

Publication in the history of patents and copyright: harmony or happenstance?

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[I]n every copyright lawyer there is always a patent lawyer waiting to spring forth, fully fledged and ready to litigate, and ... the worlds of science and technology are inextricably intermingled with those of literature and the arts ... And, in truth, the origins of copyright and patents are very similar, stemming from a common desire to provide some kind of state-sanctioned incentive for creative and innovative work.¹

Introduction

In the second half of the 18th century, the principles that should distinguish the bodies of law that we know today as patents and copyright were contestable. The nuanced distinctions and categories that exist today in law – protection for inventive functionality rather than mere discovery in patents, and for original expression rather than mundane facts or mere ideas in copyright – were embryonic at best. It was, however, accepted that patent grants for newly introduced industry permitted under section 6 of the 1623 Statute of Monopolies and published literary property recognised under the 1709 Statute of Anne created exclusive rights in protected information.² By dint of this perception, a kinship of sorts can be seen to exist between the two species of right in the minds of judges and law-makers of the era, and as such it would not be unusual that changes in one regime might trigger some reconsideration of the other. The extent of such early reciprocal development might be masked by a modern tendency to compartmentalise the two intellectual property regimes. Scholarly examinations of doctrinal matters in patent and copyright law have tended to shy away from considering matters of their shared history. This, in turn, might have understated some of the ways in which each regime influenced the other at critical stages of evolution.

This chapter seeks to address that possible understatement by making some observations about changes in the late-18th and mid-19th centuries to aspects of patent and copyright law. It suggests that those changes might be better understood by a greater appreciation of a shared history between patent and copyright law. It will commence with the centrality of manuscript publication to the resolution of the question of literary property in the late-18th century, and ask whether the use that Lord Mansfield made of the patent specification in the *Liardet v Johnson* litigation was at least influenced by the resolution of that copyright question.³ From there it will ask whether a reciprocal influence occurred in the mid-19th century insofar as the patent law concept of a novelty-destroying prior publication came to influence what amounted to an ‘abandonment’ of rights in copyright because of some prior publication. It will conclude by observing that as English law entered the 20th century, the basic contours of patent and copyright law around publication for entitlement to property and prior publication for disentitlement were – whether by accident or design – essentially the same.

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¹ Sam Ricketson, 'Business Method Patents: A Matter of Convenience? (The Stephen Stewart. Memorial Lecture 2002)' (2003) 2 *Intellectual Property Quarterly* 97, 98.

² *An Act concerning Monopolies and Dispensations with penall Lawes and the Forfeiture thereof* (1623) 21 Jac 1, c 3 ('Statute of Monopolies') and *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies during the Times Therein Mentioned* (1709) 8 Ann, c 19 ('Statute of Anne').

³ E Wyndham Hulme, 'On the History of Patent Law in the Seventeenth and Eighteenth Centuries' (1902) 18 *Law Quarterly Review* 280, 284-287.

Invention and the question of literary property

A clear majority of the eleven common law judges of the late 18th century who offered their advisory opinions to the House of Lords in *Donaldson v Beckett* took the position that some form of copyright existed at common law regardless of any print publication.⁴ However, a narrower majority of those judges also took the position that on the passing of the Statute of Anne, which conferred merely a finite term of protection for print-published literary works, the action at common law in published literary works was either ‘taken away’ by that statute or that the author was ‘precluded by such statute from any remedy, except on the foundation of the said statute’.⁵ *Donaldson v Beckett* involved whether to continue a Chancery injunction made after the expiration of the finite statutory term attaching to a published book of poems titled *Seasons* by James Thomson, on the basis of the existence of a perpetual common law right.⁶ The same literary work had been earlier litigated before the Kings Bench in *Millar v Taylor* where, by a three-to-one majority headed by Lord Mansfield, the existence of the perpetual common law right in the published work had been vindicated.⁷ A type of ‘jury vote’ taken by the Lords (both law lords and lay peers) in *Donaldson v Beckett* was in favour of ending the injunction, effectively overturning the holding in *Millar v Taylor* but without judicial reasoning. Therefore, the anterior issues surrounding the existence and nature of any common law copyright were not dealt with.⁸ Yet because the outcome of the vote could be reconciled with the majority position of the common law judges’ advisory opinions (i.e. perpetual common law copyright existed but upon print publication it was pre-empted by the Statute of Anne which covered the field), that became the received orthodoxy in English law until the passing of the *Copyright Act 1911* (UK).⁹ There remained, however, lingering resistance to this orthodoxy insofar as it admitted the existence of common law copyright.¹⁰

Lord Mansfield emerges as the central figure in the legal kerfuffle over literary property. In *Millar v Taylor* he commenced his reasons with the observation that, notwithstanding the best efforts of the four judges, the unanimity that had existed to that date in his tenure on the Kings Bench was being upset by the dissenting judgment of Justice Yates, who rejected the existence of common law copyright.¹¹ In that dissent, John Harrison’s invention of an improved nautical clock (chronometer) featured prominently. Harrison’s clock was a breakthrough because it maintained sufficient accuracy at sea to permit calculation of longitudinal position. Having introduced Harrison’s clock earlier in his reasons, Justice Yates returned to it, stating that ‘Mr Harrison ... employed at least as much time and labour and study upon his time-keeper as Mr Thomson could do in writing his *Seasons* ... as far as value is a mark of property, Mr Harrison’s time-piece is, surely, as valuable in itself, as Mr Thomson’s *Seasons*’.¹² Setting out the arguments put in favour of the view that an author’s common law right applied with equal force to an inventor such as John Harrison, Justice Yates concluded with the observation that ‘[y]et with all these arguments, it is well known, no such property can exist, after the invention is published’.¹³

⁴ *Donaldson v Beckett* (1774) 4 Burr 2408, 2409-2417; 98 ER 257, 258-262. See generally: H Thomás Gómez-Arostegui, ‘Copyright at Common law in 1774’ (2014) 47 *Connecticut Law Review* 1.

⁵ *Donaldson v Beckett* (1774) 4 Burr 2408, 2408; 98 ER 257, 258 (the language of the third question) and discussed by Gómez-Arostegui, above n 4, 28-33.

⁶ *Donaldson v Beckett* (1774) 4 Burr 2408, 2408; 98 ER 257, 257.

⁷ *Millar v Taylor* (1769) 4 Burr 2303, 2407; 98 ER 201, 257.

⁸ *Donaldson v Beckett* (1774) 4 Burr 2408, 2417; 98 ER 257, 262 and Gómez-Arostegui, above n 4, 33-45.

⁹ Mark Rose, *Authors and Owners – The Invention of Copyright* (Harvard University Press, 1993) 112.

¹⁰ *Jefferys v Boosey* (1854) 4 HL Cas 815, 962; 10 ER 681, 739 (Lord Brougham); Charles Palmer Phillips, *The Law of Copyright* (London: V & R Stevens Sons & Haynes, 1863) 2.

¹¹ *Millar v Taylor* (1769) 4 Burr 2303, 2395-2396; 98 ER 201, 250-251.

¹² *Ibid.*, 2361, 2387; 232, 246.

¹³ *Ibid.*

The first advisory opinion delivered to the House of Lords by Baron Eyre, who like Justice Yates was against the very existence of common law copyright, also mentioned John Harrison to argue the absurdity of perpetual common law copyright:

Had Mr Harrison wrote a description of the use of his time-piece, which he could have done in a few hours, the pamphlet would have been the subject of literary property; the profits of which he might have claimed for ever: but the time-piece itself, the subject of twenty years study, might be copied in the first hour it was published.¹⁴

The Harrison chronometer of 1759 was an example of incremental invention or, to use the language of the 18th century, an 'addition'. It was arrived at by the realisation that small, high-frequency oscillators were more stable than larger mechanisms.¹⁵ While it was a considerable technological advance, the influence of the 1644 reference in Coke's *Institutes to Bircot's Case* endured.¹⁶ Under it, incremental improvement should be denied patent grant on the basis that it 'was to put but a new button to an old coat, and it is much easier to add than to invent'.¹⁷ This rule meant that gradual technological improvements were doctrinally outside of eligible 'manner of new manufactures'. Instead, patent grants were confined to the introduction to the nation of industries and trades not hitherto practised locally. Such things as improving a clock for sea-faring applications was not obviously permitted under the rule in *Bircot's Case*. In turn, given the long-standing need for the capacity to measure nautical longitude, the absence of any clear patent incentive might help to shed light on why non-patent incentives had been offered. Since 1713, a prize of up to £20,000, administered by the Commissioners for the Discovery of the Longitude at Sea, was on offer.¹⁸ Having supplied an ingenious solution, John Harrison was denied the full prize for reasons symptomatic of the venality that can infect patronage-based systems.¹⁹ Indeed, prior to the Monarch's personal intercession on Harrison's behalf, in 1762 the Parliament itself intervened and authorised the Commissioners of the Navy to pay Harrison £5,000 upon his publishing and making known his 'Watch for Discovery of the Longitude ... so that other Workmen may be enabled to make other such Instruments or Watches for the same Purpose'.²⁰ Such a disclosure obligation presaged system-wide changes to patent law that Lord Mansfield would introduce. Moreover, this statutory obligation might have been in the minds of Justice Yates and Baron Eyre when they referenced Harrison's invention in their respective *Millar v Taylor* and *Donaldson v Beckett* opinions. The policy of the statute resembled those judges' own copyright logic: public grant should only occur upon the author causing his or her manuscript to be published.

¹⁴ 'Literary Property', *Morning Chronicle* (London), 16 February 1774, 2.

¹⁵ Ed Estow, 'Icon: Harrison H4 Marine Timekeeper', *Gear Patrol* (online), 18 February 2014

<<https://gearpatrol.com/2014/02/18/history-of-the-harrison-h4-marine-timekeeper/>>; Dava Sobel, *Longitude: The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of his Time* (Walker, 1995) ch 10.

¹⁶ Edward Coke, *Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminall Causes* (M Flesher for W Lee and D Pakeman, 1644) 184; James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press, 2004) 200-201.

¹⁷ Coke, above n 16, 184.

¹⁸ *An Act for providing a Publick Reward for such Person or Persons as shall discover the Longitude at Sea* (1713) 12 Ann, c 14.

¹⁹ Sobel above n 15, ch 13. However, those advocating a re-examination of such patronage systems for possible modern revival have offered a revised historical account: Robert Burrell and Catherine Kelly, 'Public Rewards and Innovation Policy: Lessons from the Eighteenth and Early Nineteenth Centuries' (2014) 77 *Modern Law Review* 858, 873: 'There is a case to be made that the Board of Longitude did not act entirely unreasonably in refusing to grant Harrison the full longitude prize'.

²⁰ *An Act for the Encouragement of John Harrison, to publish and make known his Invention of a Machine or Watch, for the Discovery of the Longitude at Sea* (1762) 2 Geo III, c 14 and Sobel above n 15, 147-149.

The intellectual impacts on Lord Mansfield of the outcome in *Donaldson v Beckett*, and the rhetorical uses of Harrison's invention by Justice Yates and Baron Eyre, are matters for speculation. However, clearly *Donaldson v Beckett* represented a rejection of Lord Mansfield's *Millar v Taylor* view that literary property was recognised in perpetuity by the common law, irrespective of publication. From 1774, publication emerged as the critical act which made finite a type of right which had been held to be perpetual. *Donaldson v Beckett* confined the term in published literary works to those stipulated in the Statute of Anne: at least 14 years and at most 28 years, depending upon the longevity of the author. At that time, the permissible term of a patent grant made under the Statute of Monopolies was 14 years, although patentees at least since the 1740s had successfully petitioned Parliament to pass Private Acts to prolong patent terms, typically for an additional 14 years.²¹ In other words, in the wake of *Donaldson v Beckett* there existed a degree of *de facto* harmony between the proprietary terms of a published literary work and a manner of new manufacture protected by a patent grant augmentable by Private Act.

Lord Mansfield and the fundamentals of patent law

In this setting of relative term equivalence between published literary works and grants of patents Lord Mansfield gave jury instructions which reshaped the fundamentals of patent law. The 1776 instructions in *Morris v Bramson* were taken to overrule the principle in *Bircot's Case*.²² The significance of that change was profound, so that by the end of the 18th century it was accepted that since *Morris v Bramson* a patent for incremental invention was good, so long as confined to the 'addition only, and not for the old machine too'.²³ The type of improvement to a known device that John Harrison had been responsible for would now be more clearly eligible for patent grant. Then, two years after *Morris v Bramson*, Lord Mansfield's jury instructions in *Liardet v Johnson* shifted the whole justification for patent grants from the introduction of new types of industry to the publication in the patent specification of a technical secret:

The third point is whether the specification is such as instructs others to make it. For the condition of giving encouragement is this: that you must specify upon record your invention in such a way as shall teach an artist, when your term is out, to make it and to make it as well as you by your directions; for then at the end of the term, the public have the benefit of it. The inventor has the benefit during the term, and the public have the benefit after.²⁴

Comparable to the instructions in *Morris v Bramson*, these too brought about a re-making of the fundamentals of patent law that took effect by the end of the century. The principles from *Liardet v Johnson* and *Morris v Bramson* ('the Mansfield-enunciated patent reforms') meant that the justification for patent grant had moved focus from a national interest in newly introduced trades and industries, to a social contract: the public disclosure of specific technical secrets, including incremental improvements, became the 'consideration' for any patent grant. The written specification 'must put the public in possession of the secret in as ample and beneficial way as the patentee himself uses it'.²⁵

The centrality of publication in copyright after *Donaldson v Beckett*, and Lord Mansfield's formidable straddling of both copyright and patent jurisprudence, might help shed a clearer light on the Mansfield-enunciated patent reforms that occurred in the immediate wake of *Donaldson v Beckett*.

²¹ Thomas Webster, *Reports and Notes of Cases on Letters for Patents of Inventions* (London: Thomas Blenkarn, 1844) 37.

²² (1776) 1 CPC 30, 34; 1 HPC 181, 187.

²³ *Boulton and Watt v Bull* (1795) 2 BI H 463, 489; 126 ER 651, 664 (Buller J).

²⁴ Hulme, 'On the History of Patent Law', above n 3, 285.

²⁵ *R v Arkwright* (1785) 1 WPC 64, 66; 1 HPC 245, 251 (Buller J).

Chapter 4 in *Across intellectual property: essays in honour of Sam Ricketson* edited by Graeme Austin, Andrew Christie, Andrew Kenyon, Megan Richardson (Cambridge University Press, 2020)

Lord Mansfield's *Millar v Taylor* conception of perpetual common law copyright was emphatically not conditioned upon book publication. Rather, it was justified by the author's exertions alone. His conception was significantly – although not totally – displaced by *Donaldson v Beckett*.²⁶ The outcome in *Donaldson v Beckett* rendered the proprietary rights in an author's unpublished manuscript less certain, but certainly confined rights in published works to the Statute of Anne statutory terms. Indeed, in the latter part of the 1770s, an author's unpublished manuscript and an inventor's technical secret both had an uncertain proprietary status. Common law copyright might have still protected the manuscript while unpublished, but this was less certain after *Donaldson v Beckett* and throughout the centuries influential viewpoints have disputed its existence. Indeed, prior to 1911 only chattel property rights in the manuscript could be asserted with complete confidence. Secrets *per se*, whether personal or technical, have never attracted proprietary recognition in the Anglo tradition.²⁷ After *Donaldson v Beckett* it was only upon due print publication of the manuscript that a finite term of copyright was available. To use the language of the Statute of Anne, upon publication there was a property right 'for the encouragement' of 'useful books'. In patents, while the transmission of new trades or industry was traditionally required (such as by training apprentices), grants had never formally required the publication of any technical information as any *quid pro quo*. The written specification had been earlier introduced simply to distinguish grants from each other.²⁸ After the Mansfield-enunciated patent reforms it was only upon full public disclosure of the inventor's technical secret in the written specification that the patent grant was valid. To use the language of Lord Mansfield's jury instructions in *Liardet v Johnson*, the disclosure of technical knowledge was 'the condition of giving encouragement' so that 'the public have the benefit of it'.²⁹

Thus, by the end of the 18th century the basic contours of protection for literary works and inventions were the same. After *Donaldson v Beckett* and the Mansfield-enunciated patent reforms, publication of the author's manuscript or the inventor's secret emerged as the crux of both regimes, and encouragement for the writing or the invention emerged as the overarching justification for both. Was this happenstance, the product of deliberate harmonisation or subliminal cross-cutting impact? It may not be possible to provide a conclusive answer. However, a reasonable deduction is that Lord Mansfield's experience in the vexed copyright question, in which John Harrison's chronometer played a cameo role, at least influenced this coincidence in the basic contours between the two. As will be suggested next, it is also possible to observe one other significant coincidence relating to publication that took shape between the two regimes in the following century.

Prior publications in patents and copyright

If late in the 18th century concepts from the resolution of the question of literary property did inform patent law fundamentals through the medium of Lord Mansfield, perhaps patent law concepts reciprocated and gave shape to copyright doctrine in the 19th century. What can be seen to emerge in the 19th century after *Jefferys v Boosey* was similarity in a more detailed feature of the patent and copyright regimes.³⁰ As noted above, at best there were murky rights in information prior to grant of patent or due print publication of copyright subject matter, with clearer rules governing patent grant and statutory copyright for finite terms. The rules relating to patents have evolved and remain part of modern law, but many of the rules governing copyright pertained to the era and were overtaken

²⁶ Rose, above n 9, 112.

²⁷ *Prince Albert v Strange* (1849) 1 Mac & G 25; 41 ER 1171 and *Saltman Engineering v Campbell Engineering* (1948) 65 RPC 203.

²⁸ Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* (Cambridge University Press, 1988) 51-53.

²⁹ Hulme, 'On the History of Patent Law', above n 3, 285.

³⁰ *Jefferys v Boosey* (1854) 4 HL Cas 815; 10 ER 681.

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by the UK giving effect to the 1908 (Berlin) revision of the Berne Convention in 1911. So that under *Jefferys v Boosey*, for a work to attract English copyright protection (as opposed to public performance rights or rights arising from the International Copyright Acts) the work's author had to be physically present in the jurisdiction when, in England, the *first* printing and publishing of the work occurred locally. Then, and only then, was the author a British 'author' for statutory copyright purposes. A valid patent grant required the support of a specification *first* disclosing the invention. By the mid-19th century, first public disclosure was the critical, and comparable, legal event for creation of property rights in inventions and writings. When would an earlier publication disentitle an inventor or author to statutory rights?

Hulme concluded his influential 1897 article with a comparative table intended to highlight what were the late 18th century changes to UK patent law:

<i>Sixteenth Century.</i>	<i>End of Eighteenth Century.</i>
Consideration of the grant the introduction of the industry. Formal disclosure of the invention waived by the Crown.	Consideration of the grant the written disclosure of the invention. No proof of working required.
Patents of addition of doubtful validity.	Patents of addition good at law.
Crucial test of monopoly prior user within the realm within the memory of man.	Crucial test of grant absolute novelty of the invention both in practice and as regards the published literature of the Art within the Realm.
Prior sale not prejudicial.	Prior sale fatal to the validity of patent. ³¹

The Mansfield-enunciated patent reforms were essentially the trigger for all the changes summarised in Hulme's table. The second item in the table is explained by Mansfield's jury instructions in *Morris v Bramson*. The first, third and fourth items are changes explicable in large part by the impacts of Lord Mansfield's jury instructions in *Liardet v Johnson*, described by Hulme as 'a landmark in the history of English patent law'.³² Whereas the first deals with the sufficiency of the written disclosure of the invention, the third and fourth items deal with a related core requirement of patent law: that the invention so disclosed is 'novel'.

In the decades following *Liardet v Johnson*, clear statements of principle relating to the necessity for the patent grant to be in respect of novel subject matter led to the patentee custom of separately demarcating, by 'claiming', novel features.³³ In that way it was hoped that the specification could be used both to fully disclose and to assert novelty.³⁴ (The use of the patent claim for infringement purposes came later.³⁵) Thus after *Liardet v Johnson*, novelty of the technology emerged as a concept defined by an assessment of the secret disclosed in the specification compared against publications prior to the grant. Lord Ellenborough's 1803 jury instruction made the point that: 'if prior to the time of his obtaining a patent, any part of that which is the substance of the invention has been communicated to the public ... so as to be a known thing, in that case he cannot claim the benefit of his patent'.³⁶ Critically, a patentee being responsible for that communication was no exception. In *Wood v Zimmer* there existed evidence of the patentee disclosing his invention by product sales prior to grant. Chief Justice Gibbs, after observing that 'the question is somewhat new', stated in his 1815 jury charge:

³¹ E Wyndham Hulme, 'On the Consideration of the Patent grant, Past and Present' (1897) 13 *Law Quarterly Review* 313, 318.

³² *Ibid.*, 317

³³ David J Brennan, 'The Evolution of English Patent Claims as Property Definers' (2005) 4 *Intellectual Property Quarterly* 361.

³⁴ *Ibid.*, 372-376.

³⁵ *Ibid.*, 380-399.

³⁶ *Huddart v Grimshaw* (1803) 1 WPC 85, 86-87.

To entitle a man to a patent, the invention must be new to the world. The public sale of that, which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void.³⁷

To similar effect Lord Brougham, who had been responsible for 1835 statutory reforms which had conferred prolongation and confirmatory patent jurisdiction upon the Privy Council, made the following comment during the course of an 1843 House of Lords appeal:

The [Statute of Monopolies] excludes from a patent the true inventor who shall have made the invention so public that others at the time of granting the patent shall use the invention. The public have lost the consideration for the patent, namely the specification which is given.³⁸

In this statement Lord Brougham concisely explained why any prior publication in patent law, including communications for which the patentee was responsible, destroyed the validity of the grant. Under the logic of *Liardet v Johnson* disclosure of the secret was the inventor's payment for the grant. There could be no payment if, whether by an inventor or a third person, the secret had been prior published whether in print, by product sale or by public use. By his subsequent decision in *Jefferys v Boosey*, Lord Brougham helped to ensure that this became the basis of a rule in copyright law too.³⁹

After *Donaldson v Beckett* there was no doubt that, for a literary work, once the work had been (with its author's consent) printed and sold to the British public, that work had been published. At that moment any common law rights ended, and a finite statutory copyright might arise. It was the equivalent of an inventor disclosing technical secrets in the written specification supporting a patent grant. However, what was the position if the author's work had been prior disclosed to the public in a manner other than printed publication? *Macklin v Richardson* was decided in the period between *Millar v Taylor* and *Donaldson v Beckett*.⁴⁰ An injunction was sought to restrain the print reproduction of a dramatic work which had been publicly performed with the author's permission, but not circulated in print. By a short-hand taker sitting as a member of the audience during a performance, the defendant had obtained a copy and printed the work for sale. The defence argued that no infringement was actionable because plaintiff's public performance prior to securing Statute of Anne copyright meant that the plaintiff had neither common law nor statutory rights. This was rejected:

It has been argued to be a publication, by being acted; and therefore the printing is no injury to the plaintiff: but that is a mistake; for besides the advantage from the performance, the author has another means of profit, from the printing and publishing; and there is as much reason that he should be protected in that right as any other author.⁴¹

Thus, unpublished literary and dramatic matter did not lose common law copyright by its communication to the public by performance, and implicitly statutory rights remained available upon authorised print publication. This was at odds with the patent rule that was shortly to develop in the wake of *Liardet v Johnson*. In *Jefferys v Boosey*, Lord Brougham brought the copyright position into line with patent law by rhetorically asking: 'if [the author] makes his composition public, can he retain the exclusive right which he had before?'⁴² To this, the following answer was given: 'whatever

³⁷ *Wood v Zimmer* (1815) Holt 58, 60; 171 ER 161, 162.

³⁸ *The Househill Coal and Iron Company v Neilson* (1843) 1 WPC 673, 719.

³⁹ *Jefferys v Boosey* (1854) 4 HL Cas 815; 10 ER 681. See generally, David J Brennan, 'The Root of Title to Copyright in Works' (2015) 4 *Intellectual Property Quarterly* 289, 308-319.

⁴⁰ *Macklin v Richardson* (1770) Amb 694; 27 ER 451.

⁴¹ *Ibid.*, 696; 452 (Lord Commissioner Smythe).

⁴² *Jefferys v Boosey* (1854) 4 HL Cas 815, 962; 10 ER 681, 739.

may have been the original right of the author, the publication appears to be of necessity an abandonment'.⁴³ The rejection of *Macklin v Richardson* was done by Lord Brougham putting forward a concept of publication more expansive than the circulation of printed copies. Resembling that in patent law, it comprised acts of prior public disclosure and included disclosures for which the originator was responsible. These served to divest inventor and author alike of general law rights, and to disentitle each one of statutory rights under the Statute of Monopolies and Statute of Anne respectively.⁴⁴

By the time of *Caird v Sime* in 1887, the more elastic patent rule of any prior public disclosure rendering the subject matter *publici juris* had taken hold in copyright. Lord Watson was in no doubt that if William Blackstone's lectures at Oxford were public communications, and if his *Commentaries on the Laws of England* were substantially the same as the lectures, 'the Statute of Anne could give the author no copyright in the original text'.⁴⁵ Thus by the late 19th century, the patent prior publication rule (which persists today) had become the copyright prior publication rule. While this aspect of English copyright law was swept away by the *Copyright Act 1911* (UK), the possibility of works entering the public domain by certain public performances and exhibitions remained a contentious aspect of US copyright law for most of the 20th century.⁴⁶

Conclusion

The propositions that the resolution of the question of literary property could have sparked the reshaping of patent doctrines in the late 18th century, and that in turn those patent doctrines could have had a reciprocal influence upon an important aspect of English copyright law of the 19th century, are speculative. The similar patterns that emerged in each regime around a first stylised publication for entitlement purposes, and around prior disentiing publications, might have been coincidence. However, the 'cross-pollinating' roles possibly played by Lord Mansfield in the late-18th century and by Lord Brougham in the mid-19th century add a perspective from which to view the similarities. Moreover, considering such possible historical connections allows research to look outside meticulously compartmentalised accounts of patent and copyright history and to consider messy truths. It is at least plausible, that when they were legal amoebas in the 18th and 19th centuries, the rights under the Statute of Monopolies and the Statute of Anne were considered to be similar enough to be treated similarly.

⁴³ *Ibid.*, 965; 740.

⁴⁴ However, some confusion persisted: Brennan, above n 39, 312-313, discussing *Clark v Bishop* (1872) 25 LT NS 908.

⁴⁵ *Caird v Sime* (1887) 12 App Cas 326, 350.

⁴⁶ Paul Goldstein, *Copyright: Principles, Law, and Practice* (Little, Brown, 1989) vol 1, 249-252, where error is suggested in the *King v Mister Maestro*, 244 F Supp 101 (1963) holding that the public delivery of Martin Luther King's *I Have a Dream* speech did not constitute a publication of the work such as to divest copyright in it.