it.

To understand those tactics – which included subterfuge to get into pirates' premises – we need to go back to the 1902 law and ask why it was such a failure. The main reason was that it as-

sumed a truism about morality and place that had been ingrained in English society for well over two centuries. This was the conviction that the home was the fundamental site of sound morals. In the seventeenth century, when vagrancy acts were first instituted, it had been taken for granted that secure, patriarchal households were the basis of a stable society. Streets, fairs, and markets, on the contrary, were notorious for their licentiousness. Laws requiring peddlers to obtain licenses – laws that the publishers now sought to exploit against sellers of pirated sheet music – were another reflection of this idea, the tenacity of which it would be hard to overestimate. The reason why the 1902 act provided no right of forced entry into houses was that it assumed, *a priori*, that piracy must be a street-based crime.

The implications of existing British laws against piracy became plain to Preston in 1902, when he tried to prosecute pirates in Liverpool. In this industrial city, some two hundred separate songs were reputedly available as piracies, and the legitimate trade complained of a 60 percent decline in business. Shortly after he arrived, Preston seized pirated sheet music from “street-sellers.” Next he raided a private home, seizing seven thousand copies of pirated music from the residence of John O’Neile at 50 Hunter Street, and causing a “sensation” in the neighborhood. In court, however, O’Neile’s defense contended that there was no evidence that any of the music had actually been sold in the home – a point that Preston had to concede. Since, as the defense claimed, “the [musical copyright] act refers to street trading and not to anything in a house,” O’Neile could not be found guilty simply because he had stored pirated sheet music in his home.

Stymied, Preston had no option but to

6 British Library, Music Library, ms. M.55.

about the prosecution. "The act is rather weak," his lawyer observed; "It would have been better to leave us alone and let us proceed under the old act." Tellingly, a moment after O'Neile walked, a barrow boy who had had far fewer pirated sheets came before the same judge and found himself punished because he had been operating in the street.

Preston's struggle with the pirates thus came to focus on questions of place. Responding to Day's commando tactics, the pirates had begun to appear in courts and in the press as heroic defenders of domestic privacy, as well as upholders of diversity against monopoly and defenders of the people's right to affordable songs. So Preston took care to think through a taxonomy of places and practices that would buttress the legitimacy of his raids.

Was the location of a given raid a home or a warehouse? Was it a place of sale or of storage? To what extent could police or MPA men legitimately claim access? What about a market stall: was it a sacred slice of domesticity in the midst of a public square or an open space?

These were real questions that Preston – unlike Abbott the previous year – took care to appreciate and answer. As a result, newspaper reports and the courts themselves increasingly classified piratical villains according to places of work. Four distinct classes of enemy took shape.

1) The first was that of men who sold sheets "in the public streets." These were the small fry of the trade, the hawkers, who often reappeared with new stock mere hours after a confrontation. They rarely yielded more than ten to a hundred copies at a time, and they refused to betray their sources. Preston prosecuted large numbers of such men. While there was inevitably a feeling of

futility to these prosecutions, in fact the hawkers did change their practices as a result of his campaign, abandoning the thoroughfare as a place of trade. Increasingly they dropped printed catalogues through houses' mailboxes and returned later to deliver any desired music to the householders. The pirates later took this strategy to its logical end by circulating catalogues by mail, eliminating the weak link of the street-seller altogether.

2) People with relatively fixed premises were an altogether more serious matter, since they often acted as local centers of distribution. Generally, hawkers would be supplied from houses or pubs, with the actual warehouse being a small distance away for security reasons. The most notorious example was the Rose and Crown in East London, where distribution was managed by a man known as Tum Tum. This kind of "wholesale man," responsible for managing such an operation, was a figure that Preston particularly wanted to catch.

3) Preston also sought the hack printers who actually produced the piracies. But these were not as crucial as one might suppose. They were generally, in Preston's much-repeated phrase, "men of straw." Working in garrets or cellars, they exercised little control over the enterprise and used rented equipment so as to minimize capital losses if detected. They seem to have been concentrated in London, and especially in the East End. But plates could be distributed anywhere a willing worker could be found, via a secretive method involving railway station cloakrooms, so printers also operated in, for example, Kensington. From temporary and shifting workshops they produced copies rapidly – five thousand per man per day, according to one informer. The rail network then took them

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across the country, to Leeds, Liverpool, Manchester, and Doncaster. There local organizers distributed them through the local network of piracy, first to the wholesale men, then to the hawkers.

4) But the real catch was the publisher's illicit *doppelgänger*, the pirate himself. This was the man who actually coordinated the whole network. He was the criminal capitalist, the musical Moriarty, the piratical patron of the arts who oversaw the whole enterprise while never getting his own fingers inky. The pirate alone had no predictable location, moving from address to address at will. He was therefore the one figure that Preston, Abbott, and their men had never managed to nab. He seemed to be, as the *Sheffield Telegraph* lamented, "ungetatable." For all its dynamism, Preston's campaign would not be a true success until it had trapped a real pirate. And on Christmas Eve, 1903, that suddenly became a possibility.

The great Victorian railway termini of London give rise to lines that snake out across the city atop stolid red-brick viaducts. It was in one of the arches beneath such a viaduct that the greatest music pirate of the age had his headquarters. For some time, John Abbott – still pirate hunting like Preston – had had this arch in the East End under observation, in what he called "the best Sherlock Holmes manner."

On December 24, he launched his raid. He discovered almost seventy-five thousand sheets of pirated music – ten times the largest of regular hauls. The batch had been about to be dispatched down the Great Western Railway to the pirate network. And the pirate himself was actually present. His name was James Frederick Willetts, although in his piratical capacity he tended to use the *nomme de guerre* John Fisher (coined, apparently,

because he had at one point been a fishmonger). But the press and his dealers alike knew him simply as "the pirate king."

The Christmas Eve raid was the first of a series of spectacular attacks over the next eighteen months, which progressively unveiled the extent of the pirate king's realm. Abbott himself raided a cottage in Finchley and found a printing operation with 12,000 copies of pirated music (its overseer, John Puddefoot, remarked that "they do worse on the Stock Exchange every day"). Ten thousand copies turned up in Hoxton. A raid in Hackney yielded nearly 240,000. Another in the north London suburb of Dalston yielded over 280,000 copies, from a warehouse rented by George Wotton on behalf of "the King of the Pirates." Subsequent raids across north London and the East End resulted in further big hauls: 6,500 in Devons Road, 150,000 in Upper Holloway, and 160,000 in a warehouse operated by William Tennent on behalf of "J. Fisher and Co."

Willetts was not idle in the face of these setbacks. Parliament itself had returned to the problem of music piracy, establishing a special committee to investigate. Both Preston and Abbott testified before it. But so too did the pirate king himself. Willetts's testimony – given at his own insistence – was reported at length by the press across the country. It was perhaps the only moment in modern history when a self-proclaimed master of the piratical trade volunteered to appear before the highest political powers and justify his conduct.

Willetts's justification began from the position that no author or composer should be given – or, as a matter of fact, possessed – a freehold on gifts that were God-given for the public benefit.

This was, in principle, uncontroversial.

sial. For the first time, however, musical works really did redound to the general good, since educational reform had made music a part of the cultural formation of every factory worker. Yet at the same time, the new mass market – the committee called it the “No. 2 market” – remained entirely distinct from the traditional public served by legitimate publishers. Willetts’s consumers were working-class. They did not necessarily desire different music – artisans as well as gentlemen, he insisted, appreciated *Tannhauser*, *Carmen*, and *William Tell*. But they did require music that they could afford, and this the traditional industry failed to supply.

Willetts therefore argued that, far from destroying an industry, his piracies had no significant effect at all on existing publishers’ sales. Indeed, it might even increase them, since it amounted to free advertising. (Willetts claimed that none other than David Day had confirmed as much to him privately.) In other words, Willetts insisted on the fractured nature of mass culture at a time when others were content merely to extol its size.

So why were legitimate publishers insensitive to this enormous new market? Because, Willetts explained, they had evolved into a cozy, familial trust – a “ring” dedicated to protecting high customer prices and low authorial remuneration by means of collaboration. But, Willetts argued, Parliament need not accept their conventions. For the sake of the public interest, changes must now be made.

Willetts urged that copyright return to what he took to be its original meaning: that of a “liberty” conferred for the public’s good, not the creator’s. The proper analogy was not with real property at all, but with the kind of monopoly that might be granted to a supplier of any public good, like a rail operator. Such a

monopoly did not give the operator an unrestrained right to charge whatever fares it wished, nor to cease to operate trains for all but the wealthiest portions of society, even though these both might be sensible policies for the company itself.

In fact, as Willetts reminded his audience, Parliament routinely decreed that train companies must run services at prices that the people could afford. And this, he maintained, was precisely what Parliament should do now for music. Where it had fostered the concept of cheap travel, so it should now foster the concept of cheap music. There should be first-class and third-class impressions of musical pieces, as there were first- and third-class railway carriages. In each case first-class and third-class products would produce the same end result, but would differ in their appurtenances and would appeal to distinct markets. This, he pointed out, was precisely what Francis, Day & Hunter was already doing with its cheap music series – an idea that Willetts claimed had originally been his.

So the pirate king was not against the notion of authorial right per se. Indeed, he claimed he could pay authors more than legitimate publishers did. But he denied the principle that copyright holders had a right to restrict the circulation of musical pieces themselves in the face of the public interest.

Instead he proposed that Parliament decree a statutory royalty: once published, anyone could reprint and sell a piece of music, but all who did so must pay the composer and author at the required rate. This would make alleged piracy into practical orthodoxy. It would recalibrate commercial propriety around a different kind of norm. And it was, in fact, exactly the policy that would be adopted to deal with the next great challenge to musical copyright. The next

generation saw gramophone recordings subsumed into intellectual property law under precisely this kind of principle.

In 1904, however, the Parliamentary committee was not yet ready to accept the logic of Willetts's argument. Instead, the committee recommended that a strict antipiracy bill be drafted. Yet his testimony did find some sympathetic hearers both within Parliament and without. The publishers' bid for a new law remained in the balance. And their campaign against piracy was hobbled in early 1905 when Willetts formed a limited company. From now on, however many copies of pirated sheet music Preston and Abbott might seize, Willetts himself would be invulnerable.

Backed into a corner, the publishers finally made a desperate gamble. They announced that piracy had grown so endemic that they could no longer justify investing in any new works whatsoever. The entire music publishing industry shut down.

The Parliamentary committee that Willetts had addressed remarked in its report that piracy amounted to a "common law conspiracy" against copyright. It was an almost casual aside, yet it caught the attention of William Boosey, chief pirate-catcher of Chappell and Company. It raised an interesting possibility. Although piracy itself was a merely civil offense, conspiracy was a different matter entirely. The act of conspiracy was criminal – and thus subject to far more serious penalties, including prison. Just when the war on piracy seemed lost, Boosey saw a chance finally to damage the pirates. After all, the evidence was already available, from all the raids carried out over the past eighteen months; it had simply never been put to use in

this way. He decided to make the attempt.

A new trial began in December of 1905. The alleged conspirators were all men who had been the subject of raids, including Wotton, Tennent, and Puddefoot. But the main target was their leader, Willetts. The hearing took seven weeks, with over fifty witnesses participating.

Willetts chose to mount what looks like a token defense, questioning the copyright status of the songs at issue and condemning the trade secrecy of the publishers. Perhaps he hoped that Parliament would render the whole case moot. It did not. Convicted, he was sent to prison for nine months.

For the first time, pirates faced severe penalties. They could not hope to resume operations quickly if they had to counter conspiracy charges. Soon after the Willetts trial, a second conspiracy case, this time against the "Leeds Pirate King," a man named John Owen Smith who had done extensive business with Willetts, resulted in a similar victory. Then a new music copyright law was finally passed, having received the all-important support of the government. The new law ended any hopes men like Willetts might have harbored that they would be decreed legitimate retroactively. Willetts never recovered, and piracy in general was soon reduced to virtually zero.

The defeat of the pirates – and the last-ditch survival of the publishers – rested on a redaction into legal argument of Arthur Preston's pilgrimages across the land. The publishers won by finally confronting the fact that piracy was a matter not just of immorality, but of complex social networks with their own channels

of communication and their own ideology. The conspiracy charge succeeded not by challenging the content of the pirates' networks, but by identifying them as networks.

So all of Preston's raids and seizures were not, it turned out, so futile after all. Preston and Abbott's efforts had yielded something immeasurably more valuable than the hundreds of thousands of copies they had amassed. What really counted were the tiny scraps of knowledge they had gained. Together those

scraps could be combined into a detailed understanding of piracy as a collective practice – and it was only when they were so combined that the pirates met their nemesis. Only by replicating the social knowledge of Willetts himself could Preston and Abbott defeat him.

The moral of the story is therefore simple. The best way to counter piracy is to appreciate the culture of the pirates themselves – and to understand it better than they do.

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Marcia Angell & Arnold S. Relman

*Patents, profits & American
medicine: conflicts of interest in
the testing & marketing of new drugs*

In the fall of 2001, the editors of thirteen of the world's medical journals made headlines when they jointly announced that they would not publish research reports about new prescription drugs unless the authors provided assurance that they had full access to the data and were responsible for the work.

This extraordinary step was a reaction to the growing control over clinical trials by corporate sponsors. Some of these sponsors do not permit investigators to see all of their own data, or to publish papers without prior approval.

The action of the editors – and the reason for their action – is merely one aspect of the story of the enormous economic power now wielded by the pharmaceutical industry over research, med-

ical education, and clinical practice. At the center of the story are the industry's attempts to exploit and extend patents on new brand-name drugs. These patents are one of the most lucrative forms of intellectual property in America today. This essay describes what happens when the drive to bring patented new drugs to market begins to control medical institutions and professionals who are supposed to be independent and unbiased.

The public agency responsible in the United States for overseeing the production and marketing of prescription drugs is the Food and Drug Administration (FDA). For most of its existence, the FDA has had the authority to regulate manufacturing standards and to require drug companies to prove the safety of their products.

In recent decades, the FDA has also usually required that the effectiveness of a newly patented drug be demonstrated in clinical trials, the results of which are submitted to the FDA and often published in peer-reviewed medical journals. Although some of the most important clinical trials are supported by the National Institutes of Health (NIH), the vast majority are sponsored by drug companies.

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In the year 2000, the pharmaceutical industry spent about \$3.77 billion on grants for clinical trials, compared with \$750 million spent by the federal government through the NIH. But even when a clinical trial is paid for by a drug company, the trial itself normally requires the participation of physicians and other experts. Many of these experts teach in academic medical centers, where the trials are designed and conducted. Increasingly, however, the researchers are doctors in private practice, who participate in clinical trials organized by private research companies.

The fact that investor-owned businesses sponsor most of the clinical trials that bring newly patented drugs to market presents multiple conflicts of interest for nearly everyone involved. That includes the drug companies themselves, whose essential business mission is to sell profitable drugs – not necessarily those that are optimally useful in medical treatments. It also includes the clinical investigators who receive funding from the companies to study the drugs, yet are supposed to be impartial, and the academic medical centers where much (but by no means all) of this work is done. Medical educators also find themselves with conflicts, since they receive industry support to conduct educational programs for doctors. And practitioners are constantly risking compromise by accepting the favors lavished on them by an industry determined to influence their professional judgment.

For millions of Americans, many of the drugs marketed by the pharmaceutical companies are essential for health, and even for life. Unlike most commodities, prescription drugs are often not optional goods. Furthermore, expenditures for drugs now account for the fastest-growing component of the national health

bill, and they will soon replace physicians' fees as the largest item on the bill, apart from the cost of hospitalizations. Prescription drug costs are a major and growing burden on individual patients and on public and private health insurers. As a result of these facts, the public has an interest in prescription drugs that it has in few, if any, other patented products.

Patents are the lifeblood of the drug industry. Without a patent, a company has no incentive to bring a drug to market. Patents, which are now usually granted for twenty years, give a company a monopoly that protects them from competitors as they develop the product and carry out the clinical trials necessary for FDA approval. Once approved, the drug can be sold on the market for the remaining lifetime of the patent, without risk of duplication by competitors. In addition, the effective patent life of many drugs is often extended by specific statutes and FDA regulations. The only price constraints – and they are weak – are those provided by a few competing companies with similar patented drugs and the pressures from large purchasers for bulk discounts. The theory behind patents and other forms of exclusivity is that they will provide an appropriate but limited incentive for companies to develop important and innovative new drugs. But, as we will explain later, the theory does not always work out in practice.

Most innovative drugs – that is, drugs that act in a different way from anything on the market – are now developed initially with NIH research funding, usually in academic medical centers. The drugs are then licensed to drug companies to be further developed and brought to market.

This subsidization of drug companies by the taxpayers became officially sanc-

tioned by Congress in 1980, when the Bayh-Dole Act was passed. Among other things, the Bayh-Dole Act (in conjunction with the lesser-known 1980 Stevenson-Wydler Act and several subsequent amendments) permits academic medical centers to patent drugs discovered through NIH-funded basic research. The academic centers are then permitted to license these drugs to private companies and receive royalties – which are shared with the investigators who conducted the research. The NIH itself is also permitted to set up collaborations with industry and to license drugs developed in its intramural program.

The ostensible purpose of the Bayh-Dole Act was to hasten the transfer of technology from government or academic laboratories to the marketplace. There was a general perception that the United States was lagging behind other parts of the world, especially Japan, in technology transfer. Whether that was true of the development of important new drugs is doubtful. The academic medical centers and their faculty nevertheless warmly embraced the Bayh-Dole Act – and so did the pharmaceutical industry.

Once public institutions had decided to join the drug companies in seeking patents whenever possible, little attention was paid to some of Bayh-Dole's constraints, particularly those that established the right of taxpayers to some sort of accountability, and also to some sort of return on their investment. Among these neglected provisions of the law was the requirement that the benefits of the "invention" be made "available to the public on reasonable terms." If that provision were violated, the law said, the government could "march in" and reassign the patent. The government also retained the rights to use the product itself. Some commentators have

interpreted this as a justification for some sort of price restrictions on drugs licensed to industry under the terms of Bayh-Dole. In addition, the research institutions were supposed to keep the government informed of all patents they obtained on NIH-funded work. Together, Bayh-Dole and Stevenson-Wydler contained provisions that would allow the public to recoup a portion of profits under certain limited circumstances.

In practice, virtually all of these provisions have been ignored or revoked. In 1995, the NIH itself advised against requiring "reasonable pricing," and in a report last year, it argued against trying to recoup a portion of profits. It emphasized that only four of forty-seven drugs with yearly sales above \$500 million were known to have been developed with NIH funding. What was not emphasized was the fact that there was no way of knowing about the other forty-three drugs, since the NIH had not required the medical centers to fulfill their obligation to supply information about patents they had obtained on taxpayer-funded work.

The chief effect of the Bayh-Dole Act has been to increase dramatically the number of partnerships between academic institutions and the pharmaceutical industry. There were many reasons why the drug industry wanted closer collaboration with medical institutions, but one was the need for companies to obtain human subjects for the clinical trials they needed to get FDA approval. Drug companies have money to support clinical research, but they don't have patients, so they need to look for them elsewhere. As the number of drugs being tested grows, so does the number of clinical trials, and human subjects are becoming increasingly difficult to find. Teaching hospitals are an important source, although no longer the only one.

Clinical trials have become a multibillion-dollar business, involving tens of thousands of investigators and millions of human subjects. There are now perhaps as many as sixty thousand ongoing clinical trials (no one knows the exact number).

Since companies usually sponsor trials only after they obtain patents, the time spent in trials eats directly into the time they have to market the drug with the protection of a patent. Consequently, the drug companies are in a great rush to get the trials done, and the rate-limiting factor is the difficulty in acquiring human subjects. In fact, to find subjects, drug companies routinely pay bounties to doctors – anywhere from \$500 to \$15,000 per subject enrolled – plus large bonuses for rapid enrollment.

Because the drug companies are in such a rush, they can no longer rely exclusively on academic medical centers to conduct the trials. They find they can get much faster service in the private sector. In just the past decade, the fraction of industry-sponsored trials done in academic medical centers has dropped from 80 percent to less than 40 percent. Many clinical trials are now organized instead by hundreds of for-profit companies, called contract research organizations (CROs). These companies often work with other companies that recruit human subjects through the media. CROs also organize community doctors to supply patients and collect data, or they work with still other satellite companies that do. These community doctors have become an army of amateur investigators. There are now about fifty thousand clinical investigators registered with the FDA, many of whom are community doctors involved in their first clinical trials.

Academic medical centers are trying to be more accommodating to drug

companies to win back the business being lost to CROs and other private research businesses. Conducting clinical trials for industry is a good source of revenue to help offset losses from low Medicare and managed care reimbursement. Some academic medical institutions are even setting up separate clinical research organizations to provide a convenient, single access point for drug companies and to provide them with the administrative services they need to deal with the FDA.

Many institutions are also permitting drug companies to attach strings to their grants that were unheard of just a few years ago. For example, in some arrangements with academic institutions, the companies may design their own trials, retain and analyze the data, write the papers or at least review them before publication, and even decide whether to allow publication at all. Under such conditions, investigators become little more than hired hands, and their institutions little more than drug company outposts. These are the abuses that provoked medical editors around the world to issue the announcement we mentioned at the start of this essay.

We have pointed out that many of the really innovative drugs are derived from NIH-funded research. For example, the anticancer drug Taxol was developed at Florida State University with NIH funds, then licensed to Bristol-Myers-Squibb. Indeed, nearly all of the major anticancer and anti-AIDS drugs were developed with the help of NIH funding.

What about the others? Nowadays, while some new drugs coming out of the pharmaceutical industry pipeline represent important new discoveries, most “new” drugs being developed by industry are not really new – they are simply variations on an existing theme. In fact,

the number of innovative drugs reaching the market has actually declined over the past several years, from a high of fifty-three per year in 1996 to twenty-seven in 2000.

At the same time, the market is being flooded with highly profitable drugs that usually belong to a family already on the market. For example, Claritin, one of the most profitable of all proprietary drugs, is simply one of a number of similar antihistamines used to treat allergies. Top-selling drugs like Claritin are often called “blockbusters,” and it is a revealing commentary on the pharmaceutical industry that most blockbusters are competing with several other, similar drugs that are also very profitable. Thus, the two blockbusters Zocor and Lipitor are members of a family of statins – drugs that lower blood cholesterol levels by inhibiting production of cholesterol in the liver. And the antidepressant blockbusters Zoloft and Paxil share a common mechanism of action with Prozac, itself a mega-blockbuster antidepressant that recently came off patent.

Drugs with similar actions (and frequently with similar or related chemical structures) are often referred to as “copycat” or “me-too” drugs. They are far easier to turn out than innovative drugs, although they require huge marketing campaigns to persuade doctors and patients to choose one over the other. In contrast, marketing costs for a truly groundbreaking drug, like a cure for cancer, would probably be small, because the drug would sell itself to physicians and the public – based on the published scientific evidence of its safety and effectiveness.

Marketing and administrative costs now equal roughly 30 percent of the revenues of the major drug companies, while research and development (R&D) amount to only 12 percent of revenues.

The profits of the drug companies also greatly exceed the money spent on R&D; on average, profits equal 19 percent of revenues.

The industry claims it spends \$500 million on each new drug brought to market, counting expenditures on failures. But most independent analysts believe that to be a highly inflated figure, and estimate the real figure to be closer to \$100 million. Regardless of what it is, the industry reaps huge profits. That fact would certainly seem to belie the contention of the drug companies that the high prices they charge are needed to offset the costs of their R&D.

A large share of the marketing budget of the pharmaceutical industry, about \$15 billion annually, is spent on wooing physicians in a variety of ways that cause serious conflicts of interest for the medical profession.

One of the principal ways is through educational programs. Physicians are required to obtain “continuing medical education” (CME) to renew their licenses. Increasingly, drug companies help fund and thereby influence these programs, which are usually sponsored by hospitals and medical schools. Physicians are often enticed to attend these CME programs with free meals and other favors and gifts. Drug companies also help professional societies with the expenses of scientific meetings, and they conduct their own satellite educational programs at those meetings. Most such meetings also feature commercial displays and eager salesmen pitching their company’s products. The problem with drug company involvement in CME is that sponsoring companies cannot be expected to evaluate their own drugs objectively, particularly in comparison with competitors’ drugs. Yet the impartial, comparative evaluation of drugs

should be an important function of CME programs.

Another expensive avenue by which drug companies seek to influence the prescribing practices of physicians is through what is called the “detailing” of practitioners in their private offices. This involves more than eighty thousand drug company representatives, who, at an annual cost of several billion dollars, visit doctors’ offices to tout their company’s drugs and to gain favor by plying doctors with free samples and other gifts.

Hoping to gain their share of a competitive market full of similar drugs, the drug companies find detailing to be an effective technique for influencing practitioners’ choices. But when doctors accept favors and receive information about drugs from company salespeople, they risk abdicating their responsibility to their patients, who have a right to assume that physicians will rely on their own interpretation of the best available information rather than on information supplied by necessarily biased drug companies.

Still another method used by drug companies to promote the prescribing of their top-selling drugs is to advertise directly to consumers in the popular media. In recent years, much money has been poured into an effort to persuade people to “ask your doctor about” a wide variety of drugs for common conditions. The medical information conveyed in these ads is fragmentary and sometimes misleading. The purpose, of course, is to increase popular awareness of a brand-name drug, which will then lead physicians to prescribe that brand in order to satisfy consumer demand. This practice fits well with the currently popular notion of “consumer-driven” health care, but it contributes little or nothing to the quality of medical services, and it cer-

tainly increases the costs of care.

Drug companies owe it to their investors to produce profitable drugs. But as the successful marketing of me-too drugs shows, a drug need not be especially medically useful to be profitable. In fact, one way to increase profitability is to market drugs for minor ailments aggressively. After all, there are more healthy people than seriously ill ones – at least in countries where people can afford to purchase expensive drugs. Therefore, an antihistamine or an agent that claims to help irritable bowel syndrome or one that dampens premenstrual mood swings has a much larger potential market than a drug for a serious illness.

A critical task for the drug companies is to obtain patents on me-too drugs or to extend patents on successful drugs. The drug companies accomplish this in a variety of ingenious ways. They try to find slightly new uses for old drugs or sell them in new combinations or dosage forms. Eli Lilly’s newly patented Sarafem is the same drug as Lilly’s Prozac, which has just gone off patent, but Sarafem is sold for premenstrual syndrome instead of depression. The antidiabetes drug Glucophage XR is Bristol-Myers-Squibb’s newly patented once-daily replacement for the twice-daily Glucophage, whose patent recently expired. Except for their duration of action, the two drugs are the same.

Two years ago, the *Wall Street Journal* reported a proposed complicated business deal between Merck and Schering-Plough for the marketing of two new drug combinations, one to lower serum lipid levels and the other to relieve allergies. Each combination would pair one company’s blockbuster drug, whose patent as a single product will soon expire, with a drug with supplementary

action owned by the other company. The combination drugs would have new patents, and their profits would be shared by both companies.

Not satisfied with twenty-year patents, the industry tries to extend them in other ways. The most direct but least certain way is to have a friendly member of Congress introduce a bill to extend the patent on a particular drug. Other methods are less direct but more effective. Thanks to a 1997 law, drug companies that agree to test their drugs in children automatically receive an extra six months of exclusivity – even if the drug would rarely be prescribed for children.

Companies also routinely file patents on some trivial feature of their brand-name drugs – for example, the shape of the tablets – and then sue a generic company for patent infringement when it is about to enter the market. The suit automatically extends the patent for another thirty months, or until the case is resolved. When patents finally do expire, according to allegations in several lawsuits filed by consumer groups, drug companies sometimes collude with generic companies to keep prices high.

In principle, both the FDA and the U.S. patent office have the power to prevent the kinds of abuses we have been describing – but in practice, neither agency exercises it. Over the past decade, the FDA has become increasingly friendly with the industry it regulates. Indeed, it sometimes seems as if the FDA views the drug companies, and not the American public, as its primary client.

There is some reason for that impression. In 1992, Congress passed the Prescription Drug User Fee Act. This act requires drug companies to pay a user fee – currently it is more than \$300,000 – to the FDA for every drug the agency reviews. Such fees at present constitute about half the budget of the FDA's drug review center.

The *quid pro quo* is simple: in return for the fees, the FDA reviews more drugs more quickly. Since 1992, the FDA has doubled the number of drugs reviewed annually, and cut in half the time spent on the average drug review. (In the past year or so, in the wake of several widely publicized withdrawals of drugs found to be dangerous, the FDA has slowed down a little.)

One can see from this brief overview of the clinical research system that it is permeated with financial conflicts of interest. Drug companies exert a major influence over the evaluation of their own products, either indirectly or directly, through for-profit organizations that are dependent on them. Yet the fiduciary responsibility of the drug companies is to increase the value of their stock. It is not to provide unbiased evaluations of their own products.

Even the nonprofit academic medical centers, now facing hard times in the managed care environment, are so eager for drug company business that they are ceding substantial control to the companies over the way academic research is conducted and reported. Researchers who run the clinical trials in academic centers are being allowed to enter into financial arrangements that compromise their independence. Meanwhile, most of the new, nonacademic researchers are private practitioners with no research experience who are paid large bounties and bonuses for enrolling their patients in trials.

Oversight of this situation falls, finally, to the FDA – an agency now partially supported by the industry it regulates. That support is precarious and almost certainly conditional on the agency's cooperation with industry. The Prescription Drug User Fee Act must be renewed by Congress every five years. But as the FDA well knows, the pharma-

ceutical industry has enormous clout on Capitol Hill. If the industry decided to withdraw its support for the Act, the budget of the FDA's drug review center would be slashed, and many people would lose their jobs.

These conflicts of interest are having exactly the effects on clinical research that might be predicted, and some of the consequences are worth emphasizing.

First, drug companies now broadly influence the kind of research being done. Drug companies are increasingly funding trials not to discover new agents and new approaches to treatment, but to get FDA approval of me-too drugs and to buttress marketing claims. For example, huge trials may be undertaken to show that a new statin is in some way marginally better than the other five already on the market. The research may result in successful marketing campaigns but is unlikely to yield much of any scientific or clinical value.

Second, there is growing evidence that financial conflicts of interest are compromising the integrity of the clinical research enterprise. As we have noted, drug companies now often control how and whether research is reported. Many clinical trials are never published because the results do not favor the sponsor's product. There have been several widely publicized cases of investigators who published negative results anyway and were harassed by their industry sponsors for doing so. For example, investigators in a recent trial of an HIV vaccine refused to allow the company to alter the report to make it more favorable to the vaccine. The company then tried to stop publication altogether. According to news reports, when the authors published anyway the company demanded \$7 to \$10 million in damages on the grounds that publication had hurt the company's financial prospects.

The publicized cases concern investigators who refused to tailor their results to suit their sponsors. More worrisome are the cases of investigators who quietly allow negative results to be suppressed, or who publish misleading work. Several studies have shown that papers with industry support are much more likely to favor the company's product than papers with NIH support. Bias may be extremely difficult to detect, particularly when it involves selecting only certain data to present. (Having exclusive control of the data, as drug companies often do, makes surreptitious selectivity all too easy.)

There is also evidence that human subjects are being enrolled in clinical trials for which they are not eligible – for example, because they do not have the disease in question. According to a recent Inspector General's report, physicians in one study stood to make a \$30,000 bonus when they enrolled their sixth patient. Under those circumstances, it's hard to imagine that eligibility criteria will not sometimes be stretched.

What we have, then, is a system riddled with abuses and conflicts of interest and badly in need of reform. How should it be changed?

First, we believe the Bayh-Dole Act should be enforced in all its original provisions, not just the ones that are lucrative for industry and academic institutions. Provisions that should be enforced include: 1) the stipulation that the government be notified of all patents obtained that are based on publicly funded research, and 2) the requirement that the fruits of the research be available to the public on reasonable terms. In the statute, the second provision is stated in only general terms, but it could be translated into specific regulations. Doing so

would help to ensure a reasonable *quid pro quo* between a protected and favored industry and the public that supports it and depends upon it for products essential for medical care.

Second, we recommend that full control of clinical research be restored to the medical institutions and the medical professionals responsible for the health and safety of the patients being studied. The FDA should not allow clinical trials to be controlled by for-profit businesses whose major or only clients are the drug companies. In other words, they should ban contract research organizations (CROs).

That would leave several alternatives. One would be to set up some sort of independent public agency that would function much as the CROs now do, but without having to compete for drug company business. Another alternative would be a return to the days when trials were mainly done in academic medical centers with arm's-length drug-company funding. In those days, academic investigators designed the trials, analyzed the results, wrote the papers, and published them no matter what the outcome. They had no other financial ties with the companies that funded the research, and neither did their institutions.

The academic medical centers should not have strayed from this model in the first place, despite their desire for drug company funding. In any case, FDA approval of new drugs should be contingent on assurances that investigators are not constrained by sponsors in the publication of study results and that they have no other financial ties to the sponsors. This would add strength to the new policy announced by the group of medical editors.

It will be protested that academic medical centers alone can no longer han-

dle the volume of industry-proposed clinical trials, and that is true. But that raises another issue. Is the volume of clinical trials now being undertaken by the pharmaceutical industry reasonable? Can we justify asking human subjects to participate in research that may be quite trivial?

One way to winnow out the trivial research is for the FDA to require that clinical trials, wherever feasible, compare the newly patented drug with the best existing one, not with a placebo. The FDA could also require that approval of a drug be contingent upon a clinically significant effect as well as a statistical one. For their part, the academic medical centers should not undertake clinical trials unless they have some scientific merit.

These reforms would cut down on the total number of clinical trials. They would encourage drug companies to concentrate their efforts on drugs of potentially significant medical value and not spend so much of their resources on the development of drugs with more commercial than medical promise. It is understandable that the industry should want to maximize its revenue, but not that a government agency or the academic medical centers should be its partners in this venture.

Third, Congress should increase the FDA's budget, to enable the agency to expand its responsibilities. The FDA should be shored up as a truly independent agency. It should not be permitted to continue down a road that will make it the captive of the drug industry.

Accordingly, the Prescription Drug User Fee Act should not be renewed in 2002. The FDA is, after all, a public agency charged with protecting the public health. The support it now receives through user fees should be replaced by public funds, and increased.

Fourth, we think that the terms of the collaboration between academic medicine and the pharmaceutical industry need to be reevaluated. Academia and the drug industry can serve the public interest well when they collaborate in research, but only when they do so under arrangements that keep their separate missions distinct and do not encourage academic institutions or their faculties to go into partnership with the companies or to become businesses themselves.

We believe that all financial ties between clinical investigators and the companies whose products they are testing for clinical use should be prohibited – either by law, or through the joint policies of academic medical centers. The only remedy proposed so far has been disclosure – to the institutions, to human subjects, and/or to the editors and readers of medical journals. But disclosure will no longer suffice. The pervasiveness and influence of these financial associations, and the scope of the public's stake in the matter, demand stronger action. We are convinced that the time has come simply to eliminate all such conflicts of interest.

Fifth, and finally, we think it is time to separate continuing medical education (CME) from the marketing of drugs. The former is the responsibility of independent educational institutions; the latter is the legitimate province of industry. The drug industry should not encroach on the intellectual independence of the medical profession – even if this means that physicians have to assume more of the financial burden of their own continuing education.

But the primary responsibility for reforming the current troubled state of CME clearly lies with the medical profession. The medical schools, the hospitals, and the professional organizations that ought to be responsible for the education of physicians should simply refuse financial help from the pharmaceutical industry, unless it is totally free of any industry participation.

We need to remember that the missions of the drug companies and of academic medicine, while in some respects complementary, are in most respects quite different. The primary mission of the pharmaceutical industry is to make money by developing, patenting, and then selling safe and effective drugs. The best of these drugs may make an important contribution to medical care.

The mission of academic medical centers, which are almost all nonprofit, is to educate physicians, advance medical knowledge through basic and clinical research, and provide clinical care of the highest quality.

Industry and the academic centers can sometimes collaborate very fruitfully in research leading to the development of new drugs. But if they wish to preserve the public's trust, and if the centers want public support, they should avoid financial arrangements that blur the essential distinctions between their separate missions. Unfortunately, competitive pressures in the health-care system and the lure of huge profits from pharmaceutical patents are causing industry and the academy to ignore this caution – with potentially grave implications for the public good.

Wendy Doniger

*on the
Kamasutra*

The *Kamasutra*, which many people regard as the paradigmatic textbook for sex, was composed in North India, probably in the third century C.E., in Sanskrit, the literary language of ancient India. There is nothing remotely like it even now, and for its time it was astonishingly sophisticated; it was already well known in India at a time when the Europeans were still swinging in trees, culturally (and sexually) speaking.

The *Kamasutra* is known in English almost entirely through the translation by Sir Richard Francis Burton, published

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over a century ago, in 1893. A new translation that I have been preparing, with my colleague Sudhir Kakar, for Oxford World Classics, reveals for the first time the text's surprisingly modern ideas about gender and unexpectedly subtle stereotypes of feminine and masculine natures. It also reveals relatively liberal attitudes to women's education and sexual freedom, and far more complex views on homosexual acts than are suggested by other texts of this period. And it makes us see just what Burton got wrong, and ask why he got it wrong.

Most Americans and Europeans today think that the *Kamasutra* is just about sexual positions. Reviews of books dealing with the *Kamasutra* in recent years have had titles like "Assume the Position" and "Position Impossible." In India, *Kamasutra* is the name of a condom; in America, one website offered *The Kamasutra of Pooh*, posing stuffed animals in compromising positions (Piglet on Pooh, Pooh mounting Eeyore, and so forth). The part of the *Kamasutra* describing the positions may have been the best-thumbed passage in previous ages of sexual censorship, but nowadays, when sexually explicit novels, films, and instruction manuals are available everywhere, that part is the least useful.

The real *Kamasutra*, however, is not the sort of book to be read in bed when drinking heavily, let alone held in one hand in order to keep the other hand free. The product of a culture quite remote from our own, it is in fact a book about the art of living: about finding a partner, maintaining power in a marriage, committing adultery, living as or with a courtesan, using drugs – and also about the positions in sexual intercourse. In the Burton translation, read now in the shadow of Edward Said, it seems to be about Orientalism. Read in the wake of Michel Foucault, it seems to

be about power, and in the wake of Judith Butler, about the control of women and the denial of homosexuals. I do not think these are its primary concerns, but it certainly is about gender, and to that extent Said, Foucault, and Butler are essential companions for us as we read it today.

We can learn a lot about conventional Indian ideas of gender from the *Kamasutra*. The author, Vatsyayana, describes typically female behavior: “dress, chatter, grace, emotions, delicacy, timidity, innocence, frailty, and bashfulness.” The closest he has to a word for our “gender” is “natural talent” or “glory” (*tejas*) [at 2.7.22]: “A man’s natural talent is his roughness and ferocity; a woman’s is her lack of power and her suffering, self-denial, and weakness.”

What happens when people deviate from these norms? The *Kamasutra* departs from conventional contemporary Hindu views in significant ways.

First, it has what appears to be a third gender: “There are two sorts of third nature, in the form of a woman and in the form of a man. The one in the form of a woman imitates a woman’s dress, chatter, grace, emotions, delicacy, timidity, innocence, frailty, and bashfulness. The one in the form of a man, however, conceals her desire when she wants a man and makes her living as a masseur” [2.9.1 – 6]. Though the *Kamasutra* quickly dismisses the cross-dressing male, with his stereotypical female gender behavior, it discusses the fellatio technique of the closeted man of the third nature in considerable sensual detail, in the longest consecutive passage in the text describing a physical act, and with what might even be called *gusto* [2.9.6 – 24].

In addition, the book’s long passage about the woman playing the role of a man while making love on top of a man blurs conventional Indian ideas of gen-

der. Vatsyayana acknowledges that people do, sometimes, reverse gender roles: “Their passion and a particular technique may sometimes lead them even to exchange roles; but not for very long. In the end, the natural roles are reestablished” [2.7.23]. This switch of “natural talents” is precisely what happens when the woman is on top [2.8.6], a position that most Sanskrit texts refer to as the “perverse” or “reversed” or “topsy-turvy” position (*viparitam*). Vatsyayana never uses this term, referring to the woman-on-top position only with the verb “to play the man’s role” (*purushayitva*). Even while she is playing that role, however, she mimes her own conventional gender behavior [2.8.6]: “And, at the same time, she indicates that she is embarrassed and exhausted and wishes to stop.”

A thirteenth-century commentary (by Yashodhara) spells out the gender complications: “She now does these acts against the current of her own natural talent, demonstrating her ferocity. And so, in order to express the woman’s natural talent, even though she is not embarrassed, nor exhausted, and does not wish to stop, she indicates that she is embarrassed and exhausted and wishes to stop.” Now, since Vatsyayana insists [at 2.8.39] that the woman “unveils her own feelings completely/when her passion drives her to get on top,” the feelings of the woman when she plays the man’s role seem to be both male and female. Or, rather, when she acts like a man, she pretends to be a man and then pretends to be a woman.

In this way, Vatsyayana acknowledges a woman’s active agency and challenges her stereotyped gender role. He is also a strong advocate for women’s sexual pleasure and for the importance of ensuring that she has her orgasm before he has his [2.1.10 – 23 – 6, 30]. He even

knew about the G-spot: “When he is moving inside her, and her eyes roll when she feels him in certain spots, he presses her in just those spots” [2.8.16]. The commentator clarifies the passage: “When she feels him moving in a certain spot inside her, the pleasure of that touch makes her eyes whirl around in a circle. . . . There is some argument about this. Some people say that, when the man is stroking inside her, whatever place the woman looks at, either specifically or vaguely, that is the place where he should press her.”

In his translation of this passage, Sir Richard Burton makes a basic mistake that plagues his entire translation: when the text puzzles him, as it often puzzles all who read it in Sanskrit, he translates the thirteenth-century commentary and presents it as the text. In this passage, he also gets the commentary wrong:

“While a man is doing to the woman what he likes best during congress, he should always make a point of pressing those parts of her body on which she turns her eyes.” There is nothing about what “he” likes either in the text or in the commentary; this is Burton’s fantasy.

In fact, Burton’s translation distorts gender issues throughout. His main contribution was the courage and determination to publish the work at all; he was the Larry Flynt of his day. To get around the censorship laws, Burton set up an imaginary publishing house, The Kama Shastra Society of London and Benares, with printers said to be in Benares or Cosmopoli. Even though it was not formally published in England and the United States until 1962, the Burton *Kamasutra* soon became one of the most pirated books in the English language, constantly reprinted, often with a new preface to justify the new edition, sometimes without any attribution to Burton.

His translation remains precious, like Edward Fitzgerald’s *Rubaiyat*, as a monument of English literature, though not much closer to Vatsyayana than Fitzgerald was to Omar Khayyam. For the Sanskrit text simply does not say what Burton says it says.

In general, Burton gets the gender wrong. For instance, at 4.1.19 – 21 Sudhir Kakar and I have translated the text like this:

Mildly offended by the man’s infidelities, she does not accuse him too much, but she scolds him with abusive language when he is alone or among friends. She does not, however, use love-sorcery worked with roots, for, Gonardiya says, “Nothing destroys trust like that.”

The Burton translation here reads:

In the event of any misconduct on the part of her husband, she should not blame him excessively, though she be a little displeased. She should not use abusive language towards him, but rebuke him with conciliatory words, whether he be in the company of friends or alone. Moreover, she should not be a scold, for, says Gonardiya, “there is no cause of dislike on the part of a husband so great as this characteristic in a wife.”

Notice how Burton has watered down the passage, padded it, and made it almost twice as long as our more direct translation. He mistranslates the word for “love-sorcery worked with roots” (*mulakarika*), which he renders as “she should not be a scold.” His use of the English word “misconduct” is not so much a mistranslation as a serious error of judgment, for the word in question (*apacara*) does have the general meaning of “misconduct,” but in an erotic context it usually takes on the more specific meaning of “infidelity,” a choice that is supported both by the remedy that the

text suggests (and rejects) – love-magic – and by the commentator’s gloss (*aparadha*). But the most serious problem with Burton’s translation is his use of the word “not,” which negates the wife’s right to use abusive language against her straying husband, a denial only somewhat qualified by the added phrase, “rebuke him with conciliatory words.” (Was this an innocent error or does it reflect a sexist bias? We cannot know.)

Most unfortunately, Burton adroitly managed to escape the smell of obscenity by using the Hindu terms for the sexual organs, *yoni* and *lingam*, throughout. This decision was problematic in several ways. First of all, these terms do not represent Vatsyayana’s text, which only rarely uses the word *lingam*, and never *yoni*. Instead, Vatsyayana uses several different words, primarily gender-neutral terms (*jaghana*) that can be translated as “pelvis,” or “genitals,” or “between the legs,” or other terms (such as *yantra* or *sadhana*, “the instrument”) that are neither obscene nor anatomically precise. In some places, he circumvents, by indirection or implication, the need to employ any specific word at all. Where Vatsyayana does use *lingam* [at 2.1.1], the context suggests, and the commentator affirms, that it is [like *jaghana*] gender-neutral, meant to apply to both men and women.

More significantly, Burton’s decision to use *yoni* and *lingam* had Orientalist implications for most English readers. The use of a Sanskrit term in place of an Eng-

lish equivalent anthropologized sex, distanced it, made it safe for English readers by assuring them, or pretending to assure them, that the text was not about real sexual organs, *their* sexual organs, but merely about the appendages of strange, dark people, far away, who have *lingams* and *yonis* instead of the naughty bits that we have. This move dodged “the smell of obscenity” through the same logic that allowed *National Geographic* to depict the bare breasts of black African women long before it became respectable to show white women’s breasts in *Playboy*. It enabled the authors to pretend that the book was not obscene because it was about India, when they really thought it was about sex, and knew that English readers would think so too.

In fact, the Burton translation is most accurate in the sections that deal with the sexual positions, the topic for which the book became famous. Was this because this was what Burton cared about most, or worked on most carefully? Or was it because sex is easier to understand, being universal, than the cultural information that is specific to India?

Whatever the answer, the *Kamasutra* deserves its classic status, not just because it is about essential, unchangeable human attributes – lust, love, shyness, rejection, seduction, manipulation – but also because we learn from it deeply intimate things about a culture that could well be described as long ago and in a galaxy far away.