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

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Associated with the German philosopher Jürgen Habermas, the notion of the public sphere, or more precisely, the bourgeois public sphere, has become ubiquitous in eighteenth century cultural studies. Habermas has also been invoked by scholars concerned with media and democratic discourse. But so far as I know the relationship between the emergence of the public sphere and the emergence of copyright in early modern England has not been much discussed. What I want to do in this paper, then, is to explore the relationship between the Habermasian public sphere and the inauguration of modern copyright law in the Statute of Anne in 1710.[1]

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1   8 Anne, c. 19. One particularly influential study that applies the concept of the public sphere to eighteenth-century culture is Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, MA: Harvard University Press, 1990). Important discussions of media and democratic discourse that invoke Habermas include: Niva Elkin-Koren, 'Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace', *Cardozo Arts & Entertainment Law Journal*, 14 (1996), 215-95; Rosemary J. Coombe, 'Dialogic Democracy', in *The Cultural Life of Intellectual Properties* (Durham, NC: Duke University Press, 1998), pp. 248-99; and Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001).

Mark Rose

Habermas's concept of the emergence and transformation of the public sphere is social theory on a grand scale. The danger in taking material from such a theory and applying it to a topic like the formation of modern copyright in England is that one can find oneself unable to get beyond the level of abstraction. There are two temptations that lead in this direction. One is to become enmeshed in the theoretical debates that Habermas has inspired and thus perhaps never reach the level of concrete cultural and legal history. The other is that one may be encouraged by the abstraction and generality of Habermas's own style to pitch the discussion of English cultural and legal history at an equally abstract and general level. I propose to avoid the first temptation by keeping my description of Habermas's theory as brief as possible and by limiting my critique to one point having to do with the period in which the public sphere emerges in England. Furthermore, in order to avoid the pressure of Habermas's own tendency to abstraction, I propose to anchor my discussion of the emergence of the public sphere in a single important text, Milton's *Areopagitica*. This is a tract that Milton wrote in 1644 to protest pre-publication censorship of the press. In this well-known tract, I suggest, one can find an early sketch of the public sphere vividly realised. As for the older form of publicity that, according to Habermas, preceded the bourgeois public sphere, I propose to examine some of the features of the early modern Stationers' Company, an institution in which I believe one can find the lineaments of the social form that Habermas calls 'representative publicness'. Finally, I turn to the Statute of Anne itself, a document in which, I suggest, we find the bourgeois public sphere given concrete legal reality. I conclude with a brief coda in which I touch upon the complex topic that Habermas calls the 'hollowing out' of the public sphere.

Habermas and the Public Sphere

Jürgen Habermas's study of the public sphere, originally published in 1962, first appeared in English in 1989 as *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*.[2] In this influential study Habermas describes the historical appearance of a new and distinctive social space which he refers to as the 'bourgeois public sphere'. Located conceptually between the private sphere of the family and the

2   Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger (Cambridge, MA: The MIT Press, 1991).

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

The public sphere may be conceived, Habermas says, 'as the sphere of private people coming together as a public'.[3] This form of 'publicity' – that is, 'publicity' in the sense of the condition of being public – is to be contrasted with the form that Habermas calls 'representative publicness' and that he associates with the pre-modern period.[4] In this social form, publicity was attached to the person of the noble or other authoritative figure who displayed himself publicly as an embodiment of some higher power such as the prince or the deity. 'Representative publicness' was not a social realm but something like a status attribute. The prince and the estates were not the empowered agents of the people – that is, they did not 'represent' the people in anything like the modern republican sense of representation – rather, the prince and the estates were the living embodiment of the country. To call this older social form 'representative publicness' may at first seem confusing because of our association of representation with election. But what Habermas wants to emphasise is the way authority in this social form was represented before the people – that is, demonstrated to the people – in a continuous social drama of rituals, processions, and other presentations that incorporated distinctive elements of costume, demeanour, and forms of address including such honorifics such as 'highness', 'grace', 'majesty' and 'excellence'. In order to grasp what Habermas means by 'representative publicness', think perhaps of the ritual of coronation in which the monarch, clothed in a form of dress unique to his status, presents his person to the estates in a display of majesty. Publicity in this social form operates in a manner entirely different from that in which publicity consists of private people coming together in coffee houses, concert halls, or salons to constitute themselves as a 'public'.

Sometimes the title of Habermas's study, *The Structural Transformation of the Public Sphere*, is wrongly taken to refer to the early modern development

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3   Ibid., p. 28.
4   Ibid., p. 5.

of the bourgeois public sphere. In fact, the 'structural transformation' referred to in the title is the later process that Habermas terms the 'hollowing out' of the public sphere and that he identifies with the appearance of mass society and the social welfare state.[5] In this process, which Habermas locates in such popular social and political movements as Chartism in Britain, the basis of the public sphere as a distinctive social space independent of the state begins to erode as the state assumes regulatory and protective functions in civil society. Now, in Habermas's account, the public sphere becomes an arena of competition and struggle rather than the site of conversation and exchange. Now, too, the mass media develop and change in response to the newly formed mass publics of modern society. Instead of being sites of discussion and debate, institutions such as newspapers and mass magazines become organs of advertising and manipulation for commercial purposes. Gradually, the social foundations underlying the formation of 'public opinion' as an independent source of political authority are eroded. In this context a process that Habermas calls 'refeudalisation' occurs as both political figures and large organisations such as commercial entities display themselves before mass publics in a manner analogous to feudal rituals of authority. This 'hollowing out' of the public sphere, which Habermas sees as beginning in the nineteenth century and continuing to the present day, is the 'structural transformation' to which his title refers.

Habermas's concept of the bourgeois public sphere and its later transformation has provoked a great deal of discussion in various circles and it has been charged with being naïve and idealist in its representation of the early modern public sphere as a social space insulated from state power. Moreover, the exclusionary and all-male public space that Habermas celebrates is by no means acceptable as an ideal today. Furthermore, it is far from clear that one can speak of a single eighteenth century public sphere as opposed to multiple overlapping arenas of discussion and critique. Still, as Michael McKeon, writing in a recent issue of the interdisciplinary journal *Criticism*, devoted to Habermas, puts it, the category of the early modern public sphere has become 'indispensable to historical thinking'.[6] Habermas's theory can be challenged on historical particulars, can be

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5   Ibid., pp. 141, 157.
6   Michael McKeon, 'Parsing Habermas's Bourgeois Sphere', *Criticism*, 46 (2004), 273-7 (p. 273). For some critical discussions of Habermas see the important collection *Habermas and the Public Sphere*, ed. by Craig Calhoun (Cambridge, MA: The MIT Press, 1992). Luke Goode, *Jürgen Habermas: Democracy and the Public Sphere* (London: Pluto Press, 2005), provides a good account of Habermas and some of the discussion he has provoked.

adapted or revised, but it has proven its usefulness because it allows us to identify important social changes that occurred in the early modern period. Therefore it cannot, I think, simply be dismissed.

One revision that must be made, however, has to do with the period to which the nascent public sphere is assigned. Habermas emphasises the economic foundations of the public sphere and therefore locates its appearance in the early eighteenth century. But in fact many of the institutions of civil exchange that Habermas cites date from the seventeenth rather than the eighteenth century. The famous coffee houses of London, for example, were born in the aftermath of the English Revolution, proliferating in the 1670s and 1680s and creating a new kind of civic space in which tradesmen and gentlemen could meet and discuss matters of public interest on an equal basis.[7] But even before the spread of the coffee houses, the English Revolution unleashed a torrent of controversial print after the Star Chamber was abolished by the Long Parliament in 1641. This was an act that dissolved the ancient partnership between the crown and the Stationers' Company, through which the English press had long been regulated. Much of the pamphleteering focused on questions of religious doctrine and church government. In the early 1640s, we must remember, religious and political debate were so intertwined as to be indistinguishable, and matters related to church government were of fundamental importance to the political and cultural future of the country. As William Haller, who has studied this explosion of print closely, remarks, the controversies of this period were 'evidence of the growing realisation by all parties of the power of public opinion, and by each of the importance of securing for itself control of that power'.[8] The principal instrument for doing this was the newly unfettered press. It is in this revolutionary context, I think, that we can see the shape of the nascent public sphere emerging, and it is in this context that Milton wrote *Areopagitica*. Interestingly, in England, unlike France and Germany, the public sphere does not, as Habermas suggested, emerge first as a forum

7   See Markman Ellis, *The Coffee House: A Cultural History* (London: Weidenfeld & Nicolson, 2004), pp. 75-6.

8   William Haller, 'Before *Areopagitica*', *PMLA: Publications of the Modern Language Association of America*, 42 (1927), 875-900 (p. 876). David Zaret, *Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early-Modern England* (Princeton, NJ: Princeton University Press, 2000) demonstrates how the public sphere in England arose as a consequence of the impact of printing on political communication in the context of the English Revolution. Zaret emphasizes that the appearance of the public sphere was more a product of practical commercial forces than political theory. See also Zaret's important essay, 'Religion, Science, and Printing in the Public Sphere in Seventeenth-Century England', in Calhoun, pp. 212-35.

for the discussion of art and literature but directly as an arena of religious and political debate.

Areopagitica

The context in which Milton wrote *Areopagitica* is well known. In 1643 the flood of print released by the abolition of the Star Chamber led the Stationers' Company to petition parliament to reinstitute some form of press regulation both for the good of the state and the good of the stationers. Parliament responded a few months later in June 1643 by passing an ordinance re-establishing licensing under its own authority. At first Milton does not seem to have been concerned but gradually it became apparent to him as to others that vigorous and open public discussion was the prerequisite for continuing political and religious reform. What brought this point home was evidently a petition of 24 August 1644, in which the Stationers' Company demanded stricter enforcement of the printing ordinance and cited Milton himself as a transgressor. Three months later Milton responded with *Areopagitica*. This was by no means the first appeal for liberty of the press as is sometimes claimed, but it was certainly the most eloquent and it counts as an important document in both the history of the public sphere and in some respects the history of copyright as well.[9]

One reason *Areopagitica* is a powerful document is that it vividly animates the world of books, turning the production and circulation of printed texts into little dramas. As an example let me cite the famous passage in which Milton mocks the practice of licensing as an invention of

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9   Published 24 November 1644, Milton's *Areopagitica* was anticipated by several other tracts including William Walwyn's, *The Compassionate Samaritane*, which objected to the 1643 order on the grounds that it empowered self-interested licensers to suppress 'honest men's writings'. See Haller, p. 896, who describes the context in which *Areopagitica* was written. For a suggestive discussion of Milton and Habermas see Donald L. Guss, 'Enlightenment as Process: Milton and Habermas', *PMLA: Publications of the Modern Language Association of America,* 106 (1991), 1156-69. See also David Norbrook, '*Areopagitica*, Censorship, and the Early Modern Public Sphere', in *The Administration of Aesthetics: Censorship, Political Criticism, and the Public Sphere*, ed. by Richard Burt (Minneapolis, MN: University of Minnesota Press, 1994), pp. 3-33. I have also been influenced by Francis Barker's discussion of transformation of the subject into the private citizen in *The Tremulous Private Body* (New York and London: Methuen, 1984); Abbe Blum's 'The Author's Authority: *Areopagitica* and the Labour of Licensing', in *Re-membering Milton*, ed. by Mary Nyquist and Margaret W. Ferguson (New York and London: Methuen, 1987), pp. 74-96; and Joseph Loewenstein's suggestive discussions of Milton in *The Author's Due: Printing and the Prehistory of Copyright* (Chicago, IL: The University of Chicago Press, 2002).

the counter-reformation. Here Milton portrays the title page of an officially sanctioned book with its multiple licences or imprimaturs as an Italianate piazza in which deferential worthies bow and curtsy to each other as they debate the fate of the author, a marginalised figure who stands to one side in confusion:

> Sometimes five Imprimaturs are seen together, dialoguewise, in the piazza of one titlepage, complimenting and ducking each to other with their shaven reverences, whether the author, who stands by in perplexity at the foot of his epistle, shall to the press or to the sponge. These are the pretty responsories, these are the dear antiphonies that so bewitched of late our prelates and their chaplains with the goodly echo they made; and besotted us to the gay imitation of a lordly Imprimatur...[10]

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

Dramatically opposed to this Italianate courtly scene is the social space that Milton invokes in the title page of his own publication: *Areopagitica*: *A Speech of Mr. John Milton For the Liberty of Unlicensed Printing, To the Parliament of England* (see figure 1). Here the author's name figures prominently, the words 'Mr. John Milton' spreading from one edge of the decorative frame to the other, printed in the same large swash type face as the title, '*Areopagitica*'. The largest and boldest word on the title page, however, is 'Speech', a word that emphasises the fiction of the pamphlet as an actual address to parliament. The title, '*Areopagitica*', alludes to the Athenian court of the hill of Ares, the Areopagos, which Milton conceives as a kind of parliament, and the rhetorician Isocrates whom Milton describes in the body of the tract as he 'who from his private house wrote that discourse to the parliament of Athens that persuades them to change the form of democracy which

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10   *John Milton: Complete Poems and Major Prose*, ed. by Merritt Y. Hughes (Indianapolis, IN: The Odyssey Press, 1957), p. 724.
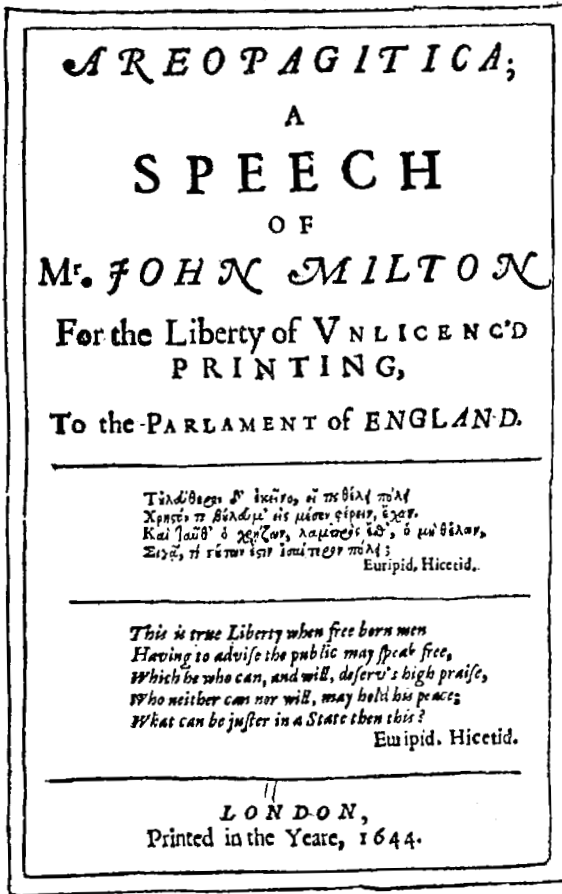
Fig. 1 Title page of John Milton's *Areopagitica*, first published in 1644.

was then established'.[11] Like Isocrates, then, Milton presents himself as a
private man entering the public sphere to address the parliament and the
commonwealth at large on a matter of public import. Moreover, we should
note that Milton's title page bears neither the mark of the licenser – not sur-
prising in a tract written against licensing – nor of the printer or bookseller.
The consequence of omitting these names is to emphasise Milton himself
as the sole authority responsible for the tract. This is related to the theme
of the speech, which might either be described as a defence of 'the liberty
of unlicensed printing', as the title page presents it, or, alternatively, as a
protest against the indignity to which licensing subjects the author. Thus
in another famous passage Milton condemns the circumstance in which

11   Ibid., p. 719.

an author 'must appear in print like a puny' – that is, a child – 'with his
guardian, and his censor's hand on the back of his title to be his bail and
surety that he is no idiot or seducer'. Such compelled infantilism, Milton
says, 'cannot be but a dishonour and derogation to the author, to the book,
to the privilege and dignity of learning'.[12] Under such circumstances, in
other words, there can be no coming together of serious men to discuss
public matters freely and openly.

Throughout *Areopagitica* books and authors are conflated. Books are
seen as the embodiments of authors and authors are presented as living in
their books. Indeed, the dominant metaphor of *Areopagitica* might be said
to be the representation of books as living persons. Thus Milton acknowl-
edges the need to keep 'a vigilant eye how books demean themselves'.

> For books are not absolutely dead things, but do contain a potency of life
> in them to be as active as that soul was whose progeny they are; nay, they do
> preserve as in a vial the purest efficacy and extraction of that living intellect
> that bred them. I know they are as lively and as vigorously productive as
> those fabulous dragon's teeth; and being sown up and down, may chance to
> spring up armed men.[13]

The reference to the 'fabulous dragon's teeth' invokes the myth of the hero
Cadmus who, having slain a sacred dragon, sowed the ground with its
teeth from which sprang a race of armed men who fought each other. It
emphasises the vital, generative quality that Milton associates with the
writing of books, and so, of course, does the metaphor of the brain child
that Milton employs when he acknowledges that truly offensive books may
be suppressed after publication. Until the institution of licensing, he says,
'books were ever as freely admitted into the world as any other birth; the
issue of the brain was no more stifled than the issue of the womb'. But if
a man's 'intellectual offspring' proved a monster, 'who denies that it was
justly burnt, or sunk into the sea?'[14] Nonetheless, Milton urges caution even
in the suppression of supposed monsters. A good book is, he says, 'the pre-
cious lifeblood of a master spirit, embalmed and treasured up on purpose
to a life beyond life', and we must be wary:

> [H]ow we spill that seasoned life of man preserved and stored up in
> books; since we see a kind of homicide may be thus committed, sometimes
> a martyrdom; and if it extend to the whole impression, a kind of massacre,
> whereof the execution ends not in the slaying of an elemental life, but strikes

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12   Ibid., p. 735.
13   Ibid., p. 720.
14   Ibid., p. 725.

at that ethereal and fifth essence, the breath of reason itself, slays an immor-
tality rather than a life.[15]

I want to call attention here to the sexuality of Milton's language in his
treatment of books and learning. In the early modern period, seminal fluid
was believed to be a distillation of blood. Moreover, sexual and intellectual
generation were thought to be parallel activities and the brain was under-
stood to incorporate an organ parallel to the womb in which ideas were
brought to term. Milton's contemporary, William Harvey, the discoverer
of the circulation of the blood, believed that he had proved this parallel
through his dissections of female deer.[16] Thus Milton's representation of
a good book as the 'precious lifeblood of a master spirit' that has been
'embalmed and treasured up... to a life beyond life' had in its day a bio-
logical dimension that may no longer be immediately apparent. And so too
does his image of a book as the 'purest efficacy and extraction' of a living
intellect preserved 'as in a vial'. This train of thought, summarised in the
statement that books 'do contain a potency of life in them to be as active
as that soul was whose progeny they are', leads Milton from the image
of the vial of living essence to the story of the dragon's teeth that trans-
form themselves into armed warriors. As Milton's metaphors and allusions
suggest, he conceives the public arena of printed discussion and debate
as a social space that is also a kind of biological space, one teeming with
ideas that are imagined to be in constant struggle and competition. And
this sometimes confusing activity, Milton insists, is a necessary and good
thing in the strenuous pursuit of truth. As he says in yet another famous
passage, 'Where there is much desire to learn, there of necessity will be
much arguing, much writing, many opinions; for opinion in good men is
but knowledge in the making'.[17]

What I am suggesting is that *Areopagitica* is a key document in the emer-
gence of the bourgeois public sphere in two senses. First, it is a document in
which Milton, portraying himself as a private man addressing the public at
large through parliament, participates in the discourse of the public sphere.
Second, it is also a document that portrays both the pre-modern form of

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15   Ibid., p. 720.
16   Harvey reports his experiments with deer in 'Of Conception', in *Disputations
Touching the Generation of Animals*, trans. and ed. by Gweneth Whitteridge (Oxford:
Blackwell Scientific, 1981), pp. 443-53. More generally on the idea that there was
thought to be a parallel between intellectual and biological generation see Mark
Rose, 'Mothers and Authors: *Johnson v. Calvert* and the New Children of Our Imagi-
nation', *Critical Inquiry*, 22 (1996), 613-33 (pp. 620-2).
17   Hughes, p. 743.

publicity – here I am thinking of the satirical sketch of bobbing and bowing imprimaturs – and the vibrant arena of arguing and clashing opinions that Milton presents as a positive alternative. The Habermasian public sphere is sometimes imagined as a scene of quiet rational debate. But Milton's conception of the social space in which public opinion is formed is less serene and is in fact in some respects quite odd. I am thinking here of the biological element in his portrayal of the public sphere, his sense of the public arena as teeming with struggling life. One might imagine perhaps that Milton was a Darwinist before his time, but in fact the paradigm is biblical and religious. 'Be fruitful, and multiply'. This was the first command given to Adam and Eve and it was a crucial tenet for Milton, who, like other protestant thinkers of the period, vehemently rejected ideas of the sanctity of virginity. 'Our Maker bids increase', Milton says in *Paradise Lost*, 'who bids abstain But our Destroyer, foe to God and Man?' (IV.748-749). For Milton, then, liberty of printing was a form of Christian liberty and a principle of vitality; licensing was a dangerous and authoritarian principle of sterility.

The Early Modern Stationers' Company

In *Areopagitica*, Milton invokes the Stationers' Company in passing when he accuses parliament of having been deceived by the 'fraud of some old patentees and monopolisers in the trade of bookselling' who argued for the reinstitution of licensing. In this passage, too, Milton makes his comment about the 'just retaining of each man his several copy' (p. 749), which refers, as has often been noted, to the rights of stationers rather than of authors. For Milton copyright may have been a guild matter, but publishing in the sense of speaking in public was an affair of the author in relation to the commonwealth. But this was not the way the issue appeared in the Ordinance of 1643. There the focus was not on the author – authors were mentioned only once, along with printers, as possible producers of scandalous books – but on the Stationers' Company as the guardian of 'ancient custom'. The goal of the ordinance was to empower the Stationers' Company to suppress 'abuses' and 'disorders' dangerous to religion and government.[18]

Milton, who was undoubtedly stung by the Stationers' Company citing him as an offender in its petition for stricter enforcement of licensing, charged that the ordinance was the product of fraud and bad faith. But

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18   *Acts and Ordinances of the Interregnum, 1642-1660*, ed. by C.H. Firth and R.S. Rait (London: H.M. Stationery Office, 1911), pp. 184-6.

while it is true that licensing was very much in the financial interests of the major figures in the company, more than deceit was involved. The early modern Stationers' Company incorporated an orientation and a stance towards the state strikingly different from Milton's. Milton was concerned with liberty and the advancement of knowledge; the company was concerned with propriety and the maintenance of order. As the controversialist Henry Parker put it in *The Humble Remonstrance of the Company of Stationers*, published in 1643 as part of the campaign for the reinstitution of licensing, the issue as the company saw it was not merely the advancement of knowledge but 'the advancement of wholesome knowledge'. Parker praised the catholic countries for their strict printing regulations – this was a touch that must have inflamed Milton – and he cited Germany and the Netherlands as examples of countries where the press was disorderly. 'It is not mere printing, but well ordered printing that merits so much favour and respect', Parker stated, and he complained about the multitude of presses that had sprung up since the abolition of the Star Chamber.[19]

In the seventeenth century, the term 'propriety' incorporated both the notion of appropriateness and of property. Consequently, as Paul Langford has noted, propriety was at once a way of looking at the world and a way of sharing it out.[20] In *The Nature of the Book*, his monumental study of how printed books achieved credibility in the early modern period, Adrian Johns analyses the structures and practices of the early modern Stationers' Company to illustrate the company's institutional commitment to order and decorum. Both dimensions of propriety were evident, for example, in the social structure of the Stationers' Company which, like that of other

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19   [Henry Parker], *The Humble Remonstrance of the Company of Stationers* (London, 1643), sig. A1-A1ᵛ.

20   Paul Langford, *Public Life and the Propertied Englishman 1689-1798* (Oxford: Oxford University Press, 1991), pp. 4-5; cited by Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making* (Chicago, IL: University of Chicago Press, 1998), p. 189. My discussion of Stationers' Company practices draws heavily on Johns' brilliant analysis of the company in *The Nature of the Book* and especially on Chapter Three, '"The Advancement of Wholesome Knowledge": The Politics of Print and the Practices of Propriety' (pp. 187-265), which adopts an anthropological approach to the early modern company. I am also indebted to Peter W.M. Blayney for useful comments made to me personally. Pending the publication of Professor Blayney's major study, the standard history of the company remains Cyprian Blagden, *The Stationers' Company: A History, 1403-1959* (London: George Allen & Unwin Ltd, 1960). For a useful discussion of the structures and practices of the London livery companies see Ian W. Archer, 'The Framework of Social Relations: The Livery Companies', *The Pursuit of Stability: Social Relations in Elizabethan London* (Cambridge: Cambridge University Press, 1991), pp. 100-48.

livery companies, was emphatically hierarchical. The most important distinction was between the freemen – those who had been admitted to the company – and the livery, the small body of elite members who had substantially greater rights, privileges, and earning potentials. Moreover, the line between the freemen and the livery was conspicuously and publicly marked. Only the livery had the right to don the impressive fur-lined gowns and satin hoods that were worn on formal occasions. The hierarchical social structure echoed that of feudal society. Likewise, as Johns notes, the governance of the company which rested in the hands of the master and a council called the 'table of assistants', echoed that in which the monarch presided over the privy council and through it governed the realm.

Propriety was also evident in the ceremonies and feasts that marked the yearly cycle of life in the company. In order to convey the flavour of these ritual occasions let me invoke one comparatively minor event, the feast held each spring by the company members who were printers by trade. We know about this feast because it was described in detail by Joseph Moxon in his seventeenth century handbook for printing known as *Moxon's Mechanick Exercises*. Held on the occasion of the annual election of four stewards to represent the printers, the feast began with a formal procession from Stationers' Hall to church led by four attendants with white staves in their hands and red and blue ribbons hung across their shoulders. After the church, the group returned to the hall for a formal meal accompanied by music. Then the ceremony of election began with the four current stewards withdrawing from the hall to a chamber from which they returned led by the company beadle. Marching in order of seniority, each steward now wore a fresh garland of leaves and carried a long white wand. Each was preceded by an attendant who carried a bowl of sugared white wine in his right hand and his staff of office in the left. Three times the procession circled the hall; then the most senior steward took his attendant's bowl, selected his successor from the assembled company, and crowning him with his garland of leaves, drank to him as 'master steward elect'. According to Moxon, there would be a great clapping of hands and drumming of feet to applaud the choice, after which the entire party would walk another round about the hall together with the newly elected steward, a ritual that was repeated three times until all four printers' stewards for the year had been elected.[21]

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21   See *Moxon's Mechanick Exercises, 1683* (New York: DeVinne Press, 1896), pp. 363-6.

What is striking about this event is how formal and elaborately ritual-
ised it was. The election was of course not an election at all in the modern
sense but a ceremonial transfer of authority publicly displayed and publicly
ratified with each steward responsible for the appointment of his successor,
most likely on the basis of precedence and seniority. Moxon emphasises
that the feast was commonly kept on or near May Day and it is interesting
to note the folk elements that figure in this ceremony of renewal, including
the leafy crowns and the long white wands. The printers' feast, begun in
1621, was not in fact an ancient ceremony; nonetheless, by incorporating
such folk elements, the event was given an aura of antiquity. Meticulous
codes of conduct, both the rules prescribed for feasts and ceremonies and
the sometimes fussy rules prescribed for regular occasions such as the
monthly meetings of the table of assistants were important because, as
Johns puts it, they constituted 'an outward and visual guarantee of the
moral propriety of proceedings'.[22] It was through the maintenance of public
displays of decorum and probity that the Stationers' Company confirmed
their authority and the authority of their printed productions.

Of course the reality of life in the Stationers' Company was not nearly so
decorous as the description of its structures and practices suggests. At vari-
ous times, as we know, the company was torn with dissension and more
than once in its history unprivileged members revolted and made difficul-
ties for the grandees.[23] But the point that I want to stress is precisely the
appearance of propriety that the company strove to maintain. In the stately
universe of the Stationers' Company with its hierarchy, and its public dis-
plays of hoods and gowns, we recognise the social form that Habermas calls
'representative publicness' and that Milton mocks in his satirical invocation
of curtsying imprimaturs complimenting and ducking in the piazza of an
approved title page. Milton's dislike of the monopolising grandees of the
Stationers' Company was echoed some years later by John Locke who also
spoke disparagingly of the monopolies held by, as he called them, 'igno-
rant and lazy stationers'.[24] Indeed, in later-seventeenth century progressive
circles it seems to have become a form of political correctness to cast asper-
sions on the grandees of the Stationers' Company, and I suspect that we,

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22   Johns, p. 197.
23   In the 1580s, for example, John Wolfe led a revolt against privileged stationers;
see Joseph Loewenstein, 'For a History of Literary Property: John Wolfe's Reforma-
tion', *ELR: English Literary Renaissance*, 18 (1988), 389-412.
24   John Locke to Edward Clarke, 2 January 1693, *Correspondence of John Locke and Edward
Clarke*, ed. by Benjamin Rand (Cambridge, MA: Harvard University Press, 1927), p. 366.

too, as the intellectual and cultural descendants of Milton and Locke are inclined to regard the patent and monopoly holders of the early modern Stationers' Company as retrogressive figures. My point, however, is that in looking back at the early modern Stationers' Company we must recognise that we are looking across a cultural divide. The company grandees who fought for the restoration of licensing in 1643 and who would do so again in 1695 did not see themselves as ignorant, lazy, or greedy; rather they saw themselves as the champions of order, probity, and decorum.

The Statute of Anne

Except for the brief period between the abolition of the Star Chamber and the Ordinance of 1643, and a second temporary gap after 1679, licensing in one form or another remained in effect in England from the early Tudors until 1695 when the Restoration Licensing Act of 1662 was allowed to lapse for the last and final time.[25] During the period from the Restoration through the Revolution of 1688 to the lapse of licensing in 1695 the bourgeois public sphere was actively developing in England. This was the period of the phenomenal spread of the London coffee houses. It was also the period in which clearly defined party divisions emerged and in which the English electorate, spurred by legislation that assured regular parliamentary elections, became an important force on the public scene.[26] Causality is often difficult to specify in historical matters, but perhaps the most accurate way of formulating the relationship between the bourgeois public sphere and the end of licensing is to say that the developing public sphere provided the context that enabled the collapse of traditional press controls. Open hostility to the great booksellers' monopolies provided one impetus for resistance to the continuation of licensing. Also becoming evident was the danger of having a partisan licenser in control of the press. Moreover, a third form of resistance directly echoed Milton's emphasis on the dignity of authorship and the importance of the free circulation of ideas.[27]

25   See Raymond Astbury, 'The Renewal of the Licensing Act in 1693 and its Lapse in 1695', *The Library*, 33 (1978), 296-322. On the general subject of licensing see Frederick Seaton Siebert, *Freedom of the Press in England, 1476-1776* (Urbana, IL: University of Illinois Press, 1952).

26   The Triennial Act (6 & 7 Will. & Mary, c.2), passed in 1694, provided for regular and frequent parliamentary elections. On the growth of the electorate and the development of political parties see J.H. Plumb, *The Origins of Political Stability, England, 1675-1725* (Boston, MA: Houghton Mifflin, 1967).

27   For the hostility to the booksellers monopolies see, for example, the objections

The active development of the public sphere provided the context for the lapse of licensing. Equally important, the collapse of press controls created a feedback loop that accelerated the further development of the public sphere. When licensing ceased on 3 May 1695, there was only one London newspaper, the official *Gazette* which published government announcements and foreign dispatches. By the end of the month, five additional papers had appeared, and within a decade there were at least nine more in London alone. These included, in addition to the *Gazette*, the *London Post*, the *English Post*, the *Post-Man*, the *Post-Boy*, the *Flying-Post*, the *Observator*, the *Review,* written by Daniel Defoe, and the *Daily Courant*. Contemporary materials suggest that by 1704 sales of newspapers – sales, not readership, which would of course be much greater – reached about 44,000 copies per week and by 1711 sales probably totalled some 70,000 copies per week.[28] Within fifteen years of the end of licensing a massive quantity of printed news and commentary was in general circulation. Moreover important politicians, Robert Harley among them, had learned to use the press to mobilise public opinion for their own purposes.[29]

The Stationers' Company together with such conservative forces as the Church of England naturally sought the restoration of licensing. Ronan Deazley counts no less than thirteen failed attempts from 1695 to 1704 to provide some form of statutory press regulation.[30] The company eventually settled for the Statute of Anne, which was enacted in the spring of 1710, and which preserved at least some elements of the structure of the trade. But whereas under the licensing regime literary property was in practice almost solely a stationers' matter, the statute gave private persons legal recognition by vesting literary property first in the author. Furthermore, it departed radically from company practices by setting limits on the term of copyright:

raised to the proposed renewal of licensing in 1695, *Journal of the House of Commons* (17 April 1695) 11: 305-6. On the continuing influence of *Areopagitica* on the licensing debate in the late seventeenth century see Ernest Sirluck, 'Areopagitica and a Forgotten Licensing Controversy', *The Review of English Studies*, n.s., 11 (1960), 260-74. At least two important tracts in the licensing controversy closely follow Milton's arguments and language. These are [Charles Blount], *Reasons Humbly Offered for the Liberty of Unlicensed Printing* (London, 1693), and [Matthew Tindal], *A Letter to a Member of Parliament* (London, 1698).

28   James R. Sutherland, 'The Circulation of Newspapers and Literary Periodicals, 1700-30', *The Library*, 15 (1934-5), 110-24.

29   See J.A. Downie, *Robert Harley and the Press* (Cambridge: Cambridge University Press, 1979).

30   Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart Publishing, 2004), pp. 1-29.

twenty-one years for books already in print, fourteen years for new books with the possibility of a second fourteen-year term if the author were still living at the end of the first. At the end of the term of protection a book would become open to all.

The most fundamental transformation brought about by the statute, however, relates to what it does *not* legislate; it makes no provision whatsoever for state regulation of what could or could not be published.[31] Rather than defining the purpose of a printing act as the need to maintain good order in religion and government as both the Ordinance of 1643 and the Licensing Act of 1662 had done, the Statute of Anne speaks of the liberties that abusive printers and booksellers have taken with individual authors and proprietors who have found their books and writings printed without their consent. This is a subtle but momentous change, the substitution of the individual for the state as the party in need of redress. Furthermore, instead of presenting itself as primarily an act to prevent abuses as did both the Ordinance of 1643 and the Licensing Act of 1662, the Statute of Anne presents itself as affirmative legislation designed, as the title states, for 'the encouragement of learning'. This is a phrase with a distinguished history, one that echoes, among other things, the title of Francis Bacon's *Advancement of Learning* (1605) and Milton's comment in *Areopagitica* that licensing constitutes 'the greatest discouragement and affront that can be offered to learning' (p. 735).

The purpose of licensing was to regulate and police what might be said in print, to restrain the press in the interests of good order. The stated purpose of the Statute of Anne is to stimulate study and speech, to encourage the proliferation of discourse in the public sphere. Moreover, by vesting the copyright of a printed book initially in the author rather than the printer or bookseller, the statute presents the author as the person ultimately responsible for a book. Under the old regime of licensing, the printing of a book was still in theory a kind of privilege that could be extended or not as the state decided. The statute, however, redefines copyright as a matter of right rather than privilege, an automatic grant to the author by virtue of his literary endeavour. Thus the statute gives legal reality to the public

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31   In 'Freedom of the Press 2.0', *Georgia Law Review*, 42 (2008), 309-405, Edward Lee emphasizes another crucial lacuna in the statute; unlike the earlier printing acts, the statute makes no provision for the regulation of printing technology. Lee argues that this significant omission anticipates modern notions of press freedom, which should be understood broadly as encompassing the unregulated use of technology as well as content.

sphere, providing a regime in which individual authors, precisely as imagined by Milton, are encouraged to bring the fruits of their efforts into the public forum on no other authority but that of their reason, their learning, and their deliberation. For the traditional ideal of public order the statute substitutes the concept of private right; authors and proprietors have a right to control the printing and publishing of their own writings. And for the traditional ideal of public decorum achieved through censorship and regulation, the statute substitutes the concept of public vitality, the ideal of a public arena characterised, as Milton put it, by 'much writing' and 'many opinions'.

The 'Hollowing Out' of the Public Sphere

The old regime of licensing that empowered the Stationers' Company was a bargain between the booksellers and the state. The new regime of the Statute of Anne, as Ronan Deazley emphasises, was a three-way bargain between authors, booksellers, and the reading public.[32] Authors were given legal recognition and limited monopoly rights; booksellers were given the opportunity to purchase and exploit these monopoly rights; and the public was assured that after the lapse of the limited term of protection, the works would become free and open to all. In setting term limits the Statute of Anne thus created the literary commons that we know today as the public domain. But it was precisely the public domain that came under challenge in the period following passage of the statute. I am referring here to the eighteenth century literary property debates in which the great booksellers of London argued that the Statute of Anne was merely a supplement to an underlying common-law right of property and that the term limits had no effect on their literary properties which were properties in exactly the same sense as lands and houses. The London booksellers were countered by those who maintained that writings could not be property. The state might grant authors and their assigns a form of limited monopoly, but copyrights could not be properties in the same sense as material goods.[33] The eighteenth century debates thus exposed a tension between property and discourse – or, more precisely, between commerce and discourse – that had been implicit from at least the 1640s. We can observe this tension in nascent form in the commercial metaphors that Milton employs in *Areopagitica*, for

32   Deazley, p. 46.
33   I discuss the logic of these debates in *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), pp. 67-91.

example when he warns: 'Truth and understanding are not such wares as to be monopolised and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and licence it like our broadcloth and our woolpacks' (pp. 736-37). The immediate legal issues in the literary property debate were resolved in 1774 in *Donaldson v. Becket* in which the House of Lords rejected the claim that literary property was perpetual.[34] But *Donaldson* did not resolve the underlying tension between property and discourse, and this tension has been characteristic of copyright since 1710. In the first half of the nineteenth century, for example, it re-emerged in the copyright reform movement led by Thomas Talfourd in the name of the author's property right. Again the claim was made that copyrights were no less property than physical goods and that in principle the author's property right should last forever. This claim was countered by Thomas Babington Macaulay who spoke for the public interest in preserving the dissemination of knowledge. The result was a compromise: the term of copyright was re-established as forty-two years or the life of the author plus seven years, whichever was longer.[35] And the same tension has recently surfaced in the United States in *Eldred v. Ashcroft*, once again in connection with the length of the copyright term.[36] This important case concerned the constitutionality of the Copyright Term Extension Act of 1998, a revision of the copyright act that extended the basic term of protection to the life of the author plus seventy years. The petitioners argued that this extended term was effectively indistinguishable from perpetual copyright and thus violated the Constitutional clause granting Congress the right to protect copyrights for limited periods only. The US Supreme Court rejected Eldred's argument – it said that the new term of copyright might be overly long but that it was nevertheless limited – but at the same time the Court acknowledged that under some circumstances there could be a conflict between copyright and freedom of speech.

The consequences for civil conversation of treating writing simply as property would be profound. As some of the participants in the eighteenth century debates realised, such a position would allow copyright owners to regulate and limit public discussion much as state censors had done earlier.[37]

34   4 Burr 2408; *English Reports*, 98, pp. 257-62 (1774); 2 Bro PC 129; *English Reports*, 1, pp. 837-49 (1774).
35   The most complete treatment of Talfourd's movement is Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999).
36   *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
37   For example, when *Donaldson v. Becket* was debated in the House of Lords in

The US Supreme Court's acknowledgement in *Eldred* of the potential for a conflict between copyright and the First Amendment reflects the continuing concern, at least in theory, with preserving vigorous civil conversation. Nonetheless, what we have seen in the last hundred and fifty years or so is an increasing emphasis on the proprietary aspect of copyright. And this is a process that has accelerated in the United States ever since the Copyright Act revision of 1976 which, among other things, eliminated the formality of registration so that copyright is now said to adhere from the moment of creation rather than the moment of registration.[38]

The focus of eighteenth century copyright was on labour. It was the labour that an author put into a work that was the foundation of the right. Thus copyright protected against literal copying but it did not protect against adaptations such as translations because these involved additional labour. As late as 1853, a Federal court rejected Harriet Beecher Stowe's claim that a German translation of *Uncle Tom's Cabin* – the translation had been prepared for the Pennsylvanian Dutch market – infringed her copyright.[39] But in the course of the nineteenth century the focus of copyright, both in the United States and in Great Britain, shifted from a focus on labour to a focus on market value. A landmark in this shift in the US is the famous case of *Folsom v. Marsh*, decided in 1841, in which Justice Joseph Story remarked that the central issue in deciding an infringement case was not whether an entire work had been copied but whether so much had been taken that the value of the original was diminished.[40] This shift in focus, combined with the extension of copyright protection to translations and derivative works of all kinds, helps to identify, I think, a set of doctrinal transformations that relate to the process that Habermas calls the 'hollowing out' of the public sphere.[41]

1774, Lord Effingham urged the liberty of the press, pointing out that affirmation of a common-law right of literary property could provide a dangerous foundation for censorship; see *The Cases of the Appellants and Respondents in the Cause of Literary Property* (London, 1774), p. 59.

38   In an important new study of copyright in relation to the First Amendment, Neil Weinstock Netanel identifies the Copyright Act of 1976 as a turning point in American legal developments and notes the increasing tendency of US courts to treat copyright as an absolute property rather than a limited entitlement. See *Copyright's Paradox* (New York: Oxford University Press, 2008), pp. 3-12.

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

40   9 F. Cas. 342 (C.C.D. Mass. 1841).

41   For important discussions of these doctrinal transformations see: Peter Jaszi, 'Toward a Theory of Copyright: Metamorphoses of Authorship', *Duke Law Journal*, 42 (1991), 455-502 (discussing how in nineteenth-century US copyright doctrine

The economic, social, and political developments that have influenced these doctrinal changes and contributed to the process of 'hollowing out' are far too complex to discuss here. As Habermas indicates, however, they have to do with the emergence in the nineteenth century of mass societies and mass markets and with the rise of very large scale commercial organisations to serve and exploit those markets. David Zaret, who has emphasised the degree to which the nascent public sphere in England was founded on commerce, challenges the pessimism that sees commercialism and modern developments in communication as responsible for the eclipse of reason in public life and the decay of the public sphere.[42] Zaret is correct, I believe, to emphasise that the explosion of print in the 1640s was a commercial as well as a political phenomenon, and to remark that commercialism itself may not be the root of modern problems. But it is not at all clear to me that his optimism about the public sphere is warranted. What he fails to take into account is the way in which changes in the fundamental contours of copyright since the eighteenth century have altered the environment of public discourse and placed new kinds of commercially grounded burdens on cultural production and civic exchange.[43]

Habermas maintains that the hollowing out of the public sphere is marked by an erosion of the distinction between public and private on which the institution of the public sphere depends. Habermas also holds that under these circumstances a process of 'refeudalisation' occurs that leads to the reappearance in modern society of social forms characteristic of the period of 'representative publicness'.[44] I note that precisely this process can be illustrated by considering the peculiar status of giant media conglomerates such as Viacom, the Walt Disney Company, or the News Corporation. Are these organisations private or public? Legally they are of course private, but in their vastness and their domination of the circulation of cultural and informational products of all kinds, they plainly have

the concept of authorship is emptied of content); Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999), esp. pp. 173-204 (describing the nineteenth-century construction of the protected work as a unitary, closed object in English law); and Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright', *Yale Law Journal*, 118 (2008), 186-271 (tracing, among other things, the shift in the focus in American doctrine from labour to market value).

42   Zaret, *Origins of Democratic Culture*, p. 275.
43   Netanel, pp. 109-53, provides a good overview of American copyright doctrine's free speech burdens.
44   Habermas, pp. 142, 195.

a public dimension as well. In fact the very concepts of public and private do not quite apply to these entities. Likewise, as we have seen, the concepts of private and public did not quite apply to the early modern Stationers' Company. The Stationers' Company was private insofar as it had its own rules and officers, but it was also public insofar as it was granted the power to regulate nearly all the printing and publishing in the realm. Chartered guilds like the Stationers' Company were the creatures of a time before the precipitation of the modern dialectic of private and public. Modern media conglomerates like Viacom collapse that dialectic producing uncanny echoes of the institutional past and raising serious questions about whether the kind of dynamic public sphere that Milton portrayed in 1644 can be sustained for the future.[45]

David Zaret's discussion of the modern public sphere fails to take account of changes in copyright doctrine. What I have left out of my discussion is of course the internet. Does the internet not provide a whole new dimension to the public sphere? Does the internet not – or, more precisely, digital technology – constitute a profound challenge to the effectiveness of copyright protection? As anyone who checks blogs even casually knows, the answer to the first question is yes. The internet has obviously changed the public sphere. But the answer to the second question, digital technology's challenge to copyright, remains unclear. As we have seen, the movie and recording industries, which are of course embedded in the giant media conglomerates, are fighting hard – and understandably so – to maintain control of their products in the context of the transformations that digital technology has wrought. The digital question is one that has political as well as legal and technological dimensions. How it will play out is anyone's guess.

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45   I make this point in 'The Claims of Copyright: Public Purposes and Private Property', in *Media Ownership: Research and Regulation*, ed. by Ronald E. Rice (Cresskill, NJ: Hampton Press, 2008), pp. 61-76.