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From *Auctor* to *Author*: Evolution of the Idea of *Authorship* Through Legal and Cultural Discourse

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Abstract

This paper examines the ideas of authorship and copyright as they developed through the complex discursive traffic of forensic and literary arguments during the 18th century in England. It carries out a brief survey of few legal cases which played a critical role in determining the nature of the ideas of literary property, authorship, and copyright. The original transcripts of these courtroom trials are not readily accessible. My work, therefore, is based on the fragments of textual evidence incorporated in the work of authors who have discussed these ideas in wide detail and made it possible, through their labor and shrewd understanding of legal provisions, for people like me to develop a working understanding of the concept of authorship.

Keywords: Authorship, Copyright, Censorship in 17th and 18th Century England.

From the perspective of legal and cultural rationality, each of the legal cases discussed in this paper represent a kind of threshold, a scandal, in the positive and constitutive sense of that term. These scandals, or "stumbling blocks" are responsible for intense and impassioned self-reflexivity. Susan Stewart in her remarkably erudite work, *Crimes of Writing*, argues that the laws of copyright were in fact products of these legal scandals. "It is not so much as the ballad scandals of eighteenth century were the *products* of rules regarding forgery, authenticity, plagiarism and originality as that the ballad scandals helped *produce* such rules" (Stewart: 103). Terry Eagleton also affirms this positive implication of the term scandal: "that which the builder has rejected as *skandalon* or stumbling block will become the cornerstone" (Eagleton: 288).

I would like to begin with a brief discussion of the idea of copyright. What is copyright and what are its many possible applications and implications? Mark Rose describes copyright as "'the practice of securing marketable rights in texts that are treated as commodities'" (Rose: 3). The definition has the advantage of being simple, yet it is this very simplicity that inveigles us into the trap of believing that there is nothing problematic about the concept of copyright.

What is foreshadowed in Rose's definition of the term is all but one aspect of its complex theory: the commercial nature of copyright. As I will discuss below, the term copyright, consistent with the circumstances and practices that have historically surrounded it, has seen phases of evolution that are not easy to grasp. In foreshadowing of the commercial aspects of copyright, one tends to relegate the other equally significant aspects to an epigonic status. To emphasize the commercial interest alone would be to fatally undermine the integrity of a work of art and its producer. In continental jurisprudence, the creative interests of an artist are given equal billing with the commercial interests he might have in his work. The embodiment of that belief is known as *droit moral*: "the doctrine that purports to protect the personal rights of the author as distinct from commercial ones" (Roeder: 556).

Paraphrasing Lyman Patterson, the scope of copyright and the laws protecting it may be summarily put together as guarding the following four interests; 1) to avoid disorder and distemper in the book trade which includes licensing, printing and publishing of works, 2) to promote and encourage learning in societies, 3) to safeguard the interests of an author in his work and 4) to circumvent monopolistic practices amongst the booksellers and tradesmen (Patterson: 181). As Lyman Ray Patterson has amply demonstrated in his remarkable book, these four aspects of copyright have forever remained inextricably interwoven within the doctrine of copyright, and while addressing historically various circumstances, one or more has occupied the dominant position at the expense of others.

In order to arrive at a serviceable understanding of why the ideas of censorship and copyright are an inextricable tangle, it is imperative for us to consider that these two themes evolved in lockstep with each other. And it was not until late in the 18th century that these two could be identified as two distinct conceptual categories.

Copyright, an idea originally meant to secure balance in the exponentially expanding book trade and to encourage the art of writing and printing books so that the society might benefit from it, underwent radical changes throughout its use by the Stationers' Company, a publishing guild that oversaw the interim workings of the book trade. The inveterate practices of the Stationers' Company remained the mainstay of the idea of copyright and eventually found a comprehensive expression in the licensing act of 1662, which in itself was a coarse rephrasing of the Star Chamber decrees of 1586 and 1637.

It is worth noting, as Patterson does, that the precise nature of literary property and copyright were allowed to remain indeterminate until the latter half of the 18th century because these ideas were never developed in common law courts but instead, they evolved under the aegis of the Court of Assistants, which was a part of the guild of Stationers' Company (Patterson: 88). Mark Rose, in a complimentary way, indicates that the typical methods through which the guild court used to settle disputes were by and large concerned with compromises and expedient reconciliations (Rose: 51). The guild court was at no time known to be concerned

about laying down principles that could serve as guidelines in settling legal disputes that were to gather force only later. The Court of Assistants therefore, derived its methods from the established *customs* of the company as distinct from the *principles* of law.

Right from the moment of its incorporation after the receipt of a charter from Philip and Mary on May 4, 1557, the policies and practices of the company and the state could be seen as serving mutual interests, ligatured by the motives of control and monopoly. In fact, the whole point of granting the charter to company was to "obtain an effective agency for censorship" (Patterson: 29). The Crown wanted to prevent forms of dissent in matters of faith and government; the Stationers, on the other hand, wanted to secure perpetual monopoly over printing and publishing texts whose commodity value was increasing significantly as a corollary of the massive expansion in the market of ideas. In addition to providing stability in the increasingly disorganized book trade, the stationers were also expected to assist the Crown in suppression of 'schismatical and heretical' writings which "moved the sovereign's subjects not only against the crown, but also against the faith and sound Catholic doctrine of Holy Mother Church" (Arber, cited from Patterson: 31).

Once we come to see that the Stationers were the State's cat's-paws in the 'regime of regulation' over the print market, it won't be too difficult to imagine the reasons for which they were able to practice their monopolistic trade techniques for almost over 150 years with royal sanction. Perhaps the most revealing illustration of this collusion between state and Stationers-- which implicitly fostered the monopolistic trade practices of the Company-- can be seen in the fact that when in 1603, the Statute of Monopolies was passed, it was not extended to affect "letters patent concerning printing" as well as the "Digging, Making or Compounding of Salt-Petre or Gunpowder, or the Casting or Making of Ordnance" (Patterson: 86). The symbolic categorization of books and ammunition as belonging to the same inventory of objects draws attention towards the menacing potential of these things and indicates the degree of threat felt by the state in allowing them to go unregulated.

The idea of an author as an "autonomous creator" of a text and a proprietor who has both, creative as well as economic interests in his work was hardly relevant in the early stages of development of the doctrine of copyright. The right of the Author as the sole owner of his intellectual property was indefinitely suspended during this time. Mark Rose, in his interesting study, suggests that the most distinguishing feature of the figure of modern author is proprietorship or copyright (Rose: 1). But it was not until very late in the 18th century that the author was recognized as having economic as well as creative interest in his own work. Before this period, even though he could be recognized as the owner of his work, the idea of author was little more than a smoke screen for defending the Stationers' monopoly.

In the times preceding the passage of Statute of Anne, also known as the first copyright statute of England, copyright was not really author's copyright but stationer's right to publish an author's work. The Stationers' copyright can be understood as the right to publish, i.e.,

reproduce copies of a book that has been assigned or 'signed off' to him by the consent of the author. The stationers never cared to claim a creative right in a work, but merely concerned themselves with the lucrative outcome of its market demand. The stationers' copyright therefore "was literally a right to copy-- that is, a right to reproduce a given work for sale" (Patterson: 71).

The thought that authors had an incontrovertible right in their work was implicitly recognized by the guild practices of the Stationers' company but never legally delineated for a variety of reasons. Part of these reasons was the company's monopolistic control over the book market. As long as there was not threat to this monopoly from the outside, it was never really necessary for them to get the legal attention of courts to settle the trivial disputes that existed within the company. These disputes mostly involved malcontent members of the company or rogue printers operating outside the company's control. The authors were never concerned with the litigations that followed once they had assigned their copies to booksellers who would then make free with them as they pleased.

The ensuing trade disputes were never an author's concern but merely involved the booksellers who would infringe each other's right to print and publish a given book. By signing off a copy to a bookseller, the author used to enter what Patterson has called a "negative covenant" with his assign or assigns which implied that he would not interfere or cause to interfere in the publishing of the said copy in exchange of an amount stipulated at the time of this assignment (Patterson: 73). It was common practice that a book had to be entered in the registers of the company before it could be sent for printing, and since the access to these registers was restricted only to the members of the company, authors hardly cared to go beyond their nominal transactions with the booksellers.

"And the sanctions for copyright came from the company, for it was the company, not the author that granted the copyright. From the stationer's viewpoint, copyright was protection against rival publishers, not against authors, and the existence of continuing rights of the author in his work was consistent with the existence of copyright in the stationer." (Patterson:71)

As long as there were few authors and limited number of printing presses, this arrangement worked impressively despite the few occasional infractions that commonly occur within the space of every established trade. But as the book market expanded, some booksellers grew in importance while others experienced a steady decline in fortunes. This could be seen as the beginning of the practice of piracy, which was nothing more than an unauthorized publication of a copy that, according to the 'ancient usage' of the company, was understood to be the 'property' of another bookseller. Despite a few skirmishes within the company, it was still the Court of Assistants, an interim tribunal, that was usually called upon to adjudicate and arbitrate the disagreements that individual booksellers had amongst themselves. But with further growth in the book market the number of competitors was not merely restricted to the

malcontents and insurgents within London. Some provincial booksellers, especially Scottish ones, had enjoyed a raving success and made sizable profits by reprinting copies owned by the stock of Stationers' Company and selling them for much cheaper prices. This amounted to a lot of discontent within the company and finally with the passage of the Copyright Statute in 1710, which restricted the term of copyright, it became impossible for the members of the company to ignore the existence of the provincial booksellers. But the Stationers were relentless in their pursuit of perpetual monopoly. Just because the statute had limited the term of copyright did not decisively mean that they were prepared to forswear the wealth they had put together in form of patents. They sought legal redress and opened the war on a new front and the figure that was to lead this front was that of the author.

On 10th of April 1710, when the Statute of Anne was finally passed, it carried, inter alia, two implications which are of crucial significance for the present discussion. First of these implications was that the term of copyright, which was theretofore held as perpetual and transferable, was limited to a certain number of years. The statute ordained that the term of copyright for works already in print should be restricted to a period of Twenty-One years from the date on which the statute went into effect. For works that were to be printed after the passage of the act, it was ordained that the term should be restricted to a period of Fourteen years, after which if the author of the work is still alive, it would return to him for another term of Fourteen years.

The second most important implication of the Statute was that it proposed an alternative way of publishing a book. As I have mentioned before, in the years preceding the statute, only a member of the Stationers' Company could print and publish a given work after making an entry in the registers of the company. According to the statute, it was possible for any one now to publish a book after giving an advertisement in the *Gazette* (Birrell: 95).It would be pointless to suggest that both these provisions dealt a direct assault on the monopoly of the Stationers' Company but despite the passage of the Statute of Anne, the London booksellers were able to enjoin publications of works for which the term of copyright had expired, on grounds of the fact that an author-- and by extension-- his assigns had a common law right in the work that he so laboriously produces, a right that cannot be taken away or abridged by the statute. This debate surrounding the nature of literary property and the extent of author's right in it, was never conclusively resolved until the landmark hearing of *Donaldson vs. Beckett* in 1774.

Before we get to the discussion of how the modern institution of authorship was forged under the influence of legal and commercial forces, I would like to point out that the reasons why the 18th century saw an unprecedented upsurge in the debate of authorship and the corollary debates of copyright cannot be apprehended without the consideration of a crucial change that was already taking place in the commercial and cultural circumstances of that time. This change was the gradual decline of the traditional system of patronage. The Idea of an author as an independent institution with commercial and social interest in the artefacts he

produces, could not have been conceived under the influence of such a system, wherein "through a complex set of symbolic and material transactions, patrons received honor and status in the form of service from their clients and in return provided both material and immaterial rewards" (Rose: 16).

It is worth noting that the first form of copyright was known as the "letters patent", predecessor to the "stationer's copyright", granted by the sovereign, "in exercise of his royal prerogative", to an individual author by way of reward for his services to the state and the society (Patterson: 26).

In these cases, as few as they may have been, the monarch used to presume the position of the patron. As Mark Rose has observed, the printing patent granted to Samuel Daniel for his *History of England* by King James is not as much of an act of investing property in the author as it is concerned with the ideas of "reward" and "honor" (Rose: 17).

Interesting from this point of view is Lymann Ray Patterson's observation regarding the difference between the idea of the royal prerogative as it was used by the Stuarts and Tudors. He observes that while the Tudors saw the royal prerogative as a "department of law which conferred upon the ruler certain necessary rights not available to the subjects", the Stuarts saw it "over and above the law" or "over and against it" (Patterson: 51).

These two different conceptions of the royal prerogative when examined together can work to explain if the author was understood as having any natural rights in his work or whether his rights were a constitutional or sovereign grant. According to the first thesis, if the author had any natural rights in his work, even the authority of the sovereign could not challenge its existence. Such a right would be imprescriptible even if it went against the royal claim. The royal prerogative, therefore, would merely be an instrument to *recognize* such rights and to protect them. If, on the other hand one favors the second theory, then the author's rights were little more than provisional sanctions from the ruling authority and could be taken away just as easily as they were *invested.*

It is no mere coincidence that the literary scene of 18th century was ripe and conducive for the entry of a genre like the novel. Traditional forms such as the sonnet were waning in importance because it was a "form inscribed within a network of aristocratic traditions and patronage" (Stallybrass: 71) Not more than a century before this, Ben Jonson had argued in favor of a "consociation of offices between the monarch and the scholar" wherein he coarsely equates these two as positions of privilege and authority (Stallybrass: 74). At the time when Jonson was writing, such a view might have seemed treasonous, but it outlined a change which was only to be realized critically in the following century with the simultaneous decline in the prerogatives of the monarch and the rise of the doctrine of possessive individualism. The latter

rushed forth in the following period to meet the new and more professional demands of the idea of authorship.

"Authorship in this sense required a two-handed fending off of royal and popular patronage alike, since both entangled the poet in symbolic arrangements, rituals deferences which no longer quite answered his *professional* needs" (Italics mine, Stallybrass: 75).

Daniel Defoe, during the early years of the 18th century was arguing for the abridgement of censorship while emphasizing that the author's interests in his work need to be protected just as the rights of any inventor who has sole property in his invention. A very similar position was being argued by Addison in his *Tatler*. Mark Rose refers to this period as the early stage of the formation of a discourse that would eventually establish the boundaries of authorial rights. Rose demonstrates that the idea of author was still not entirely dissevered from the system of patronage, by making use of the articles published by Defoe in his journal *Review*. "Despite his concern for property and authorial rights Defoe presents the issue of authorial property from within the framework of traditional society where punishment and reward are transmitted from above" (Rose: 38).

As the language of these articles suggests, rather than considering literary property as a matter of right, these authors were primarily concerned in characterizing the role of a writer as an individual who secludes himself from the tedious affairs of mankind for the cause of learning and as a token of good grace and encouragement deserves a 'reward' for his labors. But, following unprecedented and rapid changes in commerce and technology, by 1747 the idea of an author as a professional individual who must depend on his work for sustenance had acquired both form and substance.

The publication of William Warburton's *A Letter from an Author to a Member of Parliament Concerning Literary Property* was a crucial moment in the development of this authorial discourse. The pamphlet argues that just as an inventor has a right over his invention, which is both; the material unit and immaterial spirit of innovation, an author's claim to property in his work is irrefragable. The very nature of literary property is immaterial and therefore it occupies a place that is significantly higher than any other form of property. Rose observes that by invoking this distinction between material and immaterial natures of property and their corresponding implications of mental and physical labor as different from each other, Warburton was engineering a rhetoric which "when fused with the traditional coding of spirit as superior to matter, produced a hierarchical ordering" (Rose: 73). The author thus occupied the highest position in this commercial hierarchy. What we see here is a gradual shift from the traditional notion of the author as an especially skilled selfless individual working in favor of the society as a whole to an individual who labors to support his continued existence and deserves to have a perpetual interest in the profits of his work; "a commodity producer" (Rose: 74).

It has been observed by many authors, Mark Rose in particular, that the idea of an author holding property in his compositions was hugely influenced by the Lockean Humanist discourse on property, individual and society. Rose shows, through detailed illustrations, how Locke's work was central in the fashioning of these ideas. For Locke, the society was there to nurture and protect the interests of the emerging category of the individual, the highest instance of manifestation of which was the author. Locke's doctrines are indelibly inscribed within the subsequent systematic evolution of the idea of the author. Those arguing a case for the author's right as a common law right were using Locke's arguments to provide theoretical flesh to this emergent discourse. It was more in tow with the doctrine of possessive individualism, which suggested that the whole point of society was to safeguard the interests, especially property interests, of the individual. But it would be a critical error to propose that Locke's discourse was seamlessly supporting the author's claim of permanent property in his work. Those trying to limit the term of copyright rested their appeal on the fact that the limitation of the term of copyright was in interest of public and common weal. Learning promotes learning, but if it were kept within the confines of someone's personal right to print, it was highly probable that great works of literature never see the light of day. Monopoly is not an impatient trade and the only way of preventing it from damaging public standards of learning was to have some form of statutory regulation as a stranglehold on the perpetuity of copyright.

These two arguments are best understood, not as diametrically opposed to each other, but as situated on the opposite ends of a continuum. While the Lockean doctrine of property was helping the booksellers to consolidate the essence of literary property in terms of something as physical as a carriage or real estate, Locke was also emphasizing that the idea of booksellers getting away with perpetual monopoly was all but ludicrous.

"That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as, suppose, fifty or seventy years" (Locke's *Memorandum*, 208-9: cited from Rose).

The notion of literary property as a right and not merely a reward for author's industry was indeed a novel thought. As I have discussed earlier in this paper, for as long as authors were working under the aegis of a patron, such an interest seemed little more than unnecessary. Moreover, the book trade was largely controlled by a guild and before the passage of the Statute of Anne their monopolistic practices were never threatened. The idea of a book as something independent of the manuscript was hardly relevant even in the times when authors used to assign the right to print and publish their works to booksellers outright. For a man of learning to be involved in the affairs of commerce and market was a token sign of disgrace but with the

professional evolution of authorship it became more and more necessary to define the complete extent of such rights.

The first case to be argued upon the nature and location of literary property was *Pope vs. Curll* (1741). It has been speculated that Alexander Pope contrived a situation whereby he had copies of his literary correspondence with Dean Swift published by a London bookseller, Edmund Curll and then proceeded to bring legal action against him (Rose: 121). The reasons regarding why he might have done this have also been generously speculated upon. One theory suggests that it was generally regarded as unbecoming of an author with a reputation like Pope's to make his letters public. Pope might have wanted to publish these letters on his own, but he could not have done that unless and until it was as a way of, as Mark Rose calls it, "setting the record straight" (Rose: 122). Getting someone else to publish his letters first would simply have paved a path for Pope to go ahead with the publication himself and still preserve his image as a gentleman scholar.

Notwithstanding the reasons Pope might or might not have had, the following trial was a landmark case in the slowly developing legal discourse on authorship and literary property because for the first time the lawmakers of Chancery courts found themselves engaging with the intractable and pesky nature of literary property. Pope's Bill of Complaint was presented in front of Lord Chancellor Hardwicke, who after long deliberations, issued an injunction against the sale and publication of the volume in question. The most important point to be discussed during the case was the *abstract* nature of literary property. To whom does a letter belong? Is the writer the sole owner of this property or is it the recipient, or is it possible perhaps that the ownership of such documents is shared by both? Does a letter deserve to be protected under the terms defined by the Statute of Anne? Indeed, if anything, the very question of what could one possibly mean by the words like 'work' and 'book' was being addressed by the law for the first time.

One should recall here that the first part of the title of the Statute of Anne was '*An act for the encouragement of learning*'. Allowing the author complete and transferable rights over his work had a very important implication; that it might be to the detriment of learning in society should the author or his assigns refuse to print such work. But it also seemed natural that an author must have some recognized interest in the very artefact that he industriously produces. In Lord Hardwicke's decision, an injunction was issued to prevent the publication of the letters written *by* Pope and not the ones written *to* him. The defendant's counsel had based his argument on the premise that once a letter is sent to the addressee, it takes on the nature of a gift thereby discrediting the claims of the author to possess any property in it. Lord Hardwicke pontificated:

"it is only a special property in the receiver, the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to this world,

for at most the receiver has only a joint property with the writer" (Lord Chancellor Hardwicke's decision: Reprinted in the appendix A, Rose: 237).

Though fundamental questions regarding the exact character of literary property and authorship were far from *resolved* in this trial, one important implication of the case was that the contentious and problematic nature of these concepts was finally *revealed* to legal scrutiny. This was 6 years before the publication of Warburton's pamphlet which systematically developed the questions that were raised during *Pope vs. Curll* (1741). Warburton was groomed as a lawyer before he took up his offices in the church and had a personal interest in the landmark trial owing to the fact that he was also Pope's legal executioner (www.copyrighthistory.org).

One of the most nuanced arguments made in the pamphlet was regarding the essence of literary property. Warburton argued that the property of an author in his work was never merely restricted to the physical manuscript but extended to the *doctrine* that it contained.

"Six years earlier in *Pope vs. Curll*, Lord Chancellor Hardwicke had tentatively distinguished between the receiver's property right in the possession of a letter and the author's property right in the words. Now, in Warburton's *Letter*, the notion of a property in pure signs abstracted from any material support was being systematically developed" (Rose: 73).

As I have mentioned above, despite the passage of the statute, booksellers were still able to obtain injunctions from the chancery courts against publications whose term of copyright had expired. A comprehensive account of these legal cases is available in Rose, Patterson and Saunders. Although, in *Pope vs. Curll*, the crucial question of the abstract nature of literary property was raised, it was never really resolved, and the judgment issued by Lord Chancellor Hardwicke was more of an expedient that represented a middle house position.

How can one locate property in ideas? This was a question that stared unhappily in the faces of those who were to participate in the trials that determined the nature of literary property. The most practical problem faced by the jurists involved in the matter was the lack of precedents. Since these questions were never before argued in the legal context of courtrooms, it was impossible to draw upon precedents which could serve as guidelines. Another problem was that if the very essence of literary property was abstract, how could one define it in terms which were only applicable to material property, the limits of which could be defined for terms of possession?

Mark Rose's work presents an interesting reflection on the metaphors that were being used during these trials and concludes that the most frequent of them were the 'paternity trope' (the renaissance notion that an author has as much of a right over his work as a father has over his child, famously antiquated by now) and the 'real estate metaphor' (supported by the

Lockean idea that man has his property in everything that he has manipulated and mixed with his labor) (Rose: 78). To put it sharply, the jurists simply did not know where to situate the idea of literary property given that the available ways of interpreting and determining property were all restricted to the conditions of material possession. And if determined, could it be possible for it to receive the same treatment as something material, like an estate or a house or even a chair? It is way easier to run away with a book than to encroach upon a house. Significantly, once stolen, material property cannot be augmented physically but it is easy for one to reduplicate copies of a book. Augustine Birrell seizes upon this confusion by pointing out that in the Western countries, the idea of property had been developed around the theory of exclusion.

"Certain rights over things amounting in the aggregate to a more or less complete exclusion of others than the owner from participating, save by consent, in their enjoyment had in the Western World become recognized as property" (Birrell: 11).

Now since the fundamental point of publishing a book is share it with people, it seemed almost impossible for the jurists to offer it complete protection from intellectual pillaging.

The three other landmark trials which proved crucial in the determination of authorial rights were *Tonson vs Collins* (1762), *Millar vs Taylor* (1769) and *Donaldson vs Becket* (1774). In the first of these three cases, despite the good intent of the judges, no verdict was issued because it was revealed that the action was collusive and the defendant was merely nominal. The case was orchestrated by the London and provincial booksellers to solve the aporia of literary property and authorial rights (Saunders: 141). The whole question was based around discussion of whether or not an author possessed a common law right in his work and did or did not the Statute of Anne destroy this right? Saunders argues that a crucial clue to understanding that the statute took away author's common law right, if any had existed before its passage by drawing attention to the title of the statute. The statute mentions 'vesting' of rights in the author, which clearly indicates that it was not in recognition of any such rights but rather it was assigning them to the author.

In *Millar vs. Taylor*, the judges of King's Bench concurred— with one dissenting opinion of Justice Yates— that an author has a common law right in his work and the statute had failed to recognize it. But in the following trial of *Donaldson vs. Becket*, the House of Lords upturned the decision of the Kings Bench and held that the term of copyright has to be kept limited in continuous interest of the needs of a learned society. Thus, it was in 1774, some sixty-four years after the passage of the Statute of Anne, that the question of literary property and the author's right in it was finally resolved despite the resistance of the booksellers.

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