GENESIS & EVOLUTION OF COPYRIGHT
The Unfinished Revolution

This is a 19 page (including references) draft chapter of the work in progress named above. While subject to review and revision I invite comment and constructive criticism to aid in its final construction.

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For our purposes the Pre-Common Law Copyright Era begins in 567 with the first recorded case of copyright infringement in the British Isles. It ends in 1640 with Charles I's Royal Assent to abolishing the prerogative Court of the Star Chamber established by Henry VII in 1487 and the Court of High Commission for Causes Ecclesiastical established by Elizabeth I in 1558. These prerogative courts of Church and Crown licensed and enforced the right to copy – of what and by whom. As will be seen, the Courts of the Star Chamber and High Commission evolved from less effective spiritual and temporal fora for settling copyright and other disputes.

Below these prerogative courts, however, was the Court of the Ancients of the Stationers' Guild of London (1403) succeeded by the Court of Assistants of the Stationers' Company of London (1557). These tribunals settled disputes between members over the right to print. If they failed to settle then an appeal could be made to the Court of the Star Chamber or its predecessors. In general, the prerogative courts determined what could be copied (licensing) while the Stationers' Courts determined who could copy or print it.

The era flows from the Age of Manuscripts into the Age of Print. The plural 'manuscripts' and singular 'print' is deliberate. Each manuscript is unique and hand-made; each printed copy is mechanically identical. A manuscript is transcribed by a single scribe from a written text or by a single scribe or team recording dictation. In both cases a copy often contains errors due to scribal misreading or mishearing. And, of course, printing enjoys economies of scale, *i.e.*, the larger the run the lower per unit cost. Printing was the first industry of mass production. As will be seen, legal precedents set in the Age of Manuscripts guided evolution of copyright in the Age of Print and beyond.

1.1 Age of Manuscripts: 567-1476

The Age of Manuscripts succeeded the Oral Age. In pre-literate societies knowledge is transmitted orally through mnemonics of ritual and chant reinforced by visual art and dance certified by religious practice and taboo. And then there is poetry. The association of rhythmic or repetitively patterned utterances with supernatural knowledge endured into historical times. Among early Arabic peoples the word for poet was s*ha'ir* or 'the knower', a person endowed with knowledge by the spirits (Jaynes 1978). In fact the word 'Koran' translates as *Recitation.* The entrance examination to Al-Azhar University of Cairo (founded 975) remains to recite from memory at least two *juz* of the Koran (30 *juz* in total). In the West it is assumed that Homer transcribed *The Iliad* and *The Odyssey* from oral recitations long lived by his time, evolving and mutating until fixed in written form.

1.0 Pre-Common Law Copyright: 567-1640

1.1 Age of Manuscripts: 567-1476

Some sense of the psycho-social impact of the shift from an oral to a written culture is captured in the 2001 documentary: *Ramesses III: The Great Journey*. Its writers/directors -V. Girie & H. Hecht – note that in the Age of the Pharoses:

> … any work of art was considered a living being and its creator was called 'he who makes live'. To create a picture or engrave a name was to freeze the essence of reality for time everlasting.

Whether pictographic Chinese and Japanese or alphabetic English the written word does "*freeze the essence of reality for time everlasting*". In fact, Carl Sagan (1977) suggested that the written word is humanity's second genetic code.

In ancient Greece and Rome (and the Islamic world until recently - Saudi Arabia introduced copyright 1989), knowledge was kept secret or when made public, *i.e.*, published, an author's paternity was protected by moral not legal sanctions. Punishment for falsely claiming authorship was defamation and shame cast on one's self, family and tribe. Infringement was an ethical not a criminal offense.

The Germanic invaders who overthrew the Western Roman Empire (410), unlike the Islamic invaders from the South who subsequently overthrew the Eastern Empire, belonged to an essentially oral culture. The Germanic upper class of kings, nobles and warriors had contempt for reading and writing as 'unmanly' and thus did the Dark Ages fall over Western Europe. With Vandals in North Africa, Visigoths in Spain, Franks in France, Burgundians in Burgundy, Lombards and Ostrogoths in Italy, Alemanni in Switzerland and Bavarians in Bavaria, urban life, *a.k.a.*, civilization, collapsed as secular society descended into illiteracy.

It is important to note that the Germanic overlords not only spoke a different language than the conquered populations they also spoke different languages among themselves, *e.g.*, Burgundian *vs* Bavarian. They also tended to be either pagan or Arian (Christ is inferior to God and did not die on the Cross) rather than Roman Catholic or Nicean Christian (Christ was God and died on the Cross). Arian missionaries in fact reached many German tribes before the Church of Rome. The king of the Franks, Clovis, whose name evolved into 'Louis', was the first to adopt Roman Catholicism. This theological split made Islamic conquest of North Africa and Spain much easier than if the population and their overlords shared the same faith as in France.

The light of literacy hid away in island and mountain monasteries during the barbarian invasions including England with its waves of Angles, Saxons, Jutes, Danes and Vikings. The monasteries provided the scribes, illuminators or limners and binders of books but seldom original authors. New authors were

few and their works attributed to God's inspiration. There was no concept of author's rights. They copied. It was texts of the Ancients and Church Fathers lovingly conserved in such hidden places that the Western legacy of the Ancient World was preserved. Truth lay in the Past not in the forbidding Present or uncertain Future. It would take centuries before secular literacy would reappear in the West.

1.1.1 Proprietorship

At the nadir of the Dark Age, in 567, there occurred the first recorded case of copyright infringement in the British Isles, specifically Ireland that escaped the Germanic invasion. While visiting an abbey, a monk, (later Saint Columba) copied a *Psalter*: a book of Old Testament Psalms. When the abbot found out he demanded the copy. Columba refused! The abbot went to the king of Tara who ordered Columba to turn over the copy. He did. The Columba case set a copyright precedent for the future: proprietorship of the original, the manuscript or what at the time was called 'the copy' grants its owner the exclusive right to copy.

Case settled? Not quite. Incensed by the loss of the copy Columba incited rebellious nobles to overthrow the king. They did and Columba got his copy back. The Church, however, found Columba's words had led to bloodshed and he was banished from Ireland. He took up residence on the island of Iona that became a lighthouse of literacy, just out of sight of mainland Ireland. The copy is now housed in the museum of the Royal Irish Academy (*The Month* 1888, 88-90).

The barbarian conquest of Western Europe concluded with the triumph of Charlemagne who signed his name with a stencil and gave birth to the Holy Roman Empire in 800. He also saw the introduction of miniscule script. Urban life began to flourish again disturbed only by Viking raids and later Crusades. In response the Church shifted epistemic emphasis from the monastery to the Church 'school' in towns and cities to train notaries, lawyers, scribes and other literate secular professionals required by any civilization. It was from this urban school experience, among other things, that the western University arose. The ancient legacy itself became the subject of clerical and subsequent university scholars known as the 'Schoolmen' and their philosophy, Scholasticism.

Building on Byzantine and Islamic experience, *e.g.*, Al-Azhar University, the Western University was first incorporated as an association of students in Bologna about 1088. Oxford University was founded in 1167. It was modeled on the University of Paris (1150) as an association of scholars (Schumpeter 1954, 77-78).

Before the founding of Oxford University, however, another development in English history set the stage for emergence of

English Common Law & Equity with their ongoing connexion to contemporary copyright. Between 1135-1153 there was 'the Anarchy', the first English Civil War. It concerned succession to the English Crown after the death of Henry I (fourth son of William the Conqueror). In the end Henry II (son of Matilda, daughter of Henry I) was crowned and ruled between 1154 and 1189. It was he who caused the rapid growth of Oxford University when, in 1167, he banned English students from attending the University of Paris. Paris, of course, was capital to Henry's arch-rivals Louis VII and his son King Philip II of France. While teaching at Oxford is recorded as early as 1096 it was Henry II's decision that gave birth to the first English University.

It was also during the reign of Henry II, that the Common Law was born including trial by jury before a legally trained, professional Justice. Precedent became the principle *stare decisis, i.e.*, cases should be decided according to past decisions (precedent) to the degree that similar facts must yield similar results. The Common Law gradually developed in three central courts: the Court of King's Bench, the Court of Common Pleas, and the Exchequer.

In addition, as the fount of all justice the King (eventually through his Chancellor and later the Court of Chancellery and even later Courts of Equity that stood separate from Common Law Courts until the 1870s) exercised the royal prerogative to ensure Equity, the second great stream of English jurisprudence. Equity involves fairness, not guilt or innocence or right and wrong as under Common Law. Equity is driven by principle, not precedent. In tax law, for example, there is vertical (unlike treatment of unlike) and horizontal (like treatment of like) equity. These are examples of the Maxims of Equity. It will subsequently be argued that contemporary copyright needs to be viewed through Equity with respect to creators and proprietors, not just precedents set by Common Law courts.

Cambridge University was founded in 1209 during the reign of Henry II's son, King John (1199-1216). It began as an association of scholars fleeing Oxford following a dispute with townsfolk. Both universities were originally "little more than a sort of trade guild, a separate group of masters and their students, who controlled admission, regulated quality and negotiated with the local authorities" (Whyte 2008).

The medieval University was organized into three domains of philosophy, literally 'the love of knowledge': natural, moral and metaphysics, *a.k.a.,* theology. To these, the Practices or self-regulating professions of Law and Medicine were added as quasi-independent branches of applied learning. Excepting the Practices, the University taught the 'Liberal Arts', *i.e.,* knowledge suitable for the leadership elite. This included Music, the only Art admitted at the birth of the University. The University inherited its epistemic

hierarchy from the ancient Greeks placing the Liberal Arts (knowing by the mind) above the Mechanical Arts (knowing by the doing and by the senses) (Chartrand 2007).

The University broke the monopoly of knowledge held by the Church. It had its own scribes, illuminators, binders and authors. It assembled its own libraries sometimes including works not approved by the Church. Monarchs granted charters defining privileges and liberties as well as obligations such as fealty (similar to the guilds) and, subsequently, as will be seen, the Universities censored on behalf of both Church and Crown. Universities were fostered as a source of secular talent to balance the epistemic power of the Church. The need was great.

Six years after Cambridge University was founded, King John, in 1215, signed the *Magna Carta* or Great Charter placing, for the first but not last time, limits on the royal prerogative.

> It is a curious fact, and one which marks the state of literary knowledge, even amongst the nobility, in those days, that out of the twenty-six barons who subscribed this important bill of right, only three could write their own names, the signatures of the remainder, according to the term, only made their marks. (Timperley 1838, 59)

By way of contrast, in 1220 there were seventy public libraries in Islamic Spain with collections totalling 250,000 volumes (Timperley 1839, 60). Unfortunately for the early Scholastics part of the ancient legacy was not initially available. First the Byzantine Empire and then the Islamic Caliphate inherited a different share including many of Aristotle's 'lost' works. The fall of Constantinople in 1453 led to many 'new' volumes arriving in the West carried by fleeing Greek-speaking scholars. And, as the 'Reconquista' of Spain proceeded, even more volumes found their way to Latin translators until 1492 when the Emirate of Granada surrendered the last Islamic possession in Spain.

1.1.2 Prohibition

The flip side of the right to copy is prohibition to copy, *i.e.*, censorship. That copyright remains a privilege granted under terms and conditions set by the State rather than a natural right of an author/creator is demonstrated as late as the early 20th century in the *Revised Statutes of Canada*:

> 7. Exception to immoral works
>
> No literary, scientific or artistic work which is immoral, licentious, irreligious, or treasonable or seditious, shall be the legitimate subject of such registration or copyright.
>
> R.S.C.1906, c.70, s. 7

1.0 Pre-Common Law Copyright: 567-1640

1.1 Age of Manuscripts: 567-1476

In the Age of Manuscripts both Church and Crown, individually and collaboratively, acted to prohibit the repetition of "immoral, licentious, irreligious, or treasonable or seditious" rumors and copying similar written texts. It was from these censorial efforts that modern slander (spoken) and libel (written) laws evolved. It is from these same efforts that contemporary copyright emerged.

1.1.2.1 The Church

The first Christian Emperor, Constantine I (272-337), governed the Empire through *Caesaropapism*, subordination of the religious to secular authority. Like King David, the Emperor was the anointed of God on Earth. It is from this concept that the Divine Right of Kings later emerged. It was Constantine who insisted on December 25th as Christ's birthday despite scriptural evidence to the contrary. Why? So that his pagan and Christian subjects could party together during the traditional Roman celebration of *Sol Invictus* at the Roman winter solstice, December 25. Constantine convened the First Council of Nicaea in 325 to settle doctrinal disputes within *his* Church. Among other things, the Council rejected Arianism as heresy: Christ was God, part of the Holy Trinity, and died on the Cross. As noted, Germanic overlords of the fallen Western Empire did not get the memo.

In the Eastern Roman or Byzantine Empire *Caesaropapism* continued until the fall of Constantinople in 1453 and the subsequent rise of Istanbul as capital of an Ottoman Empire. It was, of course, to make a reappearance in England when, in 1558, Henry VIII declared himself head of the Church of England - the anointed of God on Earth.

What was the Roman Catholic Church to do without an Emperor? While secular institutions fell, religious congregations, abbots, bishops, churches and priests survived throughout the former Empire. They affirmed their spiritual allegiance to the Bishop of Rome, the *pontifex maximus* or "greatest priest", successor to St. Peter and to the chief high priest of the College of Pontiffs (*Collegium Pontificum*) in ancient Rome. With respect to the conquerors of the fallen Empire, the Church, in effect, adopted Matthew 22:21: *Jesus said "Render to Caesar the things that are Caesar's; and to God the things that are God's*.

Across this surviving religious empire, Church Latin became the common language, both spoken and written. It was thus across a now divided continent that the Church could mediate disputes between different kingdoms and languages. It was the Church that remained literate having access to the knowledge, inaccessible to their Germanic overlords, hidden in the written and visual legacy of the ancient world (Filoramo 1990). It was, for example, from Roman law as developed by the medieval Church that modern

international law emerged – the law of nations. As time went on Germanic overlords increasingly depended on Church scribes and scholars to document the laws and customs of their differing kingdoms. Giving onto Caesar distinguished the secular from the spiritual making the Church a powerful ally or opponent as subsequent Holy Roman Emperors were to learn.

Emergence of the University, however, broke the monopoly of knowledge and talent held by the Church. New voices arose to many of which the Church took great exception. This was the time when national languages like English, French, German, Italian and Spanish were emerging and assuming written form. And many now wanted to read the Scriptures in their native tongue.

The precedent for prohibiting copying was set in 1229 by the Council of Toulouse. It involved the copyright-related right to translate. Organized by Romanus, the pope's legate and cardinal of St. Angelo, it constituted the first court of the Inquisition and published the first canon forbidding the scriptures to the laity (Timperley 1839, 60).

The decision of the Council arguably contradicted the intentions of the editor of the Latin Bible. St. Jerome (331- 420) responded to, among other things, growing Greek influence in Christian affairs by re-translating and standardizing the Old Latin Bible. His Bible was published, in parts, to be read by all Latin speaking peoples of the Empire. The final section was published in 405. It was called the *Vulgate* or 'common' bible. St. Jerome's editorship, however, also involved including but four gospels in the New Testament, *i.e.* John, Luke, Mark and Matthew; excluding, among others, the gospels of Thomas, Philip and Truth (Hoeller 1982).

In 1401, during the reign of Henry IV (1399–1413), Parliament passed *2 Hen. IV, c.15*, or *De Heretico Comburendo.* The statute required that one must be licensed to preach - openly or privately. It made it illegal to make, write or possess books contrary to the Catholic Faith. The Act targeted the works of Wyclif & his Lollards (Harvey 2005, 162). Oxford, in fact, had given "birth to the proto-Protestant Lollard movement" (Whyte 2008).

This Act is important for two reasons. First, it initiated pre-publication licensing, *a.k.a.*, censorship, that continued in England, in one form or another, until 1695. Second, this is the first time that the Crown, by Statute of Parliament – the House of Commons and the House of Lords (Spiritual and Temporal) came to the aid of the Church.

This alliance of Church and Crown led, in 1407, to the *Oxford Constitutions.* Sanctioned by *De Heretico Comburendo*, these required a license to copy books of divinity and Holy Scripture. Censors were appointed by the Universities (Oxford &

Cambridge). Approved and licensed works were to be copied *only* by the Stationers' Guild of London. The manuscript (original) was to be deposited in the Oxford 'Chest' (Harvey 2005, 162-3).

As will be seen this initial monopoly granted in 1407 lay the foundation for the perpetual copyright enjoyed by members of the Guild and its successor, the Stationers' Company of London until 21 years after the 1710 passage of the *Statute of Queen Anne*, recognized as the first modern copyright act.

Two years later in 1409, the clergy of Canterbury (to which London belonged) met in convocation and adopted thirteen *Constitutions for Good Governance of the Church*. The sixth set up a system for licensing books while the seventh banned translation of the scriptures without a special license (Winger 1956, 162).

In 1414, during the reign of Henry V (1413–1422) Parliament passed *2 Hen. V, 1, c.7 Suggested Evils from the religious sect called Lollards.* It established joint Church/Crown control over the writing, possessing and disseminating copies of questionable religious doctrine (Harvey 2005, 166). It also required sheriffs and justices to apprehend heretics and seize their land and property (Winger 1956, 162).

In 1416, Archbishop Henry Chichesly issued an *Injunction for Semi-annual Inquisitions of Canterbury Parishes.* It ordered "each parish to search into the location of heretical books and their readers". The archbishop particularly called the injunction to the attention of the bishop of London for enforcement in his diocese" (Winger 1956, 163).

Such Church library 'inquisitions' and censorship were first fueled by proto-Protestant challenges to the Roman Catholic Church in England and on the continent, and then by Luther's Reformation and subsequent Counter-Reformation. They continued in England, with suitable 'spiritual' adjustments for Henry VII's Caesarpapism, until 1640 with the repeal of the 1589 Act of Parliament creating Elizbeth I's High Commission for Causes Ecclesiastic.

1.1.2.2 The Crown

If the Church feared heretical texts, the Crown was concerned with repetition of "treasonable or seditious" rumours and copying related texts. In 1275, during the reign of Edward I (1272-1307), Parliament passed *3 Edw. I. Stat. Westm. Prim. c. 34 Of Slanderous Reports.* It created the crime of *Scandalum Magnatum* - defamatory speech or writing published to the injury of a person of high dignity. The literal Latin is 'scandal of magnates'. Slander concerns defamatory speech; libel, defamatory writings. The Act provided that:

> anyone who should 'tell or publish any false news or tales whereby discord or occasion of discord or slander may

> grow between the king and his people, or the great men of the realm… should be imprisoned until he hath brought him into the court which was the first deviser of the tale.'' It thus became an offence to spread or repeat such gossip as well as to originate it." (Loades 1973, 143)

This was the first English *lese majesty* statute. Such statutes still exist, *e.g.*, in Germany, Thailand and Turkey. Again, it is the precedent for slander and libel laws as well as copyright today.

Edward III (1327-1377) followed in 1352 with *25 Edw. III, Stat. 5, c 2 Declaration what Offences shall be adjudged Treason*. By this Act open abuse of the king, whether in speech or writing, was declared treason.

In the reign of Richard II (1377-1399) Parliament passed two such Acts. The first in 1378, *2 Ric. II. Stat. 1. c. 5 The Penalty for telling slanderous Lyes of the Great Men of the Realm* repeated the substance of Edward III's 1352 statute adding that the spreaders of tales (copying or repeating) whose devisers could not be found were to be punished at the discretion of the Privy Council. The second in 1388, *2 Ric. II. c. 11 Reporters of Lyes against Peers, &c. shall be punished by the Council*, repeated the substance of both Edward III's and Richard II's statute. Both Acts recognized the authority of a Crown prerogative court, the Privy Council, rather than Common Law courts – the Court of King's Bench and the Court of Common Pleas.

As noted above, in 1401 *De Heretico Comburendo* forged an alliance of Church and Crown under Henry IV that led to the Oxford Constitution of 1407 and grant of the exclusive right to copy books of divinity and Holy Scripture to the Stationers' Guild of London.

In 1450, during the first reign of Henry VI (1422-1461), the Jack Cade rebellion broke out in Kent. The rebels posted libels against the King on church doors and conspicuous places. The King issued a *Proclamation against Rebel Libels*:

> Henry VI proclaimed against these seditious bills, forbidding any to read, pronounce, deliver or show, copy or cause to be copied, or impart to any man secretly or openly any seditious schedule or bill, but to burn any such bill which came to his hand" (Winger 1956, 163)

This appears to be the first, but not the last, Royal Proclamation treating copying. A Royal Proclamation was enforced by royal agents such as sheriffs. Unlike a Statute of Parliament, a Royal Proclamation was the law of the land only during a monarch's reign unless a successor re-proclaimed it.

The War of the Roses broke out in 1455 during Henry VI's first reign. It lasted until 1485 with the victory of Henry Tudor over Richard III at the Battle of Bosworth Field. Enforcement of Crown prohibitions was problematic. Some sense of the disorder is illustrated by the fact that the Crown changed hands seven times in thirty years:

Henry VI	1422-1461; 1470-1471
Edward IV	1461-1470; 1471-1483
Edward V	1483
Richard III	1483-1485
Henry VII	1485-1509

The troubles delayed introduction of the moveable type printing press into England until 1476 during the second reign of Edward IV. It was invented around 1440 by Johannes Gutenberg of Mainz, Germany, then part of the Holy Roman Empire. It spread rapidly across continental Europe including export of printed books to England.

1.1.3: Corporate Personality

With the rise of the Universities a new business opportunity and profession emerged, 'Stationer', a term first used at Bologna in the early thirteenth century (Pollard 1937, 2):

> The word "Stationer," … appears to be derived from the Latin "*Stationarius*," which term was in use in the universities to designate those persons who were in charge of a Station or *depät* where the standard texts of classical works were kept and who were authorised to deal out these texts to the students by sale or loan .(Harben 1918)).

The term was used in Cambridge and Oxford later in the thirteenth century (Blagden 1960, 21n). In England, the term came to distinguish booksellers operating from a fixed or stationary location (a retail store) from hawkers selling from a movable cart (Harvey 2005, 164 & 192). By the fourteenth century in London the term applied to "a dealer rather than a craftsman… an intermediary between the producer and the public rather than an actual maker of the goods" (Pollard 1937, 5).

The financial tone of the times is captured in three entries in Timperley's 1839 classic: *Dictionary of Printers and Printing*. The first concerns the University of Paris' 1275 regulations governing Stationers:

> The booksellers of this period were called *STATIONARII*, from their stations, or shops... They not only sold books, but many of them acquired considerable property by lending out books to be read, at exorbitant

prices, not in volumes, but in detached parts, according to the estimation in which the author was held.

In Paris, the limited trade of these booksellers, consisted principally in selling books for those who wished to dispose of them, and furnishing a depository for them, whilst on sale. To prevent frauds being practised by these stationaries, as they were called, the university framed a law, or regulation of the above date, by which the booksellers were obliged to take an oath every year, or at the farthest, every two years, or oftener if required, that they would act loyally, and with fidelity in their employment.

By the same statute, which was the first ever passed in the university respecting booksellers, they were forbidden to purchase, on their own account, the books placed in their hands, until they had been offered to sale for a month; and were enjoined to expose them publicly, immediately on being lodged in their hands, with a label affixed, containing the title and price of the book; it was also further ordered, that this price should be received on behalf of the owner of the book, who should allow a certain commission to the vender, which was fixed by the university … according to the price of the book: and if any bookseller committed fraud, he was dismissed from his office, and the masters and scholars were prohibited trading with such .persons, under pain of being deprived of all the rights and privileges of the community.

The Sorbonne or university of Paris possessed by various royal *diplomata* an extensive jurisdiction and control over everything connected with the profession; as also scribes, booksellers, binders, and illuminators. It claimed, and on many occasions, seems to have made a tenacious and frequently a severe and inquisitorial use of this right of censure. The university also exercised the right of visiting, and or inspecting books sent from other countries. Their stalls, or portable shops, were erected only near the public schools and churches, and other places of general resort… [and] sometimes placed in the Paris, or church porch, where schools were also occasionally kept; … [thus] the portal at the north end of the cross aisle, in Rouen cathedral, is to this day called *Le Portail des Libraires*, or the porch of the booksellers.

(Timperley 1839, 63)

The second entry concerns a 1332 book sale contract:

Manuscripts, or rather books, were so scarce at this time, that they were not sold but by contract, upon as good

> conditions and securities as those of an estate, among many other instances of the like kind, the following is still preserved in the library of the college of Laon, in the city of Paris, cited by Brenil, and made in the presence of two notaries, which beareth, that Jeffry of St. Liger, one of the clergymen booksellers, and so qualified, acknowledges and confesses to have sold, ceded, quitted, and transported; and sells, cedes, quits, and transports, upon mortgage of all and sundry his goods, and the custody of his own body, a book entitled *Speculum Historiale in Conseutudines Parisiuenses*, divided and bound up in four volumes, covered with red leather, to a nobleman, Messire Girard of Montagne, advocate to the King for the sum of forty livres of Paris; whereof the said bookseller holds himself well content and paid (Timperley 1839, 70).

The third Timperley description concerns England's Edward I (1272-1307) who began his reign by expelling all Jews from his kingdom:

> …their libraries were dispersed, their goods seized, and many of them barbarously murdered. At Huntingdon and Stamford, all their furniture came under the hammer for sale, together with their treasures of books. These Hebrew manuscripts were immediately purchased by Gregory of Huntingdon, prior of the abbey of Ramsey, who bequeathed them to his monastery. At Oxford great multitudes of books, which had belonged to the Jews, fell into the hands of Roger Bacon, or were bought by the Franciscan friars, of that university (Timperley 1839, 62-63).

The English experience was different in two ways. First, unlike continental Europe where a growing number of universities were being founded, Oxford and Cambridge maintained a duopoly in higher education until 1827. Both Church and Crown encouraged the duopoly. Thus from 1334 onwards, graduates of Oxford and Cambridge were required to swear the 'Stamford Oath' that they would not give lectures outside these two English universities subject to prosecution by the Crown. Why?

> The answer is control. Just as the two universities wanted to control the supply of teachers and students, so the English Church and state wanted to control the universities. Universities could be – indeed, were – the source of dangerous heresies, where people learnt to think the wrong things. Oxford gave birth to the reforming, proto-Protestant Lollard movement in the 14th century. Cambridge was home to an alarming nest of evangelicals

> – humanist-inspired converts to church reform… (Whyte 2008)

Second, Oxford and Cambridge were not in the capital. The Crown could not rely on the Universities to regulate the manuscript book trade. As will be seen, this responsibility fell to the Stationer's Guild incorporated in 1403 by the City of London. It is important to note that the City had been chartered by the Crown to grant incorporation to the various Mysteries of the Mechanical Arts. A critical aspect of incorporation, however, was that a 'freeman' of London could work in any Mystery. This would lead to ongoing problems for the Stationers as the Age of Print unfolded. It also led the City of London, over time, to restrict the number of 'freemen' granted the right to trade.

University disciplines were thus paralleled in the 'real world' by guilds practicing distinct Mysteries (Houghton 1941). The salutation Mister (Mr.) in fact derives from Mystery. Before examining the specifics of the Stationers Guild, it is appropriate to put the guild system in context.

The rural economy of the time was dominated by estates of the Monarch, Church and nobility while the guild Mysteries dominated the urban economy. In a sense, guilds were trade associations on steroids. Each Mystery, Craft or Trade involved tacit knowledge learned on the job through experience and instruction by Masters. Each guild represented what today would be called an industry.

However, as John R. Commons in his *The Legal Foundation of Capitalism* noted:

> The gild franchises of the merchants and manufacturers gave to them a 'collective lordship' similar to the private lordship of the barons, for their gilds were erected into governments with their popular assemblies, their legislatures, their courts, their executives, and even with authority to enforce fines and imprisonment of violators of their rules. Their most important sovereign privilege granted by the King was that of binding all the members by a majority vote so that they could act as a unit. These merchants' and manufacturers' gilds, at the height of their power, were not only legalized closed shops but also legalized governments. (Commons 1924, 225)

The power of such guilds was enforced by Wardens who could call members to account for failing to observe the guild's ordinances and when necessary charging offenders in the guild's internal court. These legalized governments "binding all the members by a majority vote so that they could act as a unit"

constituted a Legal Person with a corporate personality and responsibilities to the incorporating power, Crown or City. The pervasiveness of this historical guild personality is reflected today in many common English surnames such as 'Smith' and 'Cooper'. A Smith was a metal worker while a Cooper was a barrel maker. Today the self-regulating professions, or the Practices, continue to identify themselves by their craft as: Accountant, Architect, Dentist, Doctor, Engineer or Lawyer,

The concept that a Legal Person enjoys the same rights as a Natural Person is a legal fiction unique to the Common Law, one with significant implications for contemporary copyright. However, as noted by John Dewey "the conception of 'person' is a legal conception; put roughly, 'person' signifies what law makes it signify" (Dewey 1926).

In the constitutional monarchies of the British Commonwealth this legal fiction flows from the concept of the Crown. The State is thus fictionally represented as the monarch, a human personality. In the US similar treatment of Legal and Natural Persons began with the 1886 decision in Santa Clara County *vs* Southern Pacific Railway. Until then corporations were limited to the functions and States for which and in which they were chartered. In this case the railway successfully invoked the 14th Amendment of the US Constitution intended to protect former slaves from discrimination (Nace 2005). The fiction was affirmed in the 2010 US Supreme Court decision in *Citizens United* that extended freedom of expression under the 1st Amendment to corporations as 'persons'. This squashed federal limitations on political fund raising by corporations. Similarly, in 2013, in *Hobby Lobby*, both the Court of Appeals and the Supreme Court extended freedom of religious expression to a corporation under the 1st Amendment.

The greatest power of the guilds was, in fact, the apprenticeship system. In effect apprenticeship was the public school of the era. At the age of seven a child – boy or girl – could be apprenticed, sometimes for a price paid to or by the parents, to a Master of one of the Mysteries. For seven years the child would effectively be a gopher assisting his or her betters, watching and learning. At fourteen the Master might renew the apprenticeship and after another seven years of doing he or she might become a journeyman. Interestingly the term of two apprenticeships – 14 years – became the initial duration of modern copyright under the *Statute of Queen Anne* in 1710.

This system was publicly planned and implemented taking final form in the Age of Print under Elizabeth I:

> From before Elizabeth I and the *Statute of Artificer*s of 1563, there had been severe periodic labour shortages in England caused by disease (including the

> plague) and the first English civil war – the War of the Roses - that placed the Tudors on the throne. In such unsettled times feudal control tended to breakdown and labour, especially skilled labour, tended to move where wages were highest. To maintain feudal control, the *Statute of Artificers* established a statutory apprenticeship system replacing the crumbling medieval one in which journey men increasingly left their masters for greener pastures. The Statute set maximum wage rates, established residency requirements, and was intended to instill a sentiment of subordination. (Rothschild 2001, 90)

It should be noted that the *Statute of Artificers* remained in force until 1814 when Parliament recognized the emerging factory system required the free movement of labour or *laissez passer* – let them move to the work. *Laissez passer* is the flip side of the more famous *laissez faire* – let them make what they want.

In 1403, the Guild of Stationers was incorporated by the City of London. The mayor and aldermen confirmed the ordinances of the guild for:

> … writers of text-letters, limners, and others who bind and sell books, allowing them the rights (1) to elect two wardens annually, (2) to have their wardens sworn by the mayor, (3) to hold meetings for governing the city and the trade, and (4) to present defaulters to the city for correction and punishment. (Winger 1956, 160; See 1557)

Point (4), however, highlights a finding by Blayney (2013) that the City of London distinguished between simple Mysteries and formal Guilds. The Stationers, at this stage of development, relied on the City 'for correction and punishment' rather than exercising such power themselves, *i.e.*, the original Stationers Guild was more mystery than guild. This would change with Queen Mary's Royal Charter incorporating the Stationers Company in 1557.

Before and after 1403 there were separate guilds representing the various book crafts: bookbinder, lymner (illuminator), parchminer (parchment maker) and scrivner (both legal and textwriter).

> By 1357 there was a craft gild in London to which the scriveners and the lymners belonged. In 1373 those scriveners who specialized in writing legal documents - writers of court hand rather than writers of texts - petitioned for and obtained from the City the right to a separate organization; and thus began the independent existence of the Scriveners' Company. Shortly after this, the other branch of the scriveners also parted from the

> lymners and each is distinguished in the City records as a separate gild with its own ordinances...
>
> The separation of the crafts must have weakened their usefulness… (Blagden, 1960, 22)

On the other hand, the Stationers' Guild was not a craft guild. It was a retail booksellers guild. The fact that a distinct industry could now be identified demonstrates the progress of literacy in England during the so-called gothic period 1190-1470 (Michaels, 1988, 108). For some time, however, official naming of the new guild shifted back and forth between Lymner & Textwriter and Stationer (Pollard 1937, 11). In effect some Masters in the different bookmaking crafts decided to vertically integrate to the retail level becoming book sellers. As well, other freemen, for example, in the Drapers and Grocers Guilds, could also engage in retail book sales. Focus on retail trade made transition from the Age of Manuscripts to the Age of Print easier for the Stationers than the book crafts guilds excepting bookbinders. They were increasingly left behind, structurally unemployed, with the advent of Print.

It is important to appreciate the industrial disruption that would be caused by Print. Take, for example, Limners or illustrators. They appear to have had workshops, conducted 'bespoke' trade in illuminated books and were focused on the most important centres: Oxford, Cambridge and London.

> Interesting clues about the working practices of illuminators can also be gleaned from the Oxford, Cambridge and London documents. Although very few documents refer to illuminators known from signed works, the early evidence from Oxford and London suggests that the role of women in the illumination of books has been greatly underestimated. A number of women appear to have been known by the name 'Limner' or 'Luminor' and in one case 'La Luminurs'. Other documents assess husbands with their wives, implying that they worked as 'teams', sometimes with servants to assist them. This may be linked with the archaeological evidence, which suggests the close collaboration of' 'pairs' of illuminators on a number of manuscripts during this period. (Michael 1989, 109)
>
> London was already home to a number of illuminators and stationers by the thirteenth century. Two types of illuminator appear in the documents: those local to London and the Court, and itinerant artists who often stayed in London but could travel to other parts of the country. (Michael 1989, 112)

1.0 Pre-Common Law Copyright: 567-1640

1.1 Age of Manuscripts: 567-1476

With Print the Limner's craft would gradually become a lost art maintained by a few as a 'living tradition' (White & Hart, 1990) or, as much of the traditional Western Fine Arts have become 'Rolex' artforms surviving through philanthropy (Chartrand 2016).

Two important points need to be made about the early Stationers' Guild. First, one of the privileges enjoyed by London merchants including the Stationers was "exemption from toll throughout the kingdom: consequently the greater part of the wholesale trade in most commodities was concentrated in the hands of the London merchants and for the same reason the freedom of the City was jealously guarded" (Pollard 1937, 18). Second, there was no wholesale trade in books until the Age of Print (Pollard 1937, 35). Second-hand trade

Documentary evidence of the inner workings of the guild before the 1557 Royal Charter transforming it into the Stationer's Company is limited. Records have been lost or destroyed (Blagden, 1977, 9). Nonetheless certain conclusions can be drawn:

1. Starting in 1407 the Stationers' Guild enjoyed the exclusive right to copy books of divinity and Holy Scripture balanced by responsibility to Church and Crown to prohibit copying "immoral, licentious, irreligious, or treasonable or seditious" texts. Put another way, Church and Crown outsourced censorship to the guild. This set the precedent for contemporary social media platforms who perform a similar role for the State - think hate, paedophilia, racism and terrorism.
2. It had a Register on which a Stationer would claim, in writing, the exclusive right to copy a given work against all other members of the guild. This is similar to the feudal legal practice of gaining copyhold to a piece of land in a royal or aristocratic estate by signing the manor roll. This very valuable right to copy was perpetual and could be inherited. The word 'copyright' itself, however, did not enter the English language until a 1735 debate in the House of Lords, Spiritual and Temporal (OED, copyright, n., 1).
3. It had a Court of Ancients staffed according to seniority similar to the subsequent Court of Assistants staffed according to craft that attempted to settle disputes between guild members.
4. When settlement at the Court of Ancients/Assistants failed, appeal could be made to the Crown through the Privy Council serving as a court – subsequently, the Court of the Star Chamber.

5. It had a corporate personality answering Church and Crown with one voice concerning the guild's right to copy. There was no place for authors as such. The vast majority of popular works during the Age of Manuscripts were by the Ancients and Church Fathers. Authors then, as today, competed not just against their peers but also against the best of the past. In fact, the index of Blagden's 321 page *The Stationers' Company: A History 1403 - 1959* has no entry for 'author'.

The year is 1476. The War of the Roses still rages, Edward IV (1471-1483) serves his second reign and William Claxton introduces the moveable type printing press to England. The Age of Print and that of Mechanics dawns inheriting three precedents from the waning Age of Manuscripts:

1. Proprietorship: It is ownership of the physical 'copy', not authorship, that defines the right to copy;
2. Prohibition: The right to copy is subject to pre-publication licensing (censorship) by Church and Crown using the Stationers' Guild as their watchdog; and,
3. Corporate Personality: Publishing or copying a work is the exclusive province of the Stationers' Guild of London that speaks to Church and Crown with one voice but never speaks the word 'author'.

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