Evil Angel Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright

James R. Alexander
JOURNAL OF INTELLECTUAL PROPERTY LAW

VOLUME 20 SPRING 2013 NUMBER 2

ARTICLE

EVIL ANGEL EULOGY: REFLECTIONS ON THE PASSING OF THE OBSCENITY DEFENSE IN COPYRIGHT

James R. Alexander*

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 211
II. UNCOVERING THE MAXIMS OF EQUITY.............................. 219
III. EXTENDING PRINCIPLES OF EQUITY TO COPYRIGHT........... 229
IV. THE ORIGINS OF THE OBSCENITY DEFENSE ....................... 242
V. STRUGGLING WITH THE AMBIGUITIES OF LITERARY CONTENT AND FORM......................................................... 259
   A. BYRON'S CAIN AND DON JUAN ...................................... 262
   B. SHELLEY'S QUEEN MAB AND OTHER WORKS...................... 270
VI. THE LEGACY OF CLEAN HANDS IN COPYRIGHT ................... 275
VII. ADOPTION OF THE OBSCENITY DEFENSE INTO AMERICAN COPYRIGHT LAW ................................................................. 282

* Professor of Political Science, University of Pittsburgh at Johnstown, Pennsylvania; Ph.D. 1973, University of Colorado. zander@pitt.edu. 814-269-2983. The author would like to thank Oren Bracha, Gary Dyer, H. Thomas Gomez-Arostegui, Kyle Grimes, Ori Herstein, Leslie Katz, and Michael Roberts for their comments on earlier versions of this Article or in assisting with documentation in its preparation. Special thanks to Erin Kidwell of the Georgetown Law Library and to Marc Silverman and Susanna Leers at the Barco Law Library of the University of Pittsburgh.
VIII. THE COPYRIGHT CLAUSE AND THE VAGARIES OF OBScenITY ........................................................................................................... 291

IX. DEATH KNELL ........................................................................................................................................................................ 304
I. INTRODUCTION

In February 2010, John Stagliano, entrepreneur, producer, and director of pornographic films, was the principal in two simultaneous litigations regarding production and distribution of his Evil Angel films. The first was a seven-count federal criminal indictment brought against him and his company, John Stagliano, Inc. (JSI), for distribution of obscene materials and possession for purposes of distribution of obscene materials, specifically, two films and one movie trailer.1 These charges were subsequently dismissed after a jury trial on July 16, 2010.2 The second litigation was a civil action; specifically, a copyright infringement claim filed by JSI on behalf of itself and Jules Jordan Video (JJV) against Alain Elmaleh and his Montreal-based Kaytel Video Distribution accused Elmaleh and Kaytel of producing and distributing knock-off DVD copies of JSI and JJV copyrighted films.3 Ironically, Stagliano may have been targeted for criminal prosecution not because his films were “rough” or characterized by demeaning treatment of women, which is a usual trigger for federal action, but because of the presumption that court documents would be available from his civil suit, which would save the prosecution the expense of independent discovery.4


2 Kernes, supra note 1.

3 The initial suits were consolidated into Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F.3d 1146, 1150–51 (9th Cir. 2010).

Details of the Stagliano copyright infringement suit were fairly typical for piracy of films in the pornography industry at that time. In early Spring 2005, JSI and JJV began to experience an abnormally high return rate on their top-selling videos with customers claiming inferior or defective quality. After investigation, plaintiffs discovered that Kaytel was producing unauthorized DVD glass masters of JSI and JJV videos in California, shipping them to Canada for replication, then distributing the counterfeit copies through intermediaries to retail stores throughout the United States and the world. Such a case easily fit within the narrow scope of copyright protection usually accorded sexually explicit material by involving exact copies and not raising any question of whether sexual content was sufficiently original to warrant protection. After a two-week trial, the jury found for the plaintiffs on all counts, awarding $11.2 million to JSI and $5.35 million to Gasper. The absurdity revealed by the nexus of these legal and equitable judgments is palpable. Is it possible that a person has a statutorily-protected proprietary right to publish a work, grounded in the legislative assumption that such protection advances knowledge and learning, and yet for doing so, he becomes subject to criminal prosecution for distribution of that same work on the legislative assumption that certain types of works in their nature and consequence threaten the public welfare? Can it be that Congress vests him with a right that he is then prohibited from enjoying—that he has been accorded a proprietary right to sell that which is illegal to sell, and that when he attempts to exercise his right, he becomes subject to criminal action? If so, the absurdity becomes manifest, as one claims court protection for the right to
engage in illegal activities. And how did this apparently untenable circumstance arise—through legislative inattention, or worse, whimsy? Perhaps, as Mr. Bumble so eloquently proclaimed it, "the law is a[n] ass." 9

Through the 1970s, this type of circumstance would not have arisen—Stagliano would have been convicted of distributing pornography by a jury trial under Miller standards, 10 and his claim to copyright protection of his duly registered films probably would have been denied under common law, based on prevailing equitable principles that rendered such materials ineligible for protection. These days, such criminal convictions are fairly rare and difficult to obtain, as cultural barriers to sexual material under community standards have relaxed, 11 and such copyright infringement claims are now routinely supported based on the reversal of the equitable principle in Mitchell Brothers v. Cinema Adult Theater over thirty years ago. 12 So, what changed? Has the nature of copyright

10 Miller v. California, 413 U.S. 15, 24 (1973). In a modification of the initial obscenity standards enunciated in dictum in Roth v. United States, 354 U.S. 476, 489 (1957), the Miller court established a three-pronged threshold for obscenity based on whether the nature of the work (a) appealed to prurient interest in sex, when taken as a whole and judged by contemporary community standards of the average person, (b) was patently offensive in its display of sexual conduct, and (c) lacked serious literary, artistic, political or scientific value. However, given the pervasiveness and escalating frankness of sexual depictions in print media, television, and film over time, what was considered patently offensive by the average person had become marginalized to that which might still considered shocking to most audiences by contemporary standards, e.g., sexual violence, demeaning treatment of women, torture, etc. More recent prosecutions tended to focus mainly on the most graphic and violent depictions, for which most juries would have little tolerance. Richards & Calvert, supra note 4, at 233–43.
11 OPTF obscenity prosecutions targeted “low-hanging fruit,” such as so-called gonzo films (non-stop action, no storyline or theme) that emphasized physical and verbal abuse of women. Extreme Associates specialized in “horror porn,” in which women were graphically bound, tortured, raped and killed, but was only prosecuted after a 2002 PBS documentary, AMERICAN PORN, which included violent clips from its “Forced Entry” (1970) had made the nature of its films more visible. Richards & Calvert, supra note 1, at 235–38, 254–55. Paul Little was prosecuted not for distribution of his domestic “domination” films but rather for the unauthorized distribution of his rougher European versions in the domestic market. His prosecution was made even easier by the fact that he was the principal actor in his own films, making it difficult for a jury to discriminate between his actions on film and his intent as a producer/distributor. Richards & Calvert, supra note 4, at 547–60.
12 Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979) (enforcing the copyright of a pornographic film conceded to be obscene); Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982) (confirming the holding of Mitchell Brothers). In 1972, Artie and Jim Mitchell produced and directed the movie Behind the Green Door under the production labels Jartech and Cinema 7 Film Group. The film was then copyrighted. Its distribution rights were exercised by their own Mitchell Brothers Film Group. When Cinema Adult Theatre in Dallas began showing pirated copies of the film and refused to desist when notified, Mitchell Brothers
protection been substantively broadened in a manner that now directly
contradicts the objectives of existing criminal law? Or conversely, has the
potential criminality of exercising one’s copyright been substantively expanded
to the point of negating one’s proprietary right? The answer, in the long view,
may be neither.

Prior to *Mitchell Brothers* and extending back over two centuries in English
law, it was commonplace for defendants in copyright infringement cases
relating to literary works of questionable or illicit nature to argue what became
known and accepted as the obscenity defense. Based on a broader doctrine
established in contract law by the eighteenth century, the argument was that a
plaintiff was precluded from seeking equitable relief if his own behavior related
to the defendant had been tainted by inequity. In colloquial terms, eligibility for
equitable consideration required a plaintiff to approach the court with “clean
hands” and not to ask the court to support his claimed right to property that he
had actually gained by illicit or illegal means. By the early nineteenth century,
this argument had been accepted in property, contract, and marital property law
as the Clean Hands Doctrine and then awkwardly adapted to cases of copyright

sued for injunctive relief, which was denied based on the nature of the work copyrighted in

13 Obviously, the commercial pornography market has changed due to the distribution of
copyrighted material on the internet, which makes its products almost completely intangible.
A recurrence of circumstances such as in *Mitchell Brothers* is unlikely because of the virtual
disappearance of public movie theaters showing pornographic fare. Home consumption via
videos and DVDs purchased through distributors may have shrunk the theater market. But
those products too have come to represent a shrinking share of the commercial pornography
market because of internet competition—especially via “free” tube sites—and perhaps making
infringement claims like Stagliano’s less likely in the future. What has not changed is the
degree to which criminal prosecution of pornographic remains dogged
by the vagaries of obscenity law, particularly regarding the scope and relevancy of “community standards” under *Miller*, as discussed in Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The
Ramifications of the Ninth Circuit’s Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47 (2010–2011). While the standard copyright infringement case involving
piracy and sale of pornographic content in a tangible product market (such as DVDs) has
become quite rare indeed, the current focus of infringement now has shifted to the
unauthorized capture and distribution of copyrighted material via internet peer-to-peer file
sharing (or BitTorrent) programs in mass John Doe lawsuits. See, e.g., Lawrence G. Walters,
*Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers*, 23 STAN. L. & POL’Y REV. 171 (2012) (examining recent trends in defining
criminal liability for online service providers regarding advertising of prostitution services or
pornographic content uploaded by third-party users).

14 The parallel to the free speech conundrum is obvious. A broadly protected right of free
expression, assumed to produce public benefit, can be used simultaneously to undermine the
public order, which obviates that benefit obviated, but that is beyond the scope of this inquiry.

15 See infra Part III.
infringement when the literary property at issue was of questionable content, or more specifically, if its public distribution might tend to undermine public morality and jeopardize social stability.

While admitting infringement on the plaintiff’s legitimate claim of property in a literary work, the defendant would argue that the plaintiff was nonetheless ineligible for equitable relief since the purpose of the work, as revealed by its content, its manner of distribution, or both, was to cause harm to the public. The plaintiff had, in effect, “unclean hands.” In so doing, the defendant effectively shifted the focus of equitable consideration onto the plaintiff’s own purposes and behavior, which would have remained irrelevant if the literary work at issue had been duly registered under the formal procedures established by statute.

In practice, this shift placed equity courts in a conundrum—the apparent absurdity mentioned above. If it protected a plaintiff’s literary property by providing injunctive relief, on its face a routine matter if the plaintiff could document his proprietary right, the court would appear to be publicly countenancing and even supporting the distribution of illicit works, the consequence of which would appear to be an injustice to society as a whole. If, on the other hand, the court wished to address that broader level of injustice, it would have had to admit that the public was not only a third party to the proceeding but also perhaps the principal party with substantive interests perhaps superior to those of the individual parties involved. To avoid the onus of extending its authority to protect distributors of illicit works, the court could then deny relief on public policy grounds despite the plaintiff’s legitimate claim of appropriate copyright registration. Yet while denying justice to an individual plaintiff may have served the public good in the larger sense, this strategy also raised the specter of arbitrariness and begged for clarification of the standard by which a court could legitimately deny what would seem to be legislatively-warranted protection. More to the point, this strategy laid the court open to charges of judicial bias along ideological, sectarian, or partisan lines, since the court thereby appeared to superimpose its own values on a case-by-case basis regarding the types of works the legislature intended to protect.

Obviously, equity courts were trapped in a no-win scenario. To follow the strictures of copyright law would mechanically provide statutory protection to all duly registered literary works regardless of content, unless the legislature made exclusionary provisions enumerating the types of works it explicitly did not intend to protect. In consequence, distributors of works of questionable tendency might then become emboldened and flood the market with more such works, in effect contaminating the literary marketplace and encouraging immorality. On the other hand, to suspend formalized protection and impose a
judicially-determined ineligibility on certain types of works, albeit with good intent, could be politically challenged as arbitrary and biased, perhaps compromising the court’s integrity as the source of justice. Ironically, to deny copyright protection on works of questionable nature would produce an unintended consequence that had been anticipated very early on: that literary pirates would then be free to copy and distribute such works at will, leading to proliferation in the marketplace. No matter how a court addressed such claims, the proliferation of morally corrupting materials would continue unabated.

The adaptation of the Clean Hands Doctrine to equitable claims of copyright infringement was in fact an entirely reasonable judicial response to the earliest statutory provision of copyright protection in early eighteenth century England and its application to different forms of literary property—in particular, to works suspected of having seditious, blasphemous, and immoral tendencies. Inevitably, questions arose regarding the forms and types of content of literary property that could or should be appropriately accorded copyright protection under common and statutory law. No early copyright statutes clearly addressed these questions, leading to periodic waves of “moral panic” regarding potential evil consequences of works of illicit tendency. Complicating the issue further was the debate over the discrete proprietary rights of authors, opposed to booksellers to whom authors traditionally consigned their rights. This question struck at the core of the stated purpose of copyright protection: the promotion of creativity and free expression of ideas. Equally contentious was the debate throughout the eighteenth century whether judges or juries had authority to determine the potentially harmful tendency of literary works. These were the basic elements of legal contention regarding the intent and consequences of copyright protection that marked the period between the first explicit copyright statute in England in 1710 and the doctrinal acceptance of its clean hands manifestation—the obscenity defense—a century later.

With no statutory restrictions on which forms of literary property could be accorded copyright protection, and generally hesitant to rule arbitrarily to exclude certain works, equity courts in England retreated to the more familiar ground of basing copyright infringement decisions on already established equitable maxims. The courts thereby developed an ersatz structure of precedent akin to the doctrinal structure of the law courts. This contained but did not resolve many of the core issues at play, particularly whether the legislature intended copyright protection to extend to all literary works eligible for copyright protection.

American jurisprudence absorbed this unsettled English copyright structure in the early nineteenth century with little scrutiny of its weaknesses, which
resulted in awkward comingling with the fairly obtuse language of the copyright clause of the U.S. Constitution. The U.S. Congress initially attempted to restrict eligibility to those works that were both original and informative and that were implicitly consistent with prevailing cultural norms. However, by the mid-nineteenth century, subsequent American copyright statutes markedly avoided restrictive language on the nature of works to be protected and instead focused on the formalities of the registration process. This noticeable shift in legislative emphasis resurfaced decidedly, if sporadically, in subsequent American copyright infringement rulings. With a few lingering exceptions, this undermined judicial efforts to consider, much less enforce, public policy-based substantive restrictions in copyright infringement cases long before Mitchell Brothers.

This Article attempts to trace the origins of the obscenity defense as a manifestation of the Clean Hands Doctrine, which, by the eighteenth century, had become routine in cases involving works of questionable tendency. This includes a description of the evolution of equitable maxims as they came to be applied to copyright litigation in the doctrinal insistence that plaintiffs must approach equity with "clean hands." This Article then reviews the initial awkward adaptation of the Clean Hands Doctrine to issues of copyright in Dr. Priestly's Case, a damages case on the equity side of Exchequer in 1792 involving, if not explicitly litigating, the degree to which common law copyright protection could extend to unpublished materials of questionable tendency. While Priestley was not a case of copyright infringement, its ruling contained the oft-quoted dictum that equitable principles deny that property could exist in illicit works since they were harmful to the public. In effect, the Clean Hands Doctrine required not only equitable behavior toward the defendant but also equitable intent toward the public.

With Priestley as the foundation of the Clean Hands Doctrine in copyright and ultimately the obscenity defense, this Article also attempts to reconstruct how the principle underlying that ruling became accepted as doctrinal authority during the early nineteenth century chancellorship of Lord Eldon, which indelibly, but perhaps inaccurately, associated him with the application of the obscenity defense by his practice of deferring issues of questionable property to law. Among the several copyright-related rulings at law and equity during that period, this Article specifically examines Walcot v. Walker and Southey v. Sherwood. These two Eldon rulings are traditionally considered governing under the doctrine in both English and American law, and in each, the plaintiff

16 (1802) 32 Eng. Rep. 1 (Ch.).
17 (1817) 35 Eng. Rep. 1006 (Ch.).
was denied consideration of equitable relief until he could establish his property interest in the literary work at issue by first successfully petitioning for damages at law. This led to the spurious conclusion that equitable relief could not be extended to literary works of a questionable works, routinely cited in court rulings and legal treatises for the next century.

It was during the Eldon period that copyright practice began to subtly differentiate among types of literary content, shifting its concern over illicit nature from works considered seditious or blasphemous and toward those considered more fundamentally immoral and unacceptably challenging of accepted social mores. This trend would also produce the first English obscenity statute and precipitate the development of subsequent judicial tests for determining whether specific literary or artistic works were of illicit tendency and threatening to public morals.

Against this backdrop, this Article then initiates a reconsideration of the legacy of Lord Eldon’s rulings in establishing how the Clean Hands Doctrine was applied to copyright and which of the aspects of that doctrine were critical to its adaptation in American jurisprudence. This adaptation is examined by tracing doctrinal elements from the Eldon period first in English and then in American legal treatises and other texts during the nineteenth century. American law adopted these elements with little hesitancy until the early twentieth century, when courts began to acknowledge that literary works containing immoral narratives or passages might still, on balance, contribute value to society. At that point, American jurisprudence began to differentiate more specifically between the substantive and procedural elements of copyright protection, the former surviving only as an uneasy application of the obscenity doctrine as reflected in *Miller*, yet still unreferenced as a statutory exception in copyright law.

Finally, this Article attempts to interpret how these trend lines inevitably produced the ruling in *Mitchell Brothers*. Despite consequentialist angst regarding the proliferation of pornographic materials in our society, this decision reflected the unsustainability of the obscenity defense, which was borne of a cultural era over two hundred years ago, became immediately arcane in English law as reflected in the rulings of Eldon and then proved subsequently ill-adapted to American law.
II. UNCOVERING THE MAXIMS OF EQUITY

According to the first litigations under the Statute of Anne, the first English copyright law, property rights in literary works would ordinarily be protected if duly registered. However, if the works at issue were considered of libelous, seditious, blasphemous, immoral, or otherwise culturally transgressive tendency for public policy reasons, they were routinely denied damages or equitable relief. One could establish a property right in a work of questionable nature by successfully claiming damages at law under the Statute of Anne. Works of illicit nature were ineligible for such damages, and successful pleading would indicate a finding of fact that the work was not in any fashion criminal. However, such a strategy might have proven risky should the work be ruled ineligible for damages on public policy grounds related to its illicit or illegal content. In that instance, the plaintiff would have been potentially vulnerable to criminal prosecution initiated by the government or private parties.

The earliest such denial of protection at equity appears to have been Burnett v. Chetwood, in which Lord Chancellor Macclesfield granted an injunction preventing the defendant from publishing an English translation of a previously published Latin treatise ARCHAEOLIGIA PHILOSOPHICA because it “contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it.” Macclesfield’s judgment implied that if a work were published in English, it could be misunderstood by a less educated public. While the author’s executor still held property in the Latin version of the treatise under the Statute of Anne, he would have been unable to claim a property right in a subsequent English translation, as translations were generally considered original works under the Statute of Anne. So while Burnett held...


19 (1721) 35 Eng. Rep. 1008 (Ch.).

20 Id. at 1009.

21 Id. ("[A] translation might not be the same with the reprinting of the original, on account that the translator has bestowed is care and pains upon it, and so not within the prohibition [of the Statute of Anne].").
statutory copyright to the Latin version published in 1692, Chetwood appeared to be within statutory authority to publish a translation, and the court in routine fashion might have been expected to deny Burnett’s petition for an injunction to prevent this.

However, Macclesfield granted the injunction not based on Burnett’s claim to a proprietary right but instead on an obiter dictum that the chancery court “had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality.” Macclesfield’s ruling was thus based purely on a public policy consideration rather than on any established legal authority or equitable principle, clearly contradicting not only the formal dictates of the Statute of Anne but also the doctrinal jurisdiction of the legal court over such findings of fact. It was perhaps the first and only instance in which equity court claimed jurisdictional authority over the content of works subject to copyright law, particularly libels. Tellingly, Burnett was infrequently cited and rarely considered authority in subsequent equity rulings and on occasion was pointedly derided as overtly arbitrary and beyond the court’s jurisdiction.

By the early nineteenth century, the common practice in the English Chancery Court was to deny copyright protection to such works until their morality could be reviewed at law as a question of fact. Associated with a series of rulings by Lord Eldon, this practice was grounded on the accepted legal

22 Id. In the same ruling, Macclesfield enjoined publication of a second Burnett title, DE STATU MORUORUM ET RESURGENTIUM, for which Burnett could only claim common law copyright. Unpublished works were treated differently, not only because the Statute of Anne did not recognize them but also because they had not yet been publicly distributed and therefore had no public consequence, intuited or otherwise. Macclesfield, nonetheless, included that title in the sweep of his ruling.

23 Stephen A. Siegel, Injunctions for Defamation, Juries, and the Clarifying Lens of 1868, 56 BUFFALO L. REV. 655, 684–87 (2008) (clarifying that the Chancellor’s claim that equity may restrain libels was unfounded and actually doctrinally opposite to that established during the Hardwicke era). Less than two decades later, the dictum in Burnett was authoritatively ignored in Roach v. Garvan (or The St. James’s Evening Post Case), (1742) 26 Eng. Rep. 683 (Ch.), Lord Hardwicke ruling that it was a matter of settled practice that such substantive judgments were the province of law rather than equity, and that equity ought not act, one way or the other, until the law had spoken on the matter of whether legally-recognizable property existed in the work at issue. Id. at 683 (“Whether a libel be publick, or private, the only method is to proceed at law . . . .”). In fact, published notice of Burnett did not appear for almost a century until it was appended as an editorial aside by Merivale in his nominate report of Southey v. Sherwood, (1817) 35 Eng. Rep. 1006 (Ch.), long after it had become doctrinally accepted that equity had no jurisdiction over libel, and subsequent case rulings responded to it in a largely dismissive manner. See id. (detailing the legal reporting on Burnett and how subsequent courts responded to its precedent value).

24 James Scott (Lord Eldon) was one of the dominant figures in English jurisprudence at the time, having had significant experience in the legislative, prosecutorial, and adjudicative (both law
maxim that "he who comes into equity must come with clean hands," the precursor of the Clean Hands Doctrine. As initially found in early contract and later tort law, this "clean hands maxim" was thought to have been derived from the broader maxim "no action arises out of an illegal transaction (or immoral consideration)" or ex turpi causa non oritur actio. The second of fourteen maxims deduced from published abstracts of seventeenth century equity court rulings, the concept was published by English barrister Richard Francis in his seminal treatise *Maxims of Equity* as reflecting underlying equitable principles in the common law. However, neither Francis nor any of the cases he referenced actually used the phrase "clean hands." Instead, it appears the maxim was most directly derived from a Chancery ruling in 1679 denying injunctive relief to a plaintiff in a child support case in which he, though warranted in his own claim for relief, had himself behaved in a reprehensible manner toward the mother of the child. The editor's heading for the abridgement of that case—"Inequity takes away equity"—subsequently became recognized as "the principle of plaintiff's fault" and later more colloquially as "He that hath committed inequity shall not have equity."

The more colloquial "He that hath committed inequity shall not have equity" was often in subsequent rulings and legal treatises accompanied with several other similar maxims from contract law, principally ex dolo malo non oritur actio. This concept reflected the broad unacceptableity of illegal or immoral behavior of a plaintiff toward a defendant as a basis of his action and from...
which he might be seeking court assistance for his ill-gotten advantage, which was most famously proscribed by Lord Mansfield:

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who finds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.\(^\text{31}\)

It was also companioned with the maxim that "[h]e that will have equity done to him must do it to the same person," which effectively stipulated that a plaintiff's equitable treatment of the defendant was a precondition for the plaintiff's equity claim.\(^\text{32}\) Together with these and several other nominally related maxims, the clean hands maxim over time became a fixed rule for rendering equitable judgments in copyright infringement cases.\(^\text{33}\) It also led to the gradual acceptance of an affirmative defense argument that a defendant, while admitting his own culpability regarding infringement of the plaintiff's claimed property right, could counter that the plaintiff was disqualified from consideration for relief because he was claiming property in an illegal or immoral work, which meant he was not approaching the court with "clean hands."

It is unclear what type or level of equitable behavior the early case law required. If it were implied that the nature and effect of the disputed work had to be consistent with the legislative purpose of encouraging learning and the


\(^{32}\) See Francis, supra note 26, at maxim 1. This precondition, commonly referenced as "he who seeks equity must first do equity," was an adaptation during and after the sixteenth century to include moral duties in equitable actions.

\(^{33}\) See Davis v. Marlborough, (1818) 36 Eng. Rep. 555 (Ch.) 568 (holding that "the principle of this Court is not to give relief to those who will not do equity... "). Spence interpreted this statement as "a doctrine nearly allied to, and a descendant of the above, namely 'that a person must come into court with clean hands.'"; 1 George Spence, The Equitable Jurisdiction of the Court of Chancery 422–23 (1846).
advancement of knowledge as a substantive precondition equitable relief, then his behavior and his intent were conjoined. If, on the other hand, the work was deemed illicit in nature, publication of the work would be considered inequitable due to its effect on the public welfare, and he would be denied consideration altogether. In doing so, the court would acknowledge that the plaintiff had a property interest in the literary work and was due court consideration but would reason that the plaintiff’s behavior toward the public at large, in the form of distributing works calculated to harm public morality, would outweigh any culpability on the part of the defendant toward the plaintiff and would taint the proceeding in such a manner as to make it impossible for the court to grant relief on public policy grounds.

Both approaches required a finding of fact regarding the nature of the work, which was doctrinally the province of the law courts and juries. However, whether an equity court entertained evidence on such an issue itself or deferred this to the law courts varied from case to case. Consequently, in each instance that an equity court denied injunctive relief based on the questionable nature of the work at issue, it is difficult to determine whether the denial was considered an interim ruling pending a determination of fact at law or whether it was a summary finding of fact that the work was of criminal tendency. Deferral of such questions to the law courts was the established practice. It also left open the prospect that should a law court accept the plaintiff’s claim, he could then petition for equitable relief with demonstrably “clean hands,” and as equity rulings of the period consistently remind us, equity could only grant relief in cases in which a recognized property right was at issue. It seemed to be a simple matter of jurisdiction—without documentable property in a literary work, equity courts had no remedy to offer.

In practice, an equity ruling to direct or defer consideration of property to the law courts most often caused plaintiffs simply to abandon their copyright infringement claims altogether, as their only recourse was to first establish a property right in a successful damage claim at law, which was a costly and lengthy process. Over time, this trend reinforced at least the appearance that equitable denial of relief in the first instance, when property in the literary work was still in doubt, was based on a governing principle that works of doubtful property were automatically disqualified from equitable consideration. While such works were not actually disqualified, the practice may have sent that message. As a result, the denial or dissolution of a temporary injunction in early copyright infringement cases, especially those decided by Lord Eldon, had the appearance, if not the effect, of final decrees based on a substantive finding of fact, whereas those rulings may have instead been motivated by a rule of procedure and jurisdiction. It is no small wonder that Eldon became identified...
with a doctrine that had in fact not been established—that publication of works of questionable nature (as to their content or effect) was prima facie evidence that the plaintiff had "unclean hands."

What became known as the "unclean hands" or obscenity defense entailed arguing that a literary work at issue, though perhaps duly registered for copyright under statutory provisions, was nonetheless contrary to the public interest, which in turn precluded (or alternatively "debarred," "disbarred" or "disentitled") the plaintiff from court protection on public policy grounds. This defense became as accepted as the broader maxim from which it was derived. Inevitably, the obscenity defense became clustered in later legal treatises with a number of other affirmative defenses for a plaintiff seeking equitable relief "with unclean hands," i.e., in which the relief sought, if granted, would create or continue inequity or injustice, or would contaminate the judicial proceedings in a way that may jeopardize the public confidence in the court.

Portrayed by Chafee as "a picturesque phrase applied by equity judges to a general principle running through damage actions as well as suits for specific relief," metaphorical reference to "clean hands," immediately created two levels of ambiguity. The first was a matter of clear labeling—as a rule, the doctrine held that a plaintiff must approach the court with clean hands, implying that there was a legal precondition for equitable consideration. Awkwardly, this caused the court to consider not only the substance of a plaintiff's claim in order to conclude whether he had met the precondition but also whether his behavior directly related to the inequity from which he was claiming relief. Identified as a "clean hands" precondition (or, perhaps more

---

34 The modern label of the affirmative "unclean hands" defense as the "obscenity defense" is clearly under-inclusive nomenclature. Criminal or illicit publications were not confined to works considered obscene (or obscene libels) even in the word's earlier, broader, immoral, and irreligious meaning rather than in its later, more narrow focus on sexuality. Fundamentally, the defense rests on the argument that the plaintiff's work constitutes a criminal libel that injures the public rather than any specific person, a view of libel established in *The Case De Libellis Famosis, or Of Scandalous Libels*, 77 Eng. Rep. 250 (K.B.) 251 (distinguishing personal libel involving damage to individual proprietary interests from more serious public libels that threatened public order); *see also* Dominus Rex v. Curl, (1727) 93 Eng. Rep. 849 (K.B.) (extending the doctrine specifically libelous publications as encompassing considered seditious, blasphemous, and later obscene, with the concept of obscenity having absorbed many elements of crimes of immorality, including blasphemy, by the mid-nineteenth century). *See* Pat Rogers & Paul Baines, *The Prosecutions of Edmund Curll, 1725–28*, 5 LIBR. 176 (7th ser. 2004) (detailing how prosecutions of Curll for blasphemy and immorality intimated charges of seditious libel were warranted as well). *See generally* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1984–1985) (describing the early development of the law of seditious libel).


36 As per Justice Eyre's dictum on the equity side of Exchequer in *Dering v. Earl of Winchelsea*,...
accurately, that a plaintiff's claim to equitable relief must be "clean" of related illicit behavior or intent), the metaphor belies an absolute legal distinction regarding plaintiff's behavior—that it is either clean or unclean. In practice, this dichotomy forced the court to sort out to degrees of cleanliness and degrees of relatedness on a case-by-case basis. The nature of the resulting dilemma was obvious and would beleaguer any ruling that attempted such discrimination without seeming to be totally arbitrary.

A second, more complex ambiguity emerged when the equity court was asked to balance the judicial integrity of disqualifying a plaintiff's claim, albeit an equitable result for society as a whole, with the inequitable countenance of clear civil culpability of the defendant—a choice the court did not relish since, whether it decided for or against the plaintiff, it appeared to attach its authority to some consequent level of injustice. In order to be consistent and at the same time protect its judicial integrity in turning away a plaintiff who had a legitimate legal claim, the court might have felt compelled to invoke the Clean Hands Doctrine as a matter of public policy rather than as a legal principle. Remember that at equity, the court was bound to consider the interests of all possible parties to the behavior, including consequent harm to third parties not present and the public at large. In certain circumstances, then, the court may have been pressed to refuse a possibly deserving plaintiff consideration of remedy because of the court's inability to do full justice to the third party.

The identification of a "clean hands maxim" with an underlying legal principle emerged in the 1780s from a range of cases at law, most often associated with Lord Chief Justice Mansfield,37 and cases at equity, associated with Baron James Eyre.38 In the court of Chancery, the maxim was most often associated with the rulings of Lord Eldon over two decades later. Still, this concept was not identified as a discrete "clean hands" equity maxim by most treatises commenting on the underlying principle until the late nineteenth

(1787) 29 Eng. Rep. 1184 (Ex.) 1185, that the precondition did not relate to the plaintiff's general behavior or demeanor ("it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for"). Id. See, e.g., The Meaning of "Clean Hands" in Equity, 35 Harv. L. Rev. 754, 755 (1922) (noting that "immorality and degraded character have long been held to not make a plaintiff's hands unclean," as established in Dering).

37 Mansfield's earliest use of the maxim may have been in Fitzroy v. Gwillim, (1786) 99 Eng. Rep. 1025 (K.B.) 1026 ("[Plaintiff] must come therefore with clean hands, according to the principle laid down in the case of Bosanquet and Dashwood(b), that those who seek equity must do equity.").

38 See Dering, 29 Eng. Rep. at 1185 (stating in dictum that "[I]t is not laying down any principle to say that [plaintiff's] ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands.").
However, contrary to the implication that the "clean hands maxim" had been established by the mid-nineteenth century, there was some question as to exactly what had been established. Later, legal scholars referred to the maxim rather disparagingly as "a collection of mottoes in which aspects of conscience become pickled and to a degree trivialised," or "commonly misleading," or purposed "merely to justify or explain or confirm a decision which has already been reached on other grounds." By the early twentieth century, courts considered the maxim to govern in equity claims and recorded it in legal literature as the Clean Hands Doctrine, extending to all civil actions in which the plaintiff's prior or current behavior threatened to involve the court in illegal, immoral, or unjust consideration or consequence.

In subsequent legal treatises and other texts, equitable claims that fell under the Clean Hands Doctrine were classified and sub-classified based on the assumption that the doctrine applied uniformly to each. Included were cases in which the plaintiff asked relief for inequity of his own doing and the court deferred consideration of relief until the plaintiff had first "done equity," i.e., somehow corrected the artificial imbalance created by his contractual relationship with the defendant. Also included were claims in which the plaintiff asked relief for inequity in fact due to his own related prior action, but the court had refused to consider equitable relief under any circumstances because this behavior had been illicitly designed to give the plaintiff unfair advantage.

Similarly included were cases in which the plaintiff's claim of a property interest was tainted by illicit (or criminal) behavior by both plaintiff and defendant, resulting in the court's refusal to assist either party. The treatises

---

39 Chafee I, supra note 28, at 884.
41 See Roscoe Pound, On Certain Maxims of Equity, in CAMBRIDGE LEGAL ESSAYS 259, 263–64 (G.G. Alexander et al. eds., 1926); Chafee I, supra note 28, at 882; Howard Oleck, Maxims of Equity Reappraised, 6 RUTGERS L. REV. 528 (1951–1952). Both Pound and Chafee located the first equitable use of the "clean hands" phraseology in Dering "This form seems to begin in a remark by Lord Chief Baron Eyre . . . ." Pound, supra note 36, at 263–64. According to Chafee, "In 1787 . . . the maxim as we know it was born," a conclusion that can be debated regardless of whether the phrase is considered a general maxim, a distinct maxim, or a governing principle. Chafee I, supra note 28, at 882. See also Jennifer Payne, "Clean Hands" in Derivative Actions, 61 CAMBRIDGE L.J. 76, 76 n.4 (2002).
42 See, e.g., Merryweather v. Nixan, (1799) 101 Eng. Rep. 1337 (K.B.) 1337 (sustaining a ruling at Assizes that the plaintiff could not claim equitable contribution against his fellow tort-malfeasor: "the learned Judge being of opinion that no contribution could by law be claimed as between joint wrong-doers," effectively the same principle derived from Everett v. Williams (Ex. 1725), belatedly reported in Note, The Highwayman's Case, 9 L.Q.R. 197, 198 (1893), in which a
also included the type of cases most germane to this discussion: those in which the plaintiff based his claim on literary property considered immoral in nature or effect and, by implication, calculated to harm the public. In those circumstances, the court refused to recognize property in the work for purposes of equitable relief until a jury had deemed the work not harmful. Regardless of whether there had been illicit or criminal behavior on the part of either the plaintiff or the defendant, the literary work generated its own consequence when publicly distributed—it produced a tendency toward illicit behavior among the public at large which could only be gauged by a jury at law.

The authority of the venerable Clean Hands Doctrine in copyright law appeared to be summarily eviscerated by Mitchell Brothers, a ruling that interestingly evoked relatively little comment or criticism. Most critics lamented its possible adverse consequences, focusing on the long-standing but little evidenced presumption that extending copyright protection to allegedly obscene works would increase the economic incentive to publish and distribute more such works, leading to even wider accessibility and inevitable societal harm. Lord Eldon voiced on several occasions the presumption that the market for such works would inevitably expand if not censored or regulated. He recognized that if his court refused to enjoin unauthorized publication of such works, literary pirates would rush to republish them in greater numbers at cheaper prices that would make the works more immediately accessible to a broader range of reading public, especially those of lower income and education plea by one highwayman for equitable distribution of stolen proceeds was dismissed "for scandal and impertinence.")

43 Mitchell Brothers, 604 F.2d 852 (5th Cir. 1979).

44 See, e.g., Karl Schmalz, Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?, 36 VAND. L. REV. 403 (1983) (arguing that insistence on uniformity in national copyright protection frustrates explicit federal, state and local public policies against obscenity); Note, Can Intellectual Property Law Regulate Behavior? A "Modest Proposal" for Weakening Unclean Hands, 113 HARV. L. REV. 1503 (2000) (arguing for compliance conditions on copyright registration for works that may have been produced by criminal actions, such as using actors in films without their legal consent, marking the creator as having "unclean hands"); Ann Bartow, Pornography, Coercion, and Copyright Law 2.0, 10 VAND. J. ENT. & TECH L. 799 (2008) (advocating that copyright protection be structured to insure performer consent); Ann Bartow, Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography, 39 U. BAL. L.F. 75 (2008) (encouraging a public debate on the morality of expanding the economic incentives associated with copyright protection of pornography); Christopher A. Cotropia & James Gibson, The Upside of Intellectual Property's Downside, 57 UCLA L. REV. 921 (2010) (arguing that the economic incentive for commercial pornographers to aggressively assert their property rights has diminished due to the more significant dilution of market demand from the widespread distribution of free pornography on the internet).
whose moral constitution was considered more vulnerable to challenge.\textsuperscript{45} He concluded, however, that the danger was greater if equity overstepped its jurisdictional bounds and that protection against such criminal consequences must be left to the law courts. While affirmative defenses are commonly accepted in many areas of law today, most are based on claims of misrepresentation and fraud in contractual agreements.\textsuperscript{46} An obscenity (or \textit{ex turpi causa}) defense against plaintiffs seeking copyright protection for works of questionable nature, routinely held to be compelling in English and American courts for over two hundred years, has now become extremely rare and is not considered compelling.\textsuperscript{47}

So, how venerable was the Clean Hands Doctrine, really? One can easily argue that, in practice, the assumptions underlying its application to copyright infringement had been progressively abandoned in American jurisprudence since the early twentieth century and that \textit{Mitchell Brothers} was in fact simply a long-awaited coup de grâce. And yet, that such a longstanding legal doctrine should be seemingly swept aside so easily bespeaks a doctrinal transition that calls upon us to perhaps focus less on the nuances of the \textit{Mitchell Brothers} rulings and more on the doctrine as it initially evolved in cases of literary property. That begs us to reconsider the formative early nineteenth century period in chancery, in which the doctrine was imperfectly constructed, how its

\textsuperscript{45} Southey v. Sherwood, 35 Eng. Rep. 1006 (Ch.) 1008 ("It is very true that, in some cases, it may operate so as to multiply copies of mischievous publications by the refusal of the Court to interfere by restraining them . . . .")


\textsuperscript{47} One constantly mentioned exception has been \textit{Devils Films} v. Nectar Video, 29 F. Supp. 2d 174 (S.D.N.Y. 1998), in which the court refused preliminary injunctive relief for a plaintiff seeking copyright protection of what the judge considered to be obscene films. The court found that there was probable cause to believe that the plaintiff was violating federal law by shipping obscene material in interstate commerce and that it "should invoke the doctrine of unclean hands and leave the parties where it finds them," akin to an Eldon ruling. \textit{Id.} at 175. Subsequently, the parties attempted to settle, with the defendant agreeing to accept a permanent injunction, but the court refused to sign the proposed consent order, stating "[t]he 'unclean' hands doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'" \textit{Devils Films}, Inc. v. Nectar Video, No. 99 Civ. 8016, 2000 U.S. Dist. LEXIS 12116, at *1 (S.D.N.Y. Aug. 17, 2000) (quoting Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945)). While critics have considered \textit{Devils Films} convincing evidence that the issue remains "unsettled" at the appellate level, \textit{Mitchell Brothers} was nonetheless almost immediately accepted by prominent legal treatises as governing. See, e.g., 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT \S\ 2.17 (2012); 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT \S\S 3.41--42 (2007).
ancillary “obscenity defense” became further adulterated when roughly adapted first to American constitutional language, then to subsequent copyright legislation, and finally to First Amendment strictures that required a demonstrated evil tendency. We may be inclined to think that balancing the social value of literary works, which may contain transgressive ideas or images, against their potential harms to mainstream behavioral values is a legal development peculiar to the twentieth century. However, in retrospect, such balancing characterized rulings in both copyright and obscenity law in the more formative nineteenth century period in English law.

This Article also examines the viability of the traditional interpretation of how the Clean Hands Doctrine was adapted to copyright and, if found lacking, whether that changes our view of the doctrinal import of Mitchell Brothers. The next section traces the origin of the Clean Hands Doctrine to a set of equitable principles underlying English case rulings in the seventeenth and early eighteenth centuries that related mostly to property in contracts, marital agreements, and wills. Since the notion of literary property was established but fundamentally undefined by the Statute of Anne, it was inevitable that equitable consideration in cases of copyright infringement would rely initially on the common law regarding proprietary rights. This reliance, however, was challenged to its core by increased wealth and literacy, not to mention by revolutionary sentiments. This volatility was exacerbated by the free-wheeling nature of literary publication, which included books, newspapers, journals, weeklies, and pamphlets that proliferated wildly during the period and which had, until that time, been effectively controlled by government licensing, taxation, and censorship.

III. EXTENDING PRINCIPLES OF EQUITY TO COPYRIGHT

How legal jurisprudence would regard literary property was a question pressed by the burgeoning commercial dynamics of the new print culture and its almost immediate impact on politics and culture England in late eighteenth and early nineteenth centuries, a period marked by rising literacy, the emergence of dynamics of mass consumption, and easy access to wide range of publications. The initial application of the still relatively unsettled laws of property to the newly-conceived notion of authorial rights springing from the Statute of Anne was an awkward fit at best, most noticeably as copyright law

48 See, e.g., Mark Rose, Authors and Owners: The Invention of Copyright (1993).
was then obligated to accommodate its objectives to the apparently contrary purposes served by criminal libel laws applied to literary works considered seditious, blasphemous, or immoral. The authors of the Statute of Anne wanted to establish statutory protection of proprietary rights, primarily for publishers who had been consigned common law publishing rights by authors. Their approach was akin to the system that had evolved under the Licensing Acts of 1662, 1692, 1694, and 1696 but which the expiration of the Licensing Act of 1696 had left unregulated. The Statute, however, was prefaced by language that encouraged learning by monopolistic practices enabled by the Stationers’ company charter. In no sense did the drafters of the Statute envision regulating content or considering a work’s impact on the public welfare, other than the presumption that broader access to publication would widen the public’s access to knowledge and learning. The Statute’s focus was thus narrow and procedural, only later in application raising issues related to the content of protected works—especially whether works of potentially libelous content might nonetheless contribute to learning or tend to undermine social order.

Further complicating the search for direction after the Statute of Anne took effect was the often incomplete juxtaposition of statutory and common law copyright and criminal libel law, especially when statutory law was inadequately defined and common law practice seemed to dictate directions contrary to it. Authority over these issues was fragmented by the jurisdictional separation between English courts of law and courts of equity, which resulted in cases of literary property that were or could have been claimed at law, of equity, or both. This in turn raised the vexing questions of whether equitable rulings


53 For example, the juxtaposition of crimes of public nuisance and immorality reflected in *Le Roy v. Sr. Charles Sidley*, (1663) 82 Eng. Rep. 1036 (K.B.), where the defendants’ engagement in public blasphemy and lewd behavior from the balcony of a public inn did not merely cause a
regarding potentially illicit works could be considered authority in criminal proceedings, and vice versa, and, more tangentially, the degree to which juries in criminal cases could render judgments on or even consider questions of law, such as the intent behind and consequence of illicit content.

In effect, issues regarding illicit content under copyright law intersected with doctrines of criminal libel long before the passage of the Obscene Publications Act of 1857, the first English statutory attempt to codify common law regarding obscene libel. By that time, fixed rules regarding equitable applications of the Clean Hands Doctrine to copyright infringement cases had already been established in a series of rulings by Lord Eldon during his tenure as Lord

---

54 ALEXANDER, supra note 18, at 74. The expanding use of precedent in court hearings before and during this period was facilitated by its documentation initially in published nominate reports in whole or abridged fashion, and the later legal treaties compiled and classified prior rulings and their underlying legal reasoning. See, e.g., MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760–1850 (1991) (discussing the increasing common law reliance on legal treatises).

55 See JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 229–35 (2004) (discussing the expanding role of jury trials and the context and impact of the passage of the Fox Libel Act). In most cases, Lord Eldon acknowledged that courts at equity had the authority to determine questions of fact, but he followed what he portrayed as common practice of referring any reasonable doubt regarding facts to a legal court and jury, as in O'Connor v. Cook, (1802) 31 Eng. Rep. 1247 (Ch.) 1250–51 (“[i]f any reasonable doubt has been raised upon it in the evidence, it has been of late thought wise and discreet to send the question of fact to a Jury.”). Eldon later qualified this in Hampson v. Hampson, (1814) 35 Eng. Rep. 395 (Ch.) 395, arguing that verdicts in the law courts were advisory and not compelling: “Courts of Equity have an original Jurisdiction, which, I agree, must be exercised according to a sound Discretion; to try Questions of Fact without the Intervention of a Jury; and which Aid is sought, according to the common Expression, for the purposes of informing the Conscience of the Court.” See also John Langbein, Fact Finding in the English Court of Chancery: A Rebuttal, 83 YALE L.J. 1620 (1974) (arguing that equity courts exercised fact-finding authority in cases in which they shared subject matter jurisdiction with law courts, and by accepted practice, verdicts regarding factual disputes delegated to law were considered advisory and non-binding).

Chancellor (1801–1826), indelibly identifying him with adopting the principles of the Clean Hands Doctrine into copyright law. However, Eldon grounded those decisions on the authority of a previous ruling by Justice James Eyre in Dr. Priestley's Case, a damages claim heard by Eyre as Chief Commissioner of the Great Seal that remained unpublished in nominate form until reported arguendo in Southey v. Sherwood twenty-five years later. Joseph Priestley, a noted scientist and republican activist, sued for damages caused when a mob burned his house, library, and laboratory during the Birmingham riots in 1791. Eyre is reported to have admitted evidence that Priestley's previously published writings often criticized the government and had been seditious in nature. He counseled the jury that if the unpublished manuscripts Priestley had lost in the riots were of the same nature and could be considered seditious libel, a criminal offense at law, Priestley could not claim property in them. Thus instructed, the jury awarded Priestley damages for the physical property lost but no value for the unpublished manuscripts.

The underlying issue was whether Priestley could claim property in his unpublished manuscripts, the precondition in any such claim under common law. As the manuscripts had not yet been published and were therefore beyond criminal prosecution as a seditious libel, the manuscripts would have been

57 See Pound, supra note 41, at 275–76; Chafee II, supra note 28, at 1067–1070; Edward S. Rogers, Copyright and Morals, 18 Mich. L. Rev. 390, 392 n.4 (1920); Alexander, supra note 18, at 74–79; Paul M. Zall, Lord Eldon’s Censorship, 68 PMLA 436 (1953); Phillips, supra note 56, at 140–44; Bonnie Wilkinson, Recent Development, 46 Fordham L. Rev. 1037, 1038–41 (1978). Story accepted that public policy precluded copyright protection for illicit works, and that equity courts would not interfere to aid a plaintiff if real doubt existed and would instead leave him to remedies at law. However, Story also found that Eldon exceeded appropriate discretion by denying equitable relief to works that raised any level of doubt, in effect challenging plaintiff’s title on a small pretense: “there is great difficulty in adopting this doctrine, denying the protection of an injunction in matters of property upon mere doubts.” II Joseph Story, Comments on Equity Jurisprudence § 936, p. 213, n.1 (1836).

58 There is no published nominate report for Dr. Priestley’s Case, merely its mention in Lord Eldon’s ruling in Southey. The hearings on the Birmingham riots damages that were held in the Assize at Warwick in April 1792 were reported in The (London) Morning Chronicle, no. 7125, April 9, 1792, and summarized in Robert Schofield, The Enlightened Joseph Priestley 298–99 (2004). Records of the Warwick Assize prior to 1860 were destroyed, and whether manuscript notes on the Priestley hearing exist is unknown.


60 Art. VI. – Cases of Walcot v. Walker; Southey v. Sherwood; Murray v. Benbow, and Lawrence v. Smith, 27 L. Q. Rev. 123, 125–26 (1822) [hereinafter Art. VI]. While the author of Art. VI is not identified, it is widely assumed to have been Nassau William Senior, an Eldon critic.

61 Id.

62 Id.
considered under common law to be the exclusive property of the author or his consignee until published, after which any proprietary interest would have been governed by the Statute of Anne. Whether the manuscripts had specific (and recoverable) literary value at law was a different issue. Eyre arguably prejudiced its consideration by directing the jury on the nature of some of Priestley's previous writings and by declaring in dictum that there could be no property in such writings.

Eyre's dictum left unanswered why such writings should be considered ineligible for recognition as property. One possible explanation was that certain literary works, based on the nature of their content, were ineligible for consideration as literary property altogether. Clearly, the language of the Statute of Anne did not preclude any types of works from eligibility for copyright protection as long as the formal requirements for registration were met. While the preface to the Statute identified its purpose as "the Encouragement of Learning," the Statute contained no language to indicate that was an intended restriction or precondition. Regardless, Priestley claimed literary property, not copyright protection, and as the manuscripts were unpublished, the only issue was whether they had legally recognizable literary value. Save a finding of criminality, which still may not preclude recognition of property under common law, Eyre's dictum seemed simply arbitrary, perhaps reflecting a personal bias against challenges to the government.

Alternatively, Eyre's dictum could have been based on the assumption that, even if the manuscripts were considered literary property under common law, they could not be accorded recoverable value without compromising the court's own integrity as a source of not only individual but also societal justice. The issue would then be whether the plaintiff had property in his unpublished work...
under common law and, if so, whether the court would extend protection to that property. The former is a procedural issue regarding standing to sue, and the latter is a policy issue debating the balance to denying a plaintiff's (rightful) claim based on the inequity that may result against the damage such a decision might inflict on the court's integrity. Fundamentally, this became a policy debate over whether works of illicit nature could enjoy copyright protection at all and, if not, whether equity courts could even hear cases involving such works because, as Hardwicke and Eldon stated, the court in such cases had no remedy for the plaintiff. In this sense, Eyre anticipated that Priestley's manuscripts would constitute criminal behavior (as seditious libel) but could not have been prosecuted as such until published. Yet, for the court to award damages for that type of literary property would have appeared to countenance criminal writings and their authors' right to publish them, an arguably inequitable (or more broadly anti-social) result, in direct violation of the Clean Hands Doctrine.

Priestley's property claim revealed the range of elements involved in the protection of literary property, specifically whether the plaintiff's property was

---

65 See supra notes 23–24 and accompanying text.

66 The case law tended to address this issue depending on the court's view of whether legal doctrine was more consistent with a more rigid or moderated view of property. The former held that one cannot "have (copyright) property in (like obscenity) in which the law will not allow one to have property." Dan W. Schneider, Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity, 51 CHI.-KENT L. REv. 691, 702 n.65 (1975). The latter held that while the obscene nature of one's property does not abrogate one's property interest in it, it does nonetheless prohibit the court from enforcing it by discretionary judgment regarding the balance among the plaintiff, the defendant, and the public interest. See Phillips, supra note 56, at 141–43. The moderated "public policy" view was in fact introduced arguendo by the defense in its petition for retrial in Stockdale v. Onwhyn, (1826), 7 Dowl. & R. 625 (K.B.) 626 [hereinafter Stockdale II-RD] ("The property in the work is the same, whether the work itself is good or bad . . . the question here, however, is, whether such a work is wholly unentitled to protection in a court of law . . . no such decision has even yet been come to."). While this issue was scarcely broached until Glyn v. Weston Feature Film Co., (1915) 1 Ch. 261, the moderated view obviously governed, as reflected in the tendency of the English equity courts to defer question of property to the law courts, effectively precluding equity courts from administrative authority to deny obscene materials copyright registration.

67 Ironically, for Priestley to claim damages, he would have had to argue that the manuscripts would have an estimable market value if subsequently published—value lost when they were destroyed. He could only do this by demonstrating a market value comparable to that of other works he had published, the nature of which would then be ascertainable as a matter of fact by a jury, a risky business if the works' content were of republican sentiment similar to those read in Eyre's court. While Priestley could have argued that the manuscripts had value to him personally, it was far too early in the evolution of copyright law to advance a "personhood" argument in valuing literary works. See, e.g., Margaret Jane Radin, Property and Personhood, 34 STAN. L. REv. 957 (1982).
fixed in a physical manifestation (and therefore granted a right based on possession of a tangible item); the ideas contained in it (the authorial right); the exclusive disposition of it (the copyright); and its market value if lost, stolen, or interrupted (the proprietary right). The intimation that Priestley's writings were criminal spoke only to the proprietary right, presuming he could not sell them because of their criminality such that they could have no market value. Only if Priestley published the writings or publicly gave indication he intended to do so would the nature of the writings become subject to criminal prosecution as threatening third parties, i.e., the public at large. Had Priestley's writings been pirated, regardless of whether or not he claimed a copyright in them, the publisher himself would have become subject to criminal action. 68

If based on public policy concerns, the Eyre dictum in Priestley was arguably the first application of the broader clean hands maxim to literary property, 69 in that the plaintiff sued for damages caused by the loss of the proprietary value in his unpublished manuscripts. The first published reference to Eyre's dictum was an implicit statement by Eldon of its underlying principle in Walcot v. Walker 70 ten years later, probably the first overt acceptance of what evolved into the Clean Hands Doctrine as applied to copyright. 71 In what became an iconic statement of this application, Eldon held:

68 As was the case in R. v. Clark (K.B. 1821), as reported in TIMES (London), no. 11426, Dec. 11, 1821, at 2; see infra note 216. In this sense, the OPTF could have more easily prosecuted Kaytel Video Distribution rather than John Stagliano for distributing Stagliano's Evil Angel videos, which perhaps it should have done, as the criminal charges against Stagliano inevitably collapsed when the OPTF was unable to link him to the distribution of the videos and the presumed public harm caused thereby. United States v. Stagliano, 729 F. Supp. 2d 215, 217 n.2 (D.D.C. 2010).

69 While Pound and Chafee seem to trace the first application of the maxim on the equity side to Eyre's ruling on a surety as Baron at Exchequer in Dering, see supra note 41, only Priestley involved issues related to literary property, however implicitly.

70 (1802) 32 Eng. Rep. 1. (Ch.).

71 Arguably Burnett was the first case that reflected the principle behind the doctrine, maintaining that the effect of allowing works of such an illicit nature to be distributed publicly would harm the public welfare. Burnett v. Cherwood, (1721) 35 Eng. Rep. 1008 (Ch.). In the process, the right of the author, clearly established under the Statute of Anne, was ruled subordinate to the court's obligation, in its “superintendency of all books ... to restrain the printing and publishing of any that contained reflections on religion or morality.” Id. at 1009. While largely ignored as precedent because it assumed a jurisdiction beyond equity's traditional role, Burnett at least implicitly raised the issue of whether the public itself had an equitable interest that the court had an obligation to consider. See also Walcot, 32 Eng. Rep. at 1 (embodying the first equity ruling to explicitly deny that an author had the legal right to assert property in a work based on its nature, albeit as an intermediary step in the proceeding).
If the doctrine of Lord Chief Justice Eyre (Dr. Priestley's Case, see 2 Mer. 437) is right, and I think it is, that publications may be of such a nature, that the author can maintain no action at law, it is not the business of this Court, even upon the submission in the answer, . . . that the author can maintain no action at law for the invasion of that, which he calls his property, but which the policy of the law will not permit him to consider his property. 72

Eyre’s dictum in Priestley, also cited as authority by Eldon in Southey v. Sherwood, 73 was arguably a simple matter of applying a maxim of contract law to a tort recovery of damages; the Birmingham Committee of One Hundred had been negligent in protecting Dr. Priestley’s property and was thus liable for its loss. At issue was the calculation of the value of what was lost—his house, scientific lab, instruments, books, and papers—and specifically whether the unpublished manuscripts among his papers had any equitably recoverable value beyond the expense involved in their production (paper, ink, etc.). If these were to be considered within the value of his lost property, Priestley would have had to claim that his manuscripts had value in the labor he had invested in them and perhaps commodity value in which he held property (“literary property”) under common law. 74

72 Walcot, 32 Eng. Rep. at 1. That Eldon was familiar with Eyre’s ruling in Priestley despite the absence of a published report is hardly surprising, as the small coterie of judges at law and equity continuously collected and studied manuscript reports and debated points of law amongst themselves and with the restricted number of barristers authorized to argue before them. See John P. Dawson, The Growth and Decline of English Case Law, in The Oracles of the Law 1–99 (1968) (describing the early development of the legal profusion and court reporting). Moreover, Eyre had presided over the famous treason trials of 1794, in which Eldon had, as attorney general, served as prosecutor. See also Thomas Pfau, Paranoia Historicized: Legal Fantasy, Social Change, and Satiric Meta-Commentary in the 1794 Treason Trials, in Romanticism, Radicalism, and the Press 30, 36–42 (Stephen Behrendt ed., 1997) (describing the roles played by Eden and Eyre in the 1794 treason trials). Eldon succeeded Eyre as Chief Justice of the Court of Common Pleas in 1799. It is unknown whether Eldon had mentioned Priestley explicitly in his Walcot ruling or whether court reporter Francis Vesey Jr. had added the parenthetical notation to Priestley in his published nominate report over twenty years later as a clarification of Eldon’s oral reference to Eyre. 73

74 Southey v. Sherwood, (1817) 35 Eng. Rep. 1006 (Ch.) 1008 (“[A] distinction has been taken, to which a considerable weight of authority attaches, supported, as it is, by the opinion of Lord Chief Justice Eyre, who has expressly laid it down that a person cannot recover in damages for a work which is, in its nature, calculated to do injury to the public. Upon the same principle, this Court refused an Injunction, in the case of Walcot v. Walker . . . .”). This would have made Priestley the first case of literary property under the Clean Hands Doctrine, at least by implication. With no published record or unpublished manuscript report of the hearing, however, we cannot know whether Priestley explicitly made such a claim at Assize. Presumably, Priestley’s property in his unpublished manuscripts or journals, had they been of
Eyre’s intimation that there might not be property in Priestley’s unpublished manuscripts did not deny that their literary value could be recovered by an action for damages at law. Instead, he suggested that the nature of his previously published writings, lauding republican values and hence considered to be of seditious tendency in the tumultuous 1790s, probably would have disqualified those writings from being considered property. 75 In this, Eyre was stating a principle implicitly derived from previous holdings at law: the law does not protect literary works that threaten the public welfare. That Priestley may have been disqualified from relief because the property at issue may have been of a criminal nature involved several rather obvious interpretive leaps. On the most superficial level, it assumed that the lost writings may have been seditious, similar to some of his published writings that were read in court, and therefore potentially criminal. 76 This was of course supposition, as the court had not yet reached a finding of law regarding the seditious nature of the manuscripts (nor was this even possible, as they had been destroyed). Notwithstanding, those writings could just as easily have been of a scientific nature and hence not libelous. On a more general level, it assumed that if those writings were found seditious as a matter of law, they would have been disqualified from consideration as property for reasons of public policy, a somewhat strained extension of the Clean Hands Doctrine to literary property. 77

illicit tendency, could have had no legally recognizable market value because it was illegal to sell such materials, rendering the only recoverable value to be the tangible material cost of the paper and ink. Clearly, the only way for Priestley to counter the charge that his writings would have been considered illegal was to place them in the marketplace and to see if criminal charges could be successfully maintained against them. Short of that, the value of his writings could only be estimated by establishing a market value for similar published writings, assuming he could specify their subject matter to the satisfaction of the court.

75 Art. VI, supra note 62, at 125 (“Unhappily that court is sometimes obliged to refuse its interference, and in the cases in which that interference appears to us to be peculiarly needed. The ground of its refusal is, that the jurisdiction of the court is confined to the protection of property, and that there can be no property in what is publicly injurious.”).

76 The definition of seditious works broadened or narrowed depending on political winds of the time. In periods of political unrest, such as the 1790s which saw the publication of Paine’s Age of Reason through the first two decades of the nineteenth century, especially after the Peterloo massacre in 1819, publishers were prosecuted not only for works that were critical of the Church or Crown but also for works that were more generally sympathetic to republican virtues or open to a broad debate over the meaning of scripture.

77 At the time, not all scientific writings were considered wholly innocent. Those that implicitly or explicitly challenged biblical authority, notably those based on the theories of Charles Darwin, easily could have been within the reach of criminal charges of blasphemous libel, as was the case of Thomas Burnett’s controversial Archaeologia Philosophica. See supra notes 19–22 and accompanying text (describing ARCHAEOLOGIA PHILOSOPHICA, in which the author attempted to reconcile his view of the geological evolution of the earth with the account of the Great Flood in the Book of Genesis,
Parallel to this, Eyre's ruling in *Dering v. Earl of Winchelsea* has been interpreted as qualifying the underlying equitable principle enunciated in his dictum from *Priestley* several years earlier, again by dictum. The plaintiff's brother, Thomas Deering, had entered into bonds with his brother, Edward, and two others and upon his insolvency, saddled the plaintiff, Edward, with the obligations, causing him, in turn, to sue the others to force their equitable contribution. In response, they argued that Edward was complicitous in his brother's insolvency and that such behavior precluded his ability to seek equitable relief. He sought relief, in effect, with "unclean hands." While the case had little to do with literary property, much less property of any kind, Eyre took the opportunity to restate the broader clean hands maxim already established in cases of this type. Moreover, he also stated that the plaintiff's disqualifying immoral behavior must be directly related to the claimed inequitable circumstance from which he was seeking relief or, more heinously, had interfered with, disrupted, or had by other means tainted the court's consideration of that relief, likely producing an inequitable or immoral consequence eventuating from the court's ruling, which would compromise its integrity as a court of conscience.

intimating that Biblical stories were allegorical). Posthumous publication of the work in English was enjoined because it contained "strange notions." Burnett's writings were already controversial with the publication in English of his *The Sacred Theory of the Earth*, in which he attempted to explain the Biblical Flood in strictly scientific terms, and to which *Archaelogida Philosophica* could be considered a philosophical extension, as detailed by Luciano Malusa, *Thomas Burnet (c. 1635–1715): Archaeologia philosophica*, in 1 MODELS OF THE HISTORY OF PHILOSOPHY, FROM ITS ORIGINS IN THE RENAISSANCE TO THE 'HISTORICA PHILOSOPHICA' 330–69 (C.W.T. Blackwell & Philip Weller eds., 1993). See generally Ronan Deazley, *Commentary on 'Burnet v. Chetwood' (1721)*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bendy & M. Kretschmer eds., 2008), at http://copy.law.cam.ac.uk/cam/commentary/uk_1721/uk_1721_com_97200714442.html; David Saunders, *Copyright, Obscenity and Literary History*, 57 ENG. LIT. HIST. 431, 434–35 (1990).

*1 ([Vol. 20:209](https://digitalcommons.law.uga.edu/jipl/vol20/iss2/2))

---

78 (1787) 29 Eng. Rep. 1182 (Exch.). Chafee initially identified the "clean hands maxim" as a reflection of an established general principle, Chafee I, *supra* note 28, at 880–81, but then later in his discussion of *Priestley* referred to Eyre as "the coiner of the clean hands maxim," Chafee II, *supra* note 28, at 1067, and the maxim as "exactly as old as the United States Constitution," Chafee I, *supra* note 28, at 880, dating it to *Dering*. While the general maxim obviously predates Eyre's rulings, the condition that one's inequitable behavior must be directly related to an injury done to the defendant is doctrinally traced to *Dering*. The rulings in both *Dering* and *Priestley* reflect Eyre's presumption that the maxim itself had already been established as an equitable principle.


80 Id.

81 Id.

82 See Phillips, *supra* note 56, at 143 (identifying this "tainting theory" as distinct from the Clean Hands Doctrine, the former a refusal to "delve into areas in which exercise of [the courts'] equitable jurisdiction will bring about a miscarriage of public policy" and the latter a condition on
The copyright implication of Eyre’s dictum in *Dering* though considered significant to affirmative defenses, is actually less clear since in most cases, a plaintiff’s complicity in inequitable behavior would be automatically manifest in the evil tendency of the work at issue. In *Priestley*, however, Eyre did not follow the logic of that dictum when he directed the jury that property in illicit works, such as ones that Priestley had penned in the past, could not be legally recognized. In effect, Priestley’s inequitable behavior was not related to his unpublished manuscripts of undetermined content but rather to his general pattern of publishing assumedly seditious works, revealing an illicit motive.

The issue of whether the content of literary property disqualified it from protection as property was also argued in two oft-cited contemporaneous cases at law. In *Fores v. Johnes*, the plaintiff sought recovery of payment for print caricatures he had delivered on consignment. The defendant had refused both to accept them and to pay, maintaining that the caricatures were, unbeknownst to him previously, obscene and immoral (by which he meant satirical and libelous, as caricatures of that period were inclined to be). In language the tenor of which would become relatively standard throughout the Eldon period, Justice Lawrence ruled nisi that the value of the caricatures could not be recovered until the plaintiff established that he had property in them and was owed their value pursuant to an agreement, which would have been unsupportable if they were found to be illegal. The dilemma was, of course, that if a court at law denied a plaintiff damages because it judged the plaintiff’s work to be obscene and immoral as a matter of fact, the plaintiff might then become subject to subsequent criminal prosecution, as the prevailing standard for obscene and immoral works was far from clear and would cause an unpredictable jury trial.

---

83 *Dering*, 29 Eng. Rep. at 1184 (holding that a plaintiff’s inequitable and thus compromising behavior must be directly related to publication of the work at issue rather than simply a reflection of his previous published writings or his general comportment).


85 Id.

86 Id. at 655 (“For prints, whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel.”). Justice Lawrence was reported to have continued: “For publishing such, Mr. Fores might be standing there as a criminal, and the law would never allow him to recover their value as Plaintiff in a civil action,” *Morning Chron.* (London), no. 10217, Feb. 17, 1802. Arguably, the plaintiff could have been criminally prosecuted even if he merely showed a work to a potential client prior to sale and delivery, indicating an intent to distribute. *See Wilks v. R.*, (1769) 2 Eng. Rep. 244 (K.B.).

87 *See Fores v. Johnes*, (1802) 170 Eng. Rep. 654 (K.B.). One could argue that *Fores* was simply
Similarly, in *Dubost v. Beresford*, an artist sued for damages resulting from the defendant’s destruction of his painting, which was being displayed in a public exhibition and which the defendant considered libelous and affronting to his sister and brother-in-law. Following *Fores* and consistent with *Walcot* and, in turn, with Eyre’s dictum in *Piestley*, Lord Ellenborough, C.J., ruled nisi that there could be no value in libelous works. He advised the jury that the painting could not be considered a work of art (for which a market value could arguably be estimated) and to award the plaintiff only the value of the lost canvas and paint. As in *Piestley*, the Court made a supposition regarding the a matter of an illegal and thus unenforceable contract, the product having illicit content unknown to the plaintiff. Similarly, in *Gale and Fenner v. Lackie*, plaintiffs were printers suing for non-performance of a contract to deliver the remaining parts of a manuscript, the publication of which the defendant unsuccessfully argued would have made him subject to prosecution for seditious or blasphemous libel since it criticized both the government and the Pope, an eventuality for which he provided no documentary evidence. Also, in *Popelett v. Stockdale*, plaintiff sued to recover expenses from his printing of the salacious *Memoirs of Harriette Wilson*, to which publisher Stockdale counter-argued that assistance at law could not be sought because the work itself was pernicious, and the plaintiff was nonsuited nisi. Ironically, in a separate action, Stockdale had sought damages at law for copyright infringement of the same work under the Statute of Anne, a claim easily rebutted by the defendant using the same “obscenity defense” (“This is a work that the law will not protect... Every one who comes to seek protection of the law for his property, must shew that property to be worthy of that protection [however] this work is professedly bad, and cannot be defended in any way.” *Stockdale II-RD*, supra note 66, at 76. When Stockdale moved for retrial, his argument was summarily rejected by Lord Abbott. *Id.* at 78 (“If the plaintiff had no right to sell, how can he maintain an action. Every party concerned with ushering such a book into the world, has committed an offense against decency.”).  

---

89 *Id.* Antoine Dubost, a French neo-classical painter of mythological motifs, was commissioned by art patron Thomas Hope to paint a portrait of his wife and son. During its rendering, Hope was constantly dissatisfied with the work, precipitating very public criticism of Dubost’s talent by Hope’s friends in the Royal Academy. In apparent retaliation, Dubost painted and publicly displayed a satirical caricature “La Belle et La Bete” (The Beauty and the Beast), bearing the clear likenesses of Hope and his wife as the principals, and causing Mrs. Hope’s brother to attack and mutilate it, an arguably expected response to a public libel. See Sayre MacNeil, *Some Pictures Come to Court*, reprinted in *HARVARD LEGAL ESSAYS* 247–71, 250–56 (1934); Richard E. Spear, *Antoine Dubost’s ‘Sword of Damocks’ and Thomas Hope: An Anglo-French Skirmish*, *BURLINGTON MAG.*, Vol. 148, Aug. 2006, at 520–27.
91 Obviously, Ellenborough was not rendering an aesthetic judgment about the painting but rather dismissing its capacity for artistic value in damages based on its libelous content, albeit having never seen it himself. “If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture.” *Id.* at 1235. In other words, the value of the work, a combination of labor invested and creativity embodied, was lost because the result was considered libelous. Dubost claimed that his painting should be valued comparable to the current market value of his other artistic works, each averaging in excess of £800. In this case, as in
libelous nature of the work, which in this case was based on testimony of those who saw it and on the actions of the defendant in destroying it.92

It is clear, then, that the broader notion of the clean hands maxim easily predated the Eyre dicta in Priestley and Dering, and perhaps even the range of law and equity cases that were to become clustered under one or more of Francis's Maxims of Equity under the rubric of "clean hands."93 In fact, several of

92 To lend authority to his presumption that the painting was libelous, Ellenborough took the extraordinary (and extra-legal) step of asserting that Lord Chancellor Eldon would most assuredly have declared the painting a libel had the defendant instead raised a complaint at equity ("Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it."). DuBost v. Beresford, (1810) 170 Eng. Rep. 1235 (K.B.). He thus implied (incorrectly) that Eldon would have been inclined to render a decision based on content prior to a hearing at law. In fact, Eldon was purposefully careful in Gee to confine himself to "facts of which the Court can take notice, as a case of civil property, which it is bound to protect," and to specify his jurisdiction "to be, if not entirely, mainly, relative to the question, whether the plaintiff has or has not, property," Get v. Priestbard, (1818) 36 Eng. Rep. 670 (Ch.) 674, 677, a position that explicitly followed Hardwicke's ruling seventy years earlier in Reach v. Garvan, (1742) 26 Eng. Rep. 683 (Ch.) 683: "[f]or whether it is a libel against the publick or private persons, the only method is to proceed at law." Eldon also thereby followed his own ruling in Ex parte Jones, (1805) 34 Eng. Rep. 1121 (Ch.) 1121 ("[I]t was agreed, that a court of equity has no cognisance of a libellous publication, unless it amounts to a contempt of the court," which was subsequently affirmed in rehearing by Erskine, L.C., in Ex parte Jones, (1806) 33 Eng. Rep. 283 (Ch.).) On the substantive issue, however, Eldon grudgingly followed Hardwicke's ruling in Pope v. Carl, (1741) 26 Eng. Rep. 608 (Ch.), finding sufficient property in the plaintiff's private letters to maintain an injunction:

I should have found it difficult to satisfy my mind that there is property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me . . . The doctrine of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances in each case.

However, while the principle that questions of fact should be deferred to the law courts was established in Hardwicke's time and held as authority consistently by Eldon, it later became subject to broader interpretation regarding privacy and defamation. See, e.g., Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 HARV. L. REV. 640, 641-48 (1916).

93 FRANCIS, supra note 26. None of the reported cases which Francis cited as precedent contained phraseology akin to that found in his maxims, and in many cases the connection between the underlying principles of those rulings was at best obtusely related to the broad notion that "no action arises out of an illegal transaction." Other Francis maxims, such as "he who seeks equity must do equity," may seem inconsistent with the clean hands maxim, which refers to plaintiff behavior prior to a claim, whereas the "do equity" admonition appears to refer
Francis's maxims were often used interchangeably in later references to the Clean Hands Doctrine. However, Eyre's dictum in Priestley precipitated, albeit tenuously, a connection between the doctrine and issues of copyright infringement under both common law and the Statute of Anne. While Eyre's direction to the jury was generally in keeping with a line of previous rulings of law and equity, it was hardly a sufficient bedrock for the application of the Clean Hands Doctrine to the statutory protection of literary property under copyright. For that, we must turn directly to the rulings of Lord Eldon.

IV. THE ORIGINS OF THE OBSCENITY DEFENSE

It is commonly assumed that the establishment of the Clean Hands Doctrine in equity and the affirmative "unclean hands" (or obscenity) defense it spawned are attributable to the chancery rulings of Lord Eldon, particularly to subsequent behavior. Yet, this is not as problematic as it seems, if the maxims collectively reflect a continuum of inequitable and/or illegal behavior subject to injunction. Chafee II, supra note 28, at 1095-96. Whether these maxims add up to a doctrine, or rather to what Chafee referred as "loose bundle[s] of separate defenses which somewhat resemble each other," id. at 1092, further complicates our consideration of the precedent value of Mitchell Brothers. Chafee himself presented a categorization of types of suits that arise under the Clean Hands Doctrine (in effect, eighteen "bundles"), with one cluster involving plaintiffs seeking injunctions against torts, such as in suits to protect literary property and copyright. Chafee II, supra note 28, at 1065-70. While he identified a cluster of five types of suits that arise under the exclusive jurisdiction of equity, virtually all commonly-cited precedents in clean hands cases come from areas of concurrent jurisdiction, specifically clustered as those regarding specific performance of contracts, Chafee I, supra note 28, at 893-904, and those seeking injunctions against torts, Chafee II, supra note 28, at 1060-91.

94 See, e.g., ALEXANDER, supra note 18, at 68 ("Lord Eldon established the principle that no copyright would subsist in immoral, libelous or blasphemous works."). We must be duly cautious about interpreting Eldon's rulings, as nominate reports were selective, third-party accounts regarding counsel arguments and the judge's oral decree, which may or may not have offered insight into the judge's reasoning or sources he took into consideration. Often completely devoid of contextual specification, reports frequently focused on procedural matters, the explication of which may have been editorial. Interpretation of a ruling was better facilitated if a case was covered by more than one nominate reporter, which occurred in several of Eldon's later cases. See John Leubsdorf, The Structure of Judicial Opinions, 86 MINN. L. REV. 447 (2001). Also helpful would be letters, case manuscripts or copies, or journal notations reflecting on cases heard, but unlike Hardwicke before him, Eldon was not prolific in this regard. While his Judicial Notes, 1801-1821 (11 vols.) contain detailed case notes on proceedings—mostly fact information and arguments offered by each counsel regarding cases mostly between 1802 and 1813—the only copyright infringement case mentioned is O'Conner v. Cook, (1802) 31 Eng. Rep. 1247 (Ch.) 1250-51, which references numerous nominate reports before concluding, "Where there is a reasonable doubt before you [arrow] to the prejudices of a jury and a judge of a jury" (Vol. II, p. 220). There is no mention of other copyright infringement cases, most notably Walcot, heard that same year.
his embrace of Eyre’s statement that the general principle in Priestley governed in Walcot.95 Plaintiff John Walcot,96 author of highly popular satirical verse and lyric odes under the pen name of Peter Pindar, sought permanent injunctive relief against his former publisher, who admitted unauthorized publication of Pindar’s works but argued that the satirical nature of the works rendered them libelous and ineligible for equity relief.97 Walcot’s notoriety for vivid caricatures in scurrilous allegories successfully skirted criminal prosecution for seditious libel by focusing on the personal lives of notable people (such as the Royal Family or Prime Minister William Pitt) rather than criticizing their policies or their public behavior.98 The period of Walcot’s highest popularity was the decade following 1785, during which even the King and the Prince of Wales were said to be avid followers, and his works were rampanty pirated, with legal action brought against several who quickly settled.99 As the piquancy of his work inevitably waned, Walcot reached an agreement with his publishers for the rights to his collected works in return for an annuity. He unsuccessfully attempted to litigate the terms of this agreement in Walcot, after which their agreement was reworked.100

Citing Eyre in Priestley, Eldon declared that he was unable to issue an injunction against Walker because it was unclear whether Walcot had property in his works.101 Eldon agreed with the general principle he attributed to Eyre—that one could not have property in libelous works—and admitted to having no knowledge of the content of the works at issue, ruling procedurally that his court had no jurisdiction to make a factual ruling on their nature, which he then

96 John Walcot (1738–1819) was listed as the plaintiff in the bill of complaint; however, Vesey’s published nominate report misspelled his name as Walcot and that spelling endured.
97 See Noah Heringman, “Manlius to Peter Pindar”: Satire, Patriotism, and Masculinity in the 1790s, ROMANTIC CIRCLES PRAXIS SERIES (May 2006) (describing Walcot’s evolution as a political satirist and his careful avoidance of the boundaries of libel law).
99 Kerr, supra note 98.
100 Id.
101 Walcot, (1802) 32 Eng. Rep. at 1. Similarly, two months before his ruling in Walcot, regarding whether the defendant had concurrent authority with the King’s Printer to publish Bibles and prayer books in England and Scotland, Eldon maintained “in cases of this sort the universal rule is, that, if the title is not clear at law, the Court will not grant or sustain an injunction, until it is made clear at law.” Univs. of Oxford & Cambridge v. Richardson, (1802) 31 Eng. Rep. 1260 (Ch.) 1268.
deferred to the courts at law. This set a basic pattern of fact-finding which Eldon was to follow in all copyright infringement cases, not merely in those involving literary works of questionable tendency. Walcot, however, involved two separate works that had to be treated differently, as one had not yet been published. Defendant Walker had in fact already published one unauthorized volume of Pindar's work, was planning the next volume, and had advertised the availability of both. Referring to Walker's published octavo edition of volume 4 of Peter Pindar's Collected Works, Eldon ruled it was not possible to grant an injunction until after Walcot's rights had been tried, as "facts may alter the effect of the agreement at law." Eldon also held that "the Court ought not to give an account of the unhallowed profits of libelous publications" and granted Walcot "liberty to apply for an injunction" if he succeeded in proving his property interest.

102 Walcot, 32 Eng. Rep. at 1. See also Atty. Gen. v. Cleaver, (1811) 34 Eng. Rep. 297 (Ch.) 300; Crowder v. Tinkler, (1816) 34 Eng. Rep. 645 (Ch.) 647 (in which Eldon refused even a temporary injunction in cases of public nuisances lacking the prospect of imminent or irreparable harm, instead directing the issue of nuisance as a question of fact to law); Thomas R. Lee, Preliminary Injunctions and the Status Quo, 58 WASH. & LEE L. REV. 109 (2001) (describing the Chancery Court's efforts to enjoin only "irreparable injury" while freezing the interests at stake until they could be sorted out at law); John Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 530-34 (1978) (describing the dilemma faced by equity courts considering legal rights and the emergence of standard formulae for the granting of preliminary injunctions in situations where irreparable injury required review of merits and the "balancing of convenience"); Langbein, supra note 55 (clarifying that equity had and exercised fact-finding authority at the discretion of the Chancellor).

103 Alternatively, if a property right had previously been found in a case of like circumstances, Eldon tended to defer to that precedent. See Gee v. Pritchard, (1818) 36 Eng. Rep. 670 (Ch.) 677 (plaintiff argued that unauthorized publication of her private letters would "wound" her feelings, a tacit plea for equity to protect her against the potential of personal libel, which Eldon deftly reduced to a procedural question of whether she had property in her letters under common law: "with reference to the charges of wounding feelings, looking at the jurisdiction of the Court to be, if not entirely, mainly, relative to the question, whether the Plaintiff has or has not, property... "). Though Eldon had misgivings about the potential consequences of his ruling in Gee, he nonetheless accepted the authority of Hardwicke's ruling in Pope v. Curl, (1741) 26 Eng. Rep. 608 (Ch.), an opinion he found compelling, principally because it adhered to the general maxim and "ha[d] been acquiesced in without application to a higher court," Gee, 36 Eng. Rep. at 677, with the caveat that the plaintiff "has a sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it." Id. at 678. See Note and Comment, A Re-interpertation of Gee v. Pritchard, 25 MICH. L. REV. 889 (1927).

104 Kerr, supra note 98.

105 Id.


107 Id.
With respect to the planned but yet unpublished duodecimo edition of volume five of the *Collected Works*, arguably Walcot's property under common law rather than under the Statute of Anne, Eldon reported that he would review its nature, and “[i]f upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and, if doubtful, I will send that question to law.” While Eldon implied that he had authority to render a finding of fact on the moral nature of the work, he readily admitted that his conclusion had no authority at law but rather allowed him in principle to decide whether equity can appropriately afford relief. Still, he maintained that it was within his province to scrutinize the nature of the contested work for the purpose of determining its innocence of illicit inclination, which would confirm the plaintiff's eligibility for injunctive relief. Beyond that, the issue must be deferred to law. The critical point was that Eldon did not argue that Walcot was not legally entitled to property in the work but rather that his property right had yet to be established, rendering it a matter of jurisdiction as to how the sequence of actions should proceed.

That *Walcot* was a procedural ruling consistent with equity practices at the time was reinforced by the reporter Vesey's own supplemental reference to a copyright infringement claim heard in chancery three years earlier. In that

---

108 *Id.* In effect, Eldon ruled procedurally on the unauthorized publication of volume four, directing the plaintiff to file a damage claim at law before requesting equitable relief. He did not rule at all on the planned but yet unpublished piracy of volume five, reserving judgment on its potential illicit tendency until he could read it for himself.

109 *Id.* (“I will see these publications, and determine upon the nature of them...”).

110 *Id.* (“[I will decide] whether this is question enough to send to law as to the property in those copies... If upon inspection the work appears innocent, I will act...; if criminal, I will not act at all; and if doubtful, I will send that question to law.”).

112 In his published supplemental notes on *Walcot*, Vesey noted “[a]s to the grounds upon which, and upon which alone, a court of equity will interfere in cases of literary property, see ante, note 1, to Cary v. Faden, 5 V. 24.” *Walcot v. Walker*, (1802) 34 Eng. Rep. 971 (Ch.).

13 Cary v. Faden, (1799) 31 Eng. Rep. 453 (Ch.). In 1798, John Cary had published and registered *Cary's New Itinerary*, a road book that included material from Cary's own surveying structured after Paterson's *British Itinerary*, for which Francis Newbery held the rights. While Newbery complained publicly that Cary had plagiarized his work, he took no legal action but instead issued a twelfth edition of *Paterson's British Itinerary*, published by Faden, Longman and Rees, which added new material and copied parts of Cary's issue. Cary filed for an injunction at chancery under the Statute of Anne. While it appeared that each had borrowed from the other, it was clear that the nature of the material was such that any updating would appear similar in structure and graphics to previous issues with some modification. *Id.* The only questions were whether the modifications were significant enough to warrant classification as a “new work,” at that time a matter of unsettled law, see *Alexander*, supra note 18, at 182–89; and whether the defendant used plaintiff's material without *animus furandi* (larcenous or exploitive intention), a
case, Cary v. Faden, Eldon's predecessor, Lord Loughborough, found that the works of both plaintiff and defendant were in some measure products of piracy\(^\text{14}\) and refused the plaintiff's request for an injunction. Having only the options of either requesting a rehearing at equity or filing a damage suit at law to establish his rightful claim to property in the work, Cary opted for the latter, which sorted out the issue of consignment of authorial right and awarded Cary nominal damages.\(^\text{15}\) Both parties then retreated to publish updated versions of their works. Vesey's notation of Faden in his report on Walcot was revealing in that it referenced eleven cases that raised issues regarding proprietary rights to literary works, most of which had been re-directed by Lord Eldon to courts at law for resolution.\(^\text{16}\)

concept introduced by Lord Ellenborough, C.J., in Cary v. Kearsley, 170 Eng. Rep. 679 (K.B.) 680 [hereinafter Kearsley], which mirrored Lord Hardwicke's ruling in Gyles v. Wilcox, (1740) 26 Eng. Rep. 489 (Ch.) 490, and Mansfield's ruling in Sayre v. Moore, (1785) 102 Eng. Rep. 139 (K.B.) 140. Defendant Faden was put in the position of arguing that while Cary's work was duly registered, the court could not provide Cary relief because he had, in essence, "unclean hands" by having pirated much of the contents himself from another source.\(^\text{14}\) Cary, 31 Eng. Rep. at 454. After reviewing both works, Loughborough concluded that PATTERSON'S was the original and CARY'S "[took] a different line," thereby denying the injunction and admonishing both parties:

> If I was to do strict justice, I should order the Defendants to take out of their book all they have taken from the Plaintiff, and reciprocally the Plaintiff to take out of his all that he has taken from Patterson [sic]. I think, the Plaintiff may be contented, that a bill is not filed against him.

\(^{15}\) Id. This was one of very few circumstances in which a plaintiff was directed by chancery to law to establish legal property in a literary work and actually filed an action for damages. However, Lord Kenyon avoided the issue of whether Cary had property in his work based on its registration (and the subsequent dilemma of whether the Court could deny relief to a duly registered work) by accepting his claim to property based on the surveying consignment, a pyrrhic victory at best because Cary was awarded damages of one shilling. \(^\text{Id. at 614.}\)

\(^{16}\) Those cases included Cary, 31 Eng. Rep. at 453 (plaintiff's claim to property upheld at law based on his consignment of the labor on which the literary work was based); Southey v. Sherwood, (1817) 35 Eng. Rep. 1006 (Ch.) (Eldon ruling that whether property can be held in a possibly illicit work should be determined by a court at law); Hogg v. Kirby, (1803) 32 Eng. Rep. 336 (Ch.) (Eldon citing difficulties in determining authorship when the author is nominally fictitious could only be ascertained at law); Matthewson v. Stockdale, (1806) 33 Eng. Rep. 103 (Ch.) (Erskine, L.C., ruling that in absence of a response by the defendant, property in a work was determined by documentation of the labor invested in its production); Longman v. Winchester, (1809) 33 Eng. Rep. 987 (Ch.) (Eldon ruling that whether a plaintiff could claim a property interest in lists was a matter of law); Wilkins v. Aiken, (1810) 34 Eng. Rep. 163 (Ch.) (Eldon continuing a temporary injunction until the plaintiff filed an action at law); Platt v. Button, (1815) 34 Eng. Rep. 583 (Ch.) (Eldon ruling that property in dance music must be established at law before the plaintiff could apply for an injunction); Wyatt v. Barnard, (1814) 35 Eng. Rep. 408 (Ch.) (Eldon deferring the question of whether a translation can be considered an original work to a court of law);
In fact, Eldon’s ruling in *Wacot* had guided decisions in all eleven of those cases as well as others regarding copyright infringement, in effect solidifying his reputation as the judicial source of the Clean Hands Doctrine as applied to copyright.\(^{117}\) The most noteworthy of those was surely *Southy v. Sherwood*, in which Robert Southey, then poet laureate and pro-government essayist, pleaded for a chancery injunction against unauthorized publication of his heretofore unpublished three-act play *Wat Tyler*.\(^{118}\) Composed over twenty years earlier when he was twenty-one in concert with his friend William Coleridge, *Wat Tyler* presented a sympathetic, romanticized view of the Peasant Revolt of 1381 and was considered Jacobin and perhaps even seditious in tendency. Whether the piece would have been subject to criminal prosecution if it had been published in the turbulent 1790s, when the publishers of far more notable republican tracts, primarily the works of Thomas Paine, were tried for treason and sedition, is still doubtful, as the play was considered in hindsight a “ridiculously juvenile” and dismissible minor piece.\(^{119}\) It was not, however, published in the 1790s, when the prosecution of seditious publications was rampant and when Southey had achieved some notoriety as a radical poet of long epic works in the decade prior to his appointment as poet laureate in 1813. By 1817, he was known primarily for his political essays and commentary and for his reputation as de facto chief spokesman of the Tory government.\(^{120}\) That Sherwood and others chose to publish *Wat Tyler* in 1817 clearly demonstrates their intent to expose

---

\(^{117}\) See, e.g., *Shelley v. Westbrooke*, (1817) 37 Eng. Rep. 850 (Ch.). *See also infra note 206* (discussing Eldon’s ruling utilizing the Clean Hands defense during Percy Shelley’s child custody petition).

\(^{118}\) *Southey*, 35 Eng. Rep. at 1006.

\(^{119}\) *Hoadley*, *infra* note 77, at 95–96. This argument was extended by Coleridge in a series of letters to *Courier* (London), arguing in effect that the author was young and naïve or, alternatively, was presenting the work as a literary rather than political piece, easily dissected and dismissed by William Hazlitt’s commentary *The Courier and the Wat Tyler*, in *Examiner* (London), no. 483, Mar. 30, 1817, at 194–97.

\(^{120}\) The political rhetoric of the period was savage and intensely partisan, with Tory and Whig publications accusing writers on either side of Satanic and conspiratorial motivations. In this, Southey was a prime Tory contributor, singularly obsessed with the capacity of the radical press to stir the masses to revolt and portraying each piece of radical writing as the harbinger of imminent crisis. *See* Kim Wheatley, *Paranoid Politics: The Quarterly and Edinburgh Reviews*, 15 *Prose Studies* 319 (1992) (describing how the intensity of paranoia was fueled by a presumption that the radical press would rally the masses to revolution).
Southey as a political hypocrite and to embarrass the sitting government in general.\textsuperscript{121}

In Southey, Eldon followed \textit{Walcot} (and, by extension, Eyre's statement of principle in \textit{Priestley}) by repeating that there could be no property in works of injurious nature,\textsuperscript{122} but that any consideration of the nature of the work was unnecessary since Southey had not yet established his property in the work by successfully pursuing a damages claim at law.\textsuperscript{123} Eldon argued that his primary consideration was confined to the plaintiff's interest in the property, rather than to the nature of the property itself or to the conduct of the parties involved.\textsuperscript{124}

\begin{footnotesize}
\textsuperscript{121} \textit{Id.} Southey's lengthy and controversial essay on parliamentary reform in XVI \textit{Q. REV.} 225 (Oct. 1816), was actually published in February 1817 and may have precipitated Sherwood's unauthorized publication of \textit{Wat Tyler} shortly thereafter. \textit{See} Robert Lapp, \textit{The Contest for Cultural Authority: Hazlitt, Coleridge, and the Distresses of the Regency} 113–30 (1999) (describing the convergence of literary and political discourse as Southey's \textit{Wat Tyler} became satirical fodder for parliamentary debate, and dueling newspaper editorials); Mahoney, supra note 77.

\textsuperscript{122} \textit{Southey}, 35 Eng. Rep. at 1008 ("[B]y the opinion of Lord Chief Justice Eyre, who has expressly laid it down that a person cannot recover in damages for a work which is, in its nature, calculated to do injury to the public."). Whether Eldon's reasoning in \textit{Southey} was a direct extension of his earlier ruling in \textit{Walcot} or had been mitigated by Chief Justice Ellenborough's nisi ruling at law in \textit{Hime v. Dale}, (1803) 170 Eng. Rep. 1070 (K.B.) 1070(b), is a matter of interpretation as to why obscene materials may be disqualified from equity protection. While \textit{Walcot} seemed to refuse the plaintiff any property in a libelous work, \textit{Hime}, while still adhering to the sentiment in \textit{Walcot} (portraying the work at issue as a libel "so gross as to affect the public morals"), moderated that position by according a hearing at common law and implying that works of questionable nature could still be considered property and damages could be tempered according to their degree of illicitness. \textit{Id.} at 1071. \textit{See} Phillips, supra note 56, at 140–42 (describing the moderation of the more definitive \textit{Walcot} ruling—that there could be no property in illegal works—to Abbott's more temperate ruling in Stockdale twenty years later—that such works could still be property yet "incapable of legal assertion"). Even if property were granted in the questionable works, a refusal to award damages at law would have indicated no injury to the property at issue, obviating any subsequent equitable jurisdiction. \textit{See} Alexander, supra note 18, at 70–74 (examining whether a refusal of damages at law indicated the absence of property or the absence of a remedy of law).

\textsuperscript{123} \textit{Southey}, 35 Eng. Rep. at 1008 ("I cannot grant this injunction after \textit{Mr. Southey} shall have established his right to the property by an action"). \textit{Referring to the editor's inclusion of a note on Burnett that accompanied the published nominate report on Southey because the plaintiff in Burnett had similarly not established his property right in a translation of the text at issue. Burnett v. Cherwood, (1721) 35 Eng. Rep. 1008 (Ch.). Southey's claim to property would have been under common law because the work was legally an unpublished manuscript, albeit one that Southey intended to publish in 1794.

\textsuperscript{124} \textit{Southey}, 35 Eng. Rep. at 1008 ("[S]itting here as a Judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties except as it relates to their civil interests."). Procedurally narrow or not, Eldon's ruling in \textit{Southey} was sufficient to convince Shelley of the futility of filing a copyright infringement claim against William Clark for selling copies from his privately printed \textit{Queen Mab}. 
\end{footnotesize}
Yet, Eldon was aware that by refusing the requested injunction, he was likely guaranteeing the proliferation of pirated copies and the spread of a work that could, by its distribution, injure the public.125

In this manner, Eldon recognized that fixing rules of equity could cause entrapment and, in particular, that equity could not sustain copyright protection for works of questionable tendency. In effect, the court faced the dilemma of either protecting works of questionable tendency, thereby becoming associated with the inequitable treatment of the plaintiff, or denying injunctive relief to the plaintiff, which would cause broader harm to public morality when an influx of pirated copies reached those of weaker education and moral constitution. 126 At the same time, Eldon sidestepped the two basic elements of the Clean Hands Doctrine—whether, as a finding of fact, the work was one of an illicit nature and whether its tendency, if distributed in society, was likely to harm the public interest. Eldon’s use of the Clean Hands Doctrine was now carefully confined to issues of procedure, of substantiating the legal authority of the courts at law to render findings of fact, and of sequence, insisting that a plaintiff must first succeed in a damages claim at law before attempting to supplement that relief with an injunction.127

Likewise in Murray v. Benbow,128 Eldon continued to adhere to the principle that the question of a work’s tendency had to be adjudged at law.129 Yet he

---

125 Southey, 35 Eng. Rep. at 1008. In fact, Wat Tyler was immediately pirated by six London publishers, starting with Sherwood’s production of three editions within days of the Southey decree. Together, the publishers sold an estimated 60,000 copies at a shilling each (one-tenth the normal price for such a publication), establishing a pattern that when a reputedly illicit work was denied copyright protection, its notoriety produced soaring demand and immediate piracy at far cheaper prices, snowballing into massive sales and far greater dissemination than could have been imagined. The Sherwood piracy was subsequently portrayed as “[t]he most decisive single event in shaping the reading of the romantic period.” See St Clair, supra note 49, at 316.

126 Southey, 35 Eng. Rep. at 1008 (“It is very true that, in some cases, it may operate so as to multiply copies of mischievous publications by the refusal of the court to interfere by restraining them.”). See infra note 169 (discussing the popularity of Byron’s, Shelley’s, and Southey’s works because of the proliferation of pirated copies).

127 By this time, the Clean Hands Doctrine had become a fixed rule in copyright infringement cases to the degree that defendants assumed that any questionable tendency of a literary work might practically (if not legally) disqualify it from protection, which would defer the issue to a court of law, an option most plaintiffs declined immediately. Cf. Cary v. Longman, (1801) 170 Eng. Rep. 613 (K.B.). It is perhaps noteworthy that this doctrinal position leaves open the prospect that works of illicit nature could still be ruled “property” at law, hence changing the issue to whether equitable relief should be denied on public policy grounds.

128 C13/1743/26 (Feb. 1822). This case was published in nominate form only as a reference in Lawrence v. Smith, (1822) 37 Eng. Rep. 928 (Ch.) 929 n.1 and later in greater detail in 6 CHARLES PETERSDORFF, A PRACTICAL AND ELEMENTARY ABRIDGMENT OF THE CASES 558 (1830) [hereinafter PETERSD.]. It was also chronicled in the Times (London), on Feb. 8, 11, 12, and 13,
simultaneously acknowledged that an illicit work had no property value and that his refusal to enjoin the unauthorized publication of an arguably blasphemous work (in this case Byron’s *Cain, A Mystery*) would more likely proliferate than prevent its circulation. Eldon repeated this argument barely a month later in *Lawrence v. Smith*, when the defendant moved to dissolve an injunction on his unauthorized publication of the plaintiff’s lectures on physiology because their “nature and tendency” were “hostile to natural and revealed religion, and impugned the doctrines of immateriality and immortality of the soul.”

Consistent with his practice of delegating issues of literary tendency to fact-finding at law, Eldon walked the fine line between judging the criminality of publishing blasphemous statements and simply denying equitable relief to such works until the claim of their criminality or illicitness could be assessed at law. Eldon concluded that his court only dealt with issues of civil right to property in a manner “only ancillary to the law.”

In so doing, Eldon implied but fell short of rendering a finding of fact when he offered that “considering that the law does not give protection to those who contradict the Scriptures,” he was prohibited from using the interlocutory injunction in the first place because he had “a rational doubt, whether this book does not violate the law.” This position reflected Eldon’s tendency to base rulings regarding works of questionable tendency on the inherent jurisdiction at common law or, more specifically, as an issue of appropriate jurisdiction.


129 *PETERSD., supra* note 128, at 558 (“This question I have no right to try, because it has been settled, after great difference of opinion among the learned, that it is for a jury to determine that point”).

130 *Id.* (“Now this publication, if it is one intended to vilify and bring into discredit that portion of scripture history to which it relates, is a publication, with reference to which, if the principles on which that case at Warwick (Dr. Priestly’s case) was decided by just principles of law, the party could not recover any damages in respect to a piracy of it . . . I cannot grant the injunction until you show me that you can maintain an action for it . . . If the character of the work is such that the publication of it amounts to a temporal offence, there is another way of proceeding, and the publication of it should be proceeded against directly as an offence. . . .”).

131 37 Eng. Rep. at 929 (attributing the intent of the work to be the denial of the truth of scripture, which the law does not protect).

132 *Id.* at 928; *see also* *PETERSD., supra* note 128, at 599–60.


134 *Id.*

135 See Deazley, *Rethinking Copyright*, supra note 18, at 116 (“More typically, the courts have tended to exercise this inherent jurisdiction by refusing a claimant relief on the grounds that the content of the claimant’s work is obscene or sexually immoral, defamatory, blasphemous or irreligious.”).
This undoubtedly contributed to the view that Eldon had elevated the clean hands maxim to doctrinal status. It arbitrarily reflected his own political discontent with the "mischievous" consequence of equity’s non-aggressive role, while also freeing pirates to widely disseminate works of questionable content at cheaper prices, bringing them within the purview of those less likely to discern the works’ broader cultural impact.\textsuperscript{136} This was the immediate conclusion drawn by the TIMES (London) in its editorial reaction to Eldon’s reasoning:

[These] writs of injunction were refused, upon collateral grounds. The doctrine which has been since established was then only insinuated. It derives its origin from no statute, decision, or legal authority whatever, but was founded on a single passing observation which fell from Lord Chief Justice Eyre (in DR. PRIESTLEY’S action against the hundred) but which was neither applied nor acted on. It has, however, revolutionized the state and condition of literary property... This annihilation of the vital principle of literary property, is supposed to bear analogy to some principle of the common law... Judges have decided, properly perhaps, that there can be no property in a seditious, defamatory, or immoral libel... [and yet, the wrong-doer should be estopped] from setting up his criminality towards the public as an excuse for his villainy towards the author... [if] both are libellous... let both be prosecuted in a court of criminal law... [here] he has grown rich by cheating the original author, whether the work be harmless or injurious... [and] in a shorter time and in a more effectual manner... [has] polluted the mind...

\textsuperscript{136} \textit{Art. VI, supra} note 62, at 128. Almost lost in the editorial reactions to Eldon’s jurisdictional rulings was the alternative prospect of a “chilling effect” on authors of works now subjected to the highly volatile winds of changing moral standards; see \textit{Alexander, supra} note 18, at 74–75 (describing press criticism of Eldon’s refusal to grant injunctive relief as arbitrary, causing authors to anticipate Eldon’s predisposition before publishing). \textit{See generally William Patry, Moral Panics and Copyright Wars} (2009) (arguing that copyright owners need to create conflict within infringers to establish and maintain their property interests, and that they should do so by generating moral panics regarding the consequences of non-protection); Tom Lewis, \textit{Legislating Morality: Victorian and Modern Legal Responses to Pornography}, in \textit{Behaving Badly: Social Panic and Moral Outrage — Victorian and Modern Parallels} 143–58 (Judith Rowbotham & Kim Stevenson eds., 2003) (discussing legal responses in Victorian England to the proliferation of obscene publications).
of the whole rising generation with a deluge of impiety and vice.\textsuperscript{137}

In effect, the court's denial of injunctive relief had become doctrinally conjoined with the principle that "the law gives no protection to works calculated to harm the public," notwithstanding a plaintiff's right to establish at law a legitimate claim of property in works that may have been initially considered potentially harmful in a preliminary hearing at equity.\textsuperscript{138}

Criticisms of Eldon's position conflated the doctrinal principle with the anticipation of an adverse cultural consequence, as do contemporaneous criticisms of \textit{Mitchell Brothers}.\textsuperscript{139} Eldon's doctrinal objective, however, was more broadly reflective, attempting to create a structure of uniformity in how the moral nature of literary property would be adjudged and leaving any assessment of criminal consequence to the law courts. To do that, he had to draw a careful distinction between preliminary consideration of the nature of the work and a final legal finding of fact regarding its nature, which he achieved by introducing a tripartite classification scheme of how copyright infringement cases should be addressed at equity.\textsuperscript{140} Until that time, the standard practice was for the court to review the content of the work at issue and perhaps take testimony on its potential harmful consequences. Afterward, if the court declared that the work was clearly innocent of possible harmful effect on the public, the court could immediately adjudicate the plaintiff's claim. If the work was clearly illicit and potentially criminal in its nature, its effect on public morality, or both, the claim stood outside equity's jurisdiction. This forced the court to draw hard-and-fast legal distinctions based on its own review of the work and raised the prospect that the court might harbor a personal prejudice against works of a certain type of content. This would probably dissuade any plaintiff referred to law from pursuing such an action, since the court's refusal to accept the claim as legitimately within its jurisdiction would have seemed predicated on at least a tacit finding that the work's tendency was illicit.

\textsuperscript{137} \textit{Times} (London), Aug. 12, 1823, at 2.

\textsuperscript{138} This was also clearly reflected in nisi rulings by Vice Chancellor John Leach in \textit{Byron v. Hodgson}, (1823) 37 Eng. Rep. 928 (Ch.) 929 n.1, and \textit{Byron v. Dugdale}, (1823) 1 L.J. Ch. 239 (Ch.), the latter reported in some detail in \textit{Times} (London), Aug. 9, 1823, \textit{Times} (London), Aug. 11, 1823, and \textit{Morning Chron.} (London), Aug. 9, 1823, in which he denied injunctions against unauthorized publication of Byron's \textit{DON JUAN, CANTOS VI-VIII}, directing them to law first despite counsel's plea that "passages cited as impure were impure only to the impure mind."

\textsuperscript{139} See supra note 44 and accompanying text.

\textsuperscript{140} See supra note 111 and accompanying text.
Yet, by consistently directing works of even questionable tendency to action at law, Eldon created a “holding-tank”—a third category for works whose nature raised a “rational doubt” regarding their potential for harmful effect and which should be reviewed and resolved at law first, before a jury, with only a secondary recourse to equity.141 While it may have been argued that the parameters of this third category were yet undefined and residual and that its use as a category of works actually expanded rather than reduced the court’s arbitrary discretion in reviewing works of questionable nature, a counterargument could also be made. When Eldon was confronted with works of questionable tendency, he deferred them to law based on his uncertainty, rather than allowing any subsequent action at law to be prejudiced by the implicit assumption that only illicit works were directed to law for judgment. In this manner and by fixed rule, he precluded the court from rendering even a well-reasoned judgment regarding a work’s nature, as it had so willfully (and prejudicially) done in Burnett, a ruling from which the court progressively recoiled as beyond its prerogative.142

These issues had already been raised at law in both Fons and Du Bost, cases commonly cited in the legal discourse regarding the authority of the Clean Hands Doctrine in equity. A third ruling at law, Stockdale v. Onwhyn,143 has

---

141 Lawrence v. Smith, (1822) 37 Eng. Rep. 928 (Ch.) 929 (“If the action could not be maintained, nothing can be done in this Court, which is only ancillary to the law, and, therefore, will not give relief, except when the law gives damages.”). In the Petersdorff report of the case, Eldon is said to have prefaced his ruling by stating that the jurisdiction of this court was founded on this principle, that where the law will not afford a complete remedy to literary property when invaded, this court may lend its assistance ... But then this court will only interfere, where [the plaintiff] can by law sustain an action for damages, equal to the injury he has sustained. He might then come here to make his legal remedy more effectual. But if the case be one which it is not clear will sustain an action at law, then this court will not give him the relief he seeks.


143 (1826) 172 Eng. Rep. 75 (K.B.). The Stockdale case was actually comprised of two hearings, the initial one in which the plaintiff requested an injunction and was nonsuited nisi prius en banc. There were three published
Likewise been bracketed with Eldon's chancery rulings as important in establishing the Clean Hands Doctrine in equity, if only because it seemed a straightforward application of the broader principle that copyright protection could not be accorded to works of illicit tendency. Bookseller Joseph Onwhyn and others were accused of pirating Stockdale's salacious serialization of *The Memoirs of Harriette Wilson*, for which Stockdale claimed copyright under the Statute of Anne and, unlike the plaintiffs of the Eldon cases, sued directly for damages at law. In the initial hearing, Chief Justice Abbott, citing the authority of Priestley, Walcot, Southey, Fores, and Hime, ruled nisi that the plaintiff had no legal right to sell literary work in which he claimed copyright if it were criminal in nature, effectively denying it any market value upon which damages could be claimed. However, unlike Priestley, in which Eyre had only intimated the potential criminality of the works at issue, Abbott declared Stockdale's work ineligible for protection and refused his motion for a retrial, stating that the law does not protect works calculated to harm the public and finding the works illicit in nature. Court rulings, he concluded, must be:

> taken with one object, with a view to enforce the common law of the land, which altogether prohibits the publication of such infamous works... [and]... independent of all authority and all precedent, it is our duty to declare, that the infamous work, for

Reports of the retrial hearing, the first reproduced at (1826) 172 Eng. Rep. 76 (K.B.), dated January 28, 1826, including extensive editor’s notes citing the text of the Statute of Anne and interpretive vignettes of Priestley, Walcot, Southey, and Bell v. Walker, (1785) 28 Eng. Rep. 1235 (Ch.). The retrial hearing was also reported in somewhat greater length by Barnewall and Cresswell, reprinted in (1826) 108 Eng. Rep. 65 (K.B.) [hereafter *Stockdale II-BC*], and even most elaborately by Dowling and Ryland, published independently and not reprinted in the *English Reports*, cited as 7 *Dowl. & R.* 625 (1826) [hereafter *Stockdale II-RD*].

144 *Stockdale II-RD*, supra note 66, at 75. *Memoirs* was a journalistic account of a courtesan in the higher circles of London society and was initially published by Stockdale in thirty installments between February and late August 1825, during which the author blackmailed noted persons for the privilege of not being mentioned in future issues. It was arguably both immoral in narrative and libelous in its identification of the courtesan’s liaisons, but despite publication in numerous installments, Stockdale was never prosecuted for publication of an obscene libel, perhaps because of the range of notables involved.

145 Id.

146 Id. at 76 (“This is a work that the law will not protect... Every one who comes to seek the protection of the law for his property, must shew that property to be worthy of that protection... [unlike works that have objectionable passages but a good general tendency] this work is professedly bad, and cannot be defended in any way.”).
the base profits of which the plaintiff in this case has brought his action, is entitled to no protection in a court of law.147

Whether Abbott intended to thereby disqualify all copyright in the work on general principle or to more narrowly deny damages because a market value could not be ascertained and remained an open and critical question. In his petition for a rehearing, Stockdale’s barrister pressed straight to that central point: whether copyright protection under statute or common law was intended to be content-neutral. He argued that “it is one thing to refuse the special protection of an injunction, and another to say that there can be no property in such a book.”148 With respect to Priestley specifically, he argued that evidence related to the contents of that plaintiff’s lost manuscripts was clearly inadmissible and that Eyre’s dictum was not entitled to doctrinal weight.149 The barrister concluded that the equity cases cited as authority only reflected consideration of the relative propriety of granting an injunction on a case-by-case basis.150 Abbott, however, held firm, ruling that the plaintiff could not have property in the work at hand, but he seemingly retreated to the precondition that plaintiff must first have the right to sell it.151 Only Justice

---

147 Stockdale II-RD, supra note 66, at 632. In this manner, Abbott summarily dismissed the authority of all prior rulings that may have qualified the principle that the court will not support works of illicit nature, saying “The decisions of the courts of Equity are no authorities either to lead or restrain us in forming our own judgment on a question like this,” id. at 631, a statement not included in the two published nominate reports, which had edited out Abbott’s conclusion and his statement that the action cannot be maintained. Ironically, in a related damages suit argued in Common Pleas, Stockdale’s printer, seeking payment for installments of Memoirs already printed, was also nonsuited based on Stockdale’s argument that the printer could not recover because of “the pernicious tendency of the work,” on Best, C.J.’s ruling that “no person who has contributed his assistance to the publication of such a work, can recover in a Court of Justice any compensation for labour so bestowed . . . No man can doubt the double object of this work, the corruption of youth . . . and the extortion of money from exalted individuals.” Poplett v. Stockdale, (1825) 171 Eng. Rep. 1041 (C.P.) 1041.

148 Stockdale II-BC, supra note 66. In the Dowling and Ryland report of the rehearing, Brougham’s argument was recorded with perhaps more precision: “[t]he property in the work is the same, whether the work itself is good or bad . . . the question here, however, is, whether such a work is wholly unentitled to protection in a court of law . . . no such decision has even yet been come to.” Stockdale II-DR, supra note 66, at 626.

149 Stockdale II-BC, supra note 66, at 65 (“[It] is plain that the dictum of Eyre, C.J. was not well founded in law.”).

150 Stockdale II-DR, supra note 66, at 630 (“They only shew that the granting or refusing an injunction in cases of this kind, was never considered as deciding the legal question of copyright one way or the other; but merely as the exercise of a discretionary equitable power, leaving the question of right and property at common law untouched. That question, at common law, has never yet been decided.”).

151 Id. (“Before he can maintain such an action, he must establish his right to sell such a work;
Littledale addressed the issue forthrightly, perhaps for the first time in a copyright ruling based on the Statute of Anne. While agreeing to the portrayal of the work as unfit, he alluded directly to the intent of the Statute of Anne to encourage learning and concluded that Memoirs not only defeated but also disgraced that purpose.\(^\text{152}\) In that manner, Littledale overcame the sheer arbitrariness of the Burnett ruling and opened consideration of whether a literary work, to be accorded copyright protection under the Statute of Anne, had to first demonstrate that it did in fact contribute to the encouragement of learning and, by implication, whether the Statute intended protection for all duly registered works.

That took the issue to an entirely different level. As the defense correctly maintained, the record was decidedly mixed in the weight of authority that might be accorded to prior cases at equity; the admissibility of evidence regarding the nature of works at issue; the shades of immorality found in very similar works; and the propriety of awarding injunctions in cases that would surely result in a proliferation of copies of the works.\(^\text{153}\) Some works were denied copyright protection based on a careful inspection of their content, while others were granted protection without inspection based on counsel's assurances that the works were innocent.\(^\text{154}\) It was clearly an area of unsettled law, as equitable principles and maxims had been uneasily juxtaposed upon summary conclusions about types of works that were unfit for public

\(^\text{152}\) Stockdale II-DR, supra note 66, at 632–33.
\(^\text{153}\) Stockdale II-BC, supra note 66, at 65. Note that at the time, the presumption was that proliferation would result in either case fueled by the publicity of the trial.
\(^\text{154}\) Unlike the Chancery court rulings in Walcot v. Walker (1802) and Murray v. Benbow (1822), in which injunctive relieve was refused after a first-hand reading of the works at issue, ex parte injunctions were granted in Murray v. Dugdale (1823) regarding Byron’s Beppo and Byron v. Hodgson (1823) regarding Byron’s Don Juan VI–VIII without a review of the works, based on assurances that there was nothing objectionable in them and that injunctive relief had not been denied previously. In virtually every case during the Eldon tenure, the court made it clear that when there was reasonable doubt, a law court would grant damages; injunctive relief could be considered only after a ruling by the law court that property existed in the works, as reported in 27 L.Q.R. 123, 128–30 (1822).
distribution. Could this all be swept away if the Statute of Anne were interpreted as a broad, content-neutral incentive to all authors?

In a general sense, attributing to Lord Eldon the seminal role in establishing the Clean Hands Doctrine as a fixed principle in equity, or more specifically in cases of copyright infringement, is perhaps overly generous (or condemning, depending on one's point of view). During his tenure in the chancellorship and immediately preceding it, a wide range of rulings in equity and law, other than *Priestley* and not relying upon it explicitly, questioned whether a plaintiff could claim property in materials obtained in an illegal fashion or involving libelous content. If we single out cases in which the works at issue were considered immoral, libelous, or otherwise suspect and were potentially disqualified for copyright protection, a number of much earlier chancery rulings come to the fore as suitably illustrative of the principle, though they were not yet considered authorities at the time. In fact, it can be argued that the broad principles of

---

155 See, e.g., Cary v. Faden, (1799) 1 Eng. Rep. 453 (Ch.); Cary v. Longman, (1801) 170 Eng. Rep. 613 (K.B.); Fores v. Johnes, (1802) 170 Eng. Rep. 654 (K.B.); Hime v. Dale, (1803) 170 Eng. Rep. 1070 (K.B.) (in which the defense argued that song lyrics claiming copyright had "mischievous tendency" that denied them legal protection and the court agreed to retry); Cary v. Kearsley, (1802) 170 Eng. Rep. 679 (K.B.) (establishing the "animus furandi" or "good faith" standard for measuring the intent of the publisher of questionable works); Cadman v. Horner, (1810) 34 Eng. Rep. 221 (Ch.) (in which "misrepresentation [in an agreement] disqualifies [the plaintiff] from calling for the aid of a Court of Equity; where he must come, as it is said, with clean hands."); Dubost v. Beresford, (1810) 170 Eng. Rep. 1235 (Ch.) (in which the court accepted the portrayal of plaintiff's destroyed painting as libelous as cause to rule that the plaintiff had no artistic property in it other than the canvas and the paints); Gale v. Leckie, (1817) 171 Eng. Rep. 588 (K.B.) (in which the defendant argued his contracted performance, producing a manuscript that criticized both the government and the Pope, would have made him criminally liable if published, an argument that was dismissed when he failed to provide documentary evidence of his liability); Byron v. Dugdale, (1823) 1 L.J. Ch. 239 (Ch.); Poplett v. Stockdale, (1825) 171 Eng. Rep. 1041 (C.P.) (in which the plaintiff sought to recover expenses from publisher Stockdale related to the printing of a salacious work, which the publisher himself successfully argued was pernicious; therefore, the plaintiff could not seek assistance at law).

156 Burnett v. Chetwood, (1721) 35 Eng. Rep. 1008 (Ch.). See Baller v. Watson, c1/1739/34 (Ch. 1737) (regarding a play that had been banned from the stage as immoral but registered under Anne and subsequently protected by chancery injunction); James R. Alexander, *Richardson and Copyright*, 59 NOTES & QUERIES 219 (2012) (describing the piracies of Richardson's novel *PAMELA*); Roach v. Garvan, (1742) 26 Eng. Rep. 683 (Ch.) 684 (regarding the publication of libelous letters casting aspersions upon affidavits filed in court, for which the court found the publisher in contempt: "[n]othing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes . . . ."); *see also* Trusler v. Murray, (1789) 102 Eng. Rep. 140 (K.B.) (defense argued that as defendant and plaintiff had engaged in unauthorized publication of the same work, obviating the plaintiff's claim to infringement was obviated).
the Doctrine were in fact laid out by Hardwicke in the eighteenth century and were simply declared governing by Eldon sixty years later.\(^{157}\)

This understanding would imply that the rulings from the Eldon period were, in effect, the capstone in the doctrinal evolution of clean hands. Yet the jurisprudential trend lines had already begun shifting away from prosecuting those who published works containing seditious or blasphemous sentiments. By the early nineteenth century, more and more such prosecutions failed,\(^{158}\) which perhaps suggests that the Eldon rulings instead marked the swan song of the doctrine. Until that time, writings embracing cultural freedom and political reform were considered legally conjoined, equally transgressive, and threatening, and yet juries progressively balked when asked to convict publishers based on the presumption that the very nature of their words caused harm to society.\(^{159}\) After Peterloo, radicals pressing for political reform branched off from written tracts into more overt tactics, initially organizing mass rallies, which were heavily suppressed by the government, then retreating to smaller factional groups.\(^{160}\) At that point, the rulings in Priestley, Walcot, and even Southey would

---

157 See Clyde Croft, Lord Hardwicke’s Use of Precedent in Equity, in Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987, at 121–55 (Thomas Watkin ed., 1987). Like Eldon, Hardwicke was also suspected of having a bias against publishers of illicit works, manifest in his apparent desire to broaden the scope of obscenity prosecutions beyond those traditionally referred to the ecclesiastical courts. This was traced back to his prosecution of Edmund Curll as Attorney General Philip Yorke. However, Curll’s most egregious offense may have been the seditious nature of his publication of the Memoirs of John Ker, rather than the more notoriously immoral Venus in the Cloister. The prosecution of the latter was instigated by the Secretary of State rather than by Yorke. That Yorke focused his prosecution on Venus and other publications probably reflected his own calculation of the greater likelihood of gaining a conviction rather than a moral crusade. See Rogers & Baines, supra note 34, at 190–91.


159 Michael Lobban, From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820, 10 Oxford J. Leg. Stud. 307, 330–32 (1990) (describing the difficulties in determining a “seditious effect” from highly interpretive materials, often reduced to questions of how the materials were distributed and at what cost, and the degree to which either brought them within the reach of the lower cases).

160 See id. at 310–27 (describing the erosion of prosecutions for seditious libel and the passage of the Fox Liberal Act); Robert Poole, The March to Peterloo: Politics and Festivity in Late Georgian England, 192 Past & Present 109 (2006) (describing the fragmentation of the reformist movement after government repression, escalating prosecutions for sedition rather than seditious libel). “Peterloo” was a popular reference to the mass assembly of over 60,000 at St. Peter’s Fields in Manchester on August 16, 1819, at which the reformist speakers were arrested and local militia on horseback attacked the crowd with sabers drawn, resulting in seventeen killed and over 600 injured. The attack signaled a radicalization of political protest, from the reformist pleadings of individual writers like Paine or even Byron to mass gatherings that precipitated rash
have seemed to reflect a doctrinal backwater, in many ways similar to Burnett, destined for obscurity and only vaguely illustrative of equitable principles. Perhaps Eldon sensed this when he deferred issues of content, intent, and effect to the courts at law.

What remained unclear was the jurisprudential path the Doctrine would take regarding writings of an immoral—rather than political or irreligious—nature. That path would inevitably lead to an intersection with criminal prosecution for obscene libel and the question of whether such writings warranted copyright protection. This was likewise an area of shifting legal ground, as the court struggled to balance the commercial popularity of such works with the clearly transgressive quality of their passages or underlying narratives. While many allegedly immoral tracts were naked commercial attempts to titillate public curiosity, some authors calculatingly adapted their works to more conventional literary styles—classical narratives, imaginative debates among mythological figures, fantasy motifs, general commentary, satire, parody—with which juries were familiar and might have been reticent to find immediately threatening to social values. This shift of doctrinal focus away from politically sensitive tracts and toward culturally immoral narratives was most graphically illustrated in Eldon’s time by the legal travails of two of the nineteenth century’s most famous romantic poets—Lord Byron and Percy Bysshe Shelley.

V. STRUGGLING WITH THE AMBIGUITIES OF LITERARY CONTENT AND FORM

Reformists commonly claimed that Lord Eldon prejudicially followed his personal biases when considering copyright claims regarding works, the nature and tendency of which were to entice abandonment of mainstream political, religious, or cultural values. After all, he had been and still was a chief government spokesman, had drafted and presented legislation suppressing dissident opinions, publications and gatherings, and had served as prosecutor in the famous 1794 treasons trials (in which Eyre had served as Chief Justice). governmental reprisals and the outlawing of reformist meetings and parades. Ironically, the rally had outfitted itself in the traditional cultural tapestry and music of the season and region, seemingly sufficient to avoid suspicion of revolutionary tendencies, but the sheer size and spontaneity of the gathering spooked local authorities into overreacting to its potential danger.

161 See McCALMAN, supra note 151 (describing the growth of the underground press and its gradual shift in content from revolutionary sedition to outright pornography).

162 See infra note 175 and accompanying text.

163 See Pfau, supra note 72 (describing the role Eldon played in prosecuting sedition trials in the early 1790s).
So, the question arises whether Eldon's referral of questionable works to the court of law was following the authority of procedural rules established in Hardwicke's time or was simply prejudicial against certain types of works. Given that most copyright claims regarding such works were subsequently abandoned if directed by chancery to law, law courts thereafter followed the presumption that Eldon was, in effect, rendering a final decree rather than a referral. This rendered his rulings substantive, rather than procedural, in authority and supported the axiom that he himself had often voiced: that works of such tendency could not be accorded equitable support. This was evidenced by his reputed prejudice in equity claims regarding the literary works of Byron and Shelley, assumedly based on his antipathy toward the amoral nature of their poetic narratives and their scandalous personal lives. In many ways, this reflected more the anti-establishment sentiments of Byron and Shelley themselves, rather than any public pronouncements by Eldon regarding their writings.\textsuperscript{164} In retrospect, Eldon's consideration of their works at equity was more nuanced, reflecting more the ways the unclean hands defense had become doctrinally accepted in such a counter-intuitive and incomplete fashion.

The earlier works of Byron and Shelley were popular in large measure because of their clever amoral flirtation with the boundaries of blasphemous (and immoral) libel and their veiled but obvious criticism of suppressive legislation and pro-government criminal prosecutions.\textsuperscript{165} Byron's earlier works were also published anonymously, a clear indication that the author feared government or private prosecution, which made his works a little "dangerous" and thereby more alluring to the reading public.\textsuperscript{166} On the other hand, most of Shelley's works were not commercially published during his lifetime but instead

\textsuperscript{164} Shelley made his view known publicly in a letter to \textit{EXAMINER} (London). \textit{See infra} note 215 and accompanying text. However, Byron's antipathy toward Eldon, only privately expressed until revealed in posthumous publication of his private letters, was evidenced not only in his anti-government narratives but also in his privately expressed anticipation that any litigation, at law or equity, that raised concerns about the seditious or blasphemous tendencies of his works might compromise any further claim for paternal rights to his daughter. Byron's daughter had become a ward in chancery in April 1817 as a result of Byron's legal separation from his wife in a hearing before Lord Eldon, arising from the same reasons why Shelley had lost custody of his children that same year: an immoral lifestyle. \textit{See} Peregrine Simon, \textit{Lord Eldon and the Poets}, 10 \textit{KEATS-SHELLEY REV.} 243, 262–64 (1996).

\textsuperscript{165} \textit{See} Hugh J. Luke, Jr., \textit{The Publishing of Byron's Don Juan}, 80 \textit{PMLA} 199 (1965) (chronicling the publication and piracies of \textit{DON JUAN} and the various copyright infringement claims pressed by Byron's publishers from 1819 through 1823); Iain McCalman, \textit{Unrespectable Radicalism: Infidels and Pornography in Early Nineteenth-Century London}, 104 \textit{PAST & PRESENT} 74 (1984) (describing the litigation history against the most prolific pirate booksellers of the period, including Benbow and Dugdale).

\textsuperscript{166} \textit{See} ST CLAIR, \textit{supra} note 49.
were available largely through private distribution of self-published pieces or compilations, leaving the satisfaction of growing market demand entirely to unauthorized issues.\(^{167}\) Authorial anonymity left both without standing to sue for copyright infringement unless they wished to establish their property in a work at law before claiming copyright infringement. Thus, the works of both Byron and Shelley were widely pirated and distributed at radically cheaper prices, making them accessible to the broader reading public far beyond the literary rich and flooding the market with a range of different editions.\(^{168}\) This, in turn, increased the works’ exposure and popularity, creating even more demand for pirates to satisfy.\(^{169}\) While both had ample grounds to file copyright infringement claims under common law, both balked, fearful that a finding at law (or even at equity) that their works would legally compromise their claims of paternity rights.\(^{170}\)

The question of whether a work’s illicit nature rendered it ineligible for copyright protection would have been an easy matter with regard to the bulk of cheap radical or pornographic fare available in the marketplace.\(^{171}\) But the works of Byron and Shelley were different, cast in a sophisticated and conventional literary motif more akin to classic poetic works and appealing to different reading publics—the literary aristocracy as well as those with radical political or cultural inclinations. In chancery, this raised the prospect that a work of classical literary style, which would present a prima facie claim of copyright infringement, might nonetheless be considered ineligible for relief because it might be subject to prosecution for immoral tendencies. Such a work was then both literary and unconventional in underlying narrative, if not text. If directed to law on the issue of property value, a jury would be asked to consider the literary value of the works, which, if conventionally classical in style and form, would be assumed to advance learning, as long as its text was duly deferential to institutional values and was confined in its distribution to the more learned classes. The jury would then be asked to weigh that against a claim of imminent danger portended by extending access of such works to the

\(^{167}\) Id. at 317–20.

\(^{168}\) Id.

\(^{169}\) Id. at 307–38 & App’x 11. For Byron’s works, the discounted price of the pirated “common” issues was from a quarter to a tenth of the price of the elegant first official edition. For Shelley’s works, it is more difficult to establish a level of discount since most of his works were, published privately rather than commercially, and virtually all of the copies on the market were pirated issues. Similarly, Southey’s Wat Tyler was never commercially published by the author but was widely pirated from an unpublished manuscript and was reputed to have sold 60,000 copies in its first year of distribution. Id. at 318.

\(^{170}\) See supra note 117 and accompanying text; see also infra note 206 and accompanying text.

\(^{171}\) See supra note 161 (describing the proliferation of cheap pornographic materials).
lower classes that were more susceptible to narrative challenges to bedrock values of society. Piracies compounded the dilemma by feeding and manipulating the emerging demand from the less well-heeled readership.

A. BYRON'S CAIN AND DON JUAN

Of the literary figures of his day, Byron had perhaps the longest and most varied record at chancery, in large measure due to his prolific production and immediate commercial success over a decade that made his works highly attractive for literary piracy. Their popularity was rooted in his satire of the rigidity of prevailing cultural values and the insensitivity of government to the interests of the people, an almost blatantly populist appeal, and yet they were also appreciated for their sophisticated literary style. That combination of radical satire and classical literary style rendered them neither fish nor fowl. These works were couched in complex lyrical and often creative verse, mainstream, if obscure, and restrictive within discursive circles. Yet these works contained an underlying narrative, if not phraseology, that danced perilously close to private and sometimes government prosecution.

172 Byron's celebrity rode the wave of popularity of oriental tales and foreign travelogues of the time, from which he was often accused of plagiarizing and which he countered by arguing his tales were semi-autobiographical. See Peter W. Graham, Byron and the Business of Publishing, in THE CAMBRIDGE COMPANION TO BYRON 27-43 (Drummond Bone ed., 2004) (describing the marketing of Byron's works to take advantage of the public's expanding appetite for romantic narratives in exotic places); Dan Albergotti, Playing the Audience; or, How Byron and Murray Sold The Corsair, in XIII POSTSCRIPT 57-66 (1996) (describing how publisher Murray marketed THE CORSAIR). Nonetheless, there is no doubt that he was perhaps the most widely read author of the romantic period, in large measure due to the saturation of the market with cheap pirated issues. ST CLAIR, supra note 49, at 133-34.

173 As stated above, Byron insisted on author anonymity for his earlier works, making it unlikely he would file any claims for copyright infringement. During this period, the term "piracy" was used to refer to any unauthorized publication of a work for which the legal copyright could be claimed under common law, including unpublished works such as manuscripts, journals, or private correspondence, or works covered under the Statute of Anne. Arguably, one could not "pirate" (or steal the value of) a literary work for which damages could not be claimed at law, e.g., works which were illegal to publish and distribute/sell. Stockdale II-DR, supra note 143. For this reason, chancery courts typically required a plaintiff to first establish his property in a literary work at law since injunctive relief might subsequently implicate the court in the work's illegitimacy and compromise the legitimacy of the judicial process. In all of the copyright infringement cases discussed in this Article, criminality, while often intimated or assumed, had not yet been established before a jury, so the term "piracy" remains broadly appropriate.

174 See generally GARY DYER, BRITISH SATIRE AND THE POLITICS OF STYLE, 1789–1832, at 39–66 (1997) (discussing how Byron's writings were encrypted in discursive language to address selected audiences without becoming overtly libelous).

175 Id. While Byron's works were widely considered libelous, blasphemous, and/or borderline
Complicating any consideration of infringement claims at chancery was Byron's early practice of consigning his publication rights to others, notably John Murray and later John Hunt.\textsuperscript{176} It fell to these men, rather than Byron, to argue the property right against the initial waves of literary piracy. As a result, the copyright record on Byron's works is scattered, with several infringement claims bearing Murray's name as plaintiff.\textsuperscript{177} Those claims identifying Byron as the

\textit{seditious, criminal prosecution was only once aimed at a piece by Byron—Hunt's publication of Byron's essay \textit{The Vision of Judgement}. Hunt published this burlesque of Southey's eulogy of King George III in his new radical magazine, \textit{The Liberal} in 1822, gave rise to \textit{R. v. Hunt}, (1824) 2 St. Tr. (N.S. 100) (K.B.), reported in the \textit{Times} (London), no. 12085, Jan. 16, 1824, at 2. Hunt's indictment for seditious libel was filed by a private society with connections to the government and was considered frivolous from the outset. In a raucous trial in which the entire piece was read into the record and inevitably published in the local newspapers, thereby expanding its scandalous effect, Abbott, C.J. declared "the whole being read, he [Abbott] should be wanting in his duty if he did not declare his abhorrence at the tone of impiety which pervaded it." \textit{Id.} at 3. In the process, Abbott so conflated the issues of personal and seditious libel that Hunt was convicted for casting personal disgrace upon the dead King, which was ruled a libel against his successor and hence criminally seditious. The jury returned a guilty verdict, and after a lengthy delay in sentencing, Hunt paid a fine dwarfed by the profits gained from the sale of the issue.\textsuperscript{176} Graham, \textit{supra} note 172, at 33–34 (describing the nine-year relationship between Byron and publisher John Murray, which ended when the moralistic tastes of the English reading public turned against Byron's anti-establishment writings and Murray declined his option to publish \textit{Don Juan VI–VII}). Financially well-off, Byron had consigned the copyrights to several of his earlier works to friend and advisor Robert Charles Dallas. However, when Byron learned that Dallas was simply selling the consigned rights to Murray, Byron began to sell his own consignments, first to Murray and later to John Hunt. \textit{Id.} Given Byron's popularity, the consignments were not small—Murray was said to have paid Byron almost £20,000 over the nine-year period in which he served as Byron's publisher. \textit{See ST CLAIR, supra} note 49, at 162.\textsuperscript{177} In \textit{Murray v. Elliston}, (1821) 106 Eng. Rep. 1331 (Ch.) 1331, Eldon had granted a temporary injunction against a play based on Byron's \textit{Martino Faliero, Doge of Venice}, as reported in 79 EUR. MAG. & LONDON REV. 437 (May 1821). After a full hearing, he dissolved the injunction and referred the question of property to the law court, where Abbott ruled without explanation that Murray had no right to relief, after which Murray abandoned the complaint. \textit{Murray}, 106 Eng. Rep. at 1331. In \textit{Murray v. Benbow}, C13/1743/26 (Feb. 1822), regarding unauthorized publication of Byron's \textit{Cain, A Mystery}, Eldon had initially observed "that although he had not read the work, he had reason to believe, from what he had heard, that it was of a nature to prejudice his interference . . ." \textit{Times} (London), no. 11475, Feb. 8, 1822, at 4. While apparently declining to grant an injunction "until [he] should know something more about the work," Eldon nonetheless served notice on the defendant, who then chose not to appear or provide documentation. \textit{Times} (London), no. 11477, Feb. 11, 1822, at 4. In the end, Eldon had apparently read the work in the interim and refused to grant the injunction, acknowledging that while the refusal could cause wider dissemination of the questionable work, the remedy for that rested elsewhere (the law courts). \textit{Times} (London), no. 11479, Feb. 13, 1822, at 3. In \textit{Murray v. Dugdale}, C13/1754/36 (Ch. 1823), as reported in \textit{Times} (London), no. 11931, July 23, 1823, pg. 3 and \textit{Examiner} (London), no. 809, July 27, 1823, at 492, Eldon granted an injunction against the piracy of Byron's \textit{Beppo} based upon assurances of the text's innocence, assumedly with respect to Byron's other works of
plaintiff after he abandoned authorial anonymity that characterized his earlier works were argued on his behalf while he was living abroad. 178 One of these was not a case of copyright infringement at all. 179 Finally, there was an inestimable number of infringement claims that may have been feigned and that never reached a hearing, while others were filed but subsequently not challenged. 180

While many of Byron's works contained harshly satirical and possibly libelous or scandalously unconventional (homo)erotic passages, his notoriety

more notoriety. At the same time, Murray sought legal advice on the prospect of initiating a claim against Joseph Onwhyn for unauthorized publication of Byron's *Don Juan, Cantos I–II* but ultimately did not when, to document his property in the work, he would have had to divulge Byron's reputed, but not publicly acknowledged, authorship. See Katz, *supra* note 128, at 11–13.

178 Byron v. Hodgson, (1823) 37 Eng. Rep. 929 (Ch.) n.1, Byron v. Dugdale, 1823 I.L.J. Ch. 239 (Ch.), Byron v. Cawthorn, C13/1684/2 (Ch. 1816), and Byron v. Sherwin, C13/1722/9 (Ch. 1820) all involved claims regarding works in which the literary content was not at issue. In *Cawthorn*, Murray gained an uncontested injunction against the publisher of the first four editions of Byron's satirical *English Bards and Scotch Reviewers*, who had proceeded with an unauthorized fifth edition, which Byron wished to suppress because he considered its satirical references too harsh, perhaps libelous, and a possible threat to his guardianship of his daughter. Simon, *supra* note 164, at 261–62. When the injunction against a fifth edition was granted, prices on remaining copies of the third and fourth editions soared, and Cawthorn proceeded to reprint backdated copies of those, as many as 20,000 over his consignment. Ironically, Cawthorn himself had gained an injunction against an Irish publisher who had issued a pirated edition of the earlier issue. See St Clair, *supra* note 49, at 164. In *Sherwin*, Byron's counsel argued that while Sherwin was authorized to republish a first edition of Byron's *Hours of Idleness*, he had published a second edition without authorization, and an affidavit to that effect was sufficient to gain an ex parte injunction, which Sherwin did not contest. Katz, *supra* note 128, at 15–16.

179 Byron v. Johnston, 35 Eng. Rep. 851 (Ch.); 2 Mer. 28, in which Murray successfully gained an uncontested injunction against the publication of poems misleadingly advertised as authored by Byron. Murray argued, in effect, that the poet's name and reputation alone constituted property subject to court protection.

180 It was not unusual for an author or publisher with consigned rights to give notice of an intention to file an infringement claim, hoping the accused pirate would simply withdraw his issue without contest, saving the author the expense of even filing the claim. Even when a claim was filed and a temporary injunction granted with notice, a pirate would often simply not respond, leaving the injunction in place in perpetuity. In some cases, Byron was reticent to make claims, still wary that public examination of the content of the works would adversely affect his guardianship rights. For example, two of Byron's unpublished (but privately printed) poems associated with his scandalous marital separation were published in *The Champion* on April 14, 1816, and in the *Examiner* (London) on April 21, 1816, yet he sought no copyright protection under common law. Lord Byron's *Poems on His Own Domestic Circumstances*, *The Champion*, no. 171, April 14, 1816, at 113, 117–18, microformed on Early English Newspapers, Unit 31, *The Champion*, 1816–17 (Research Publications); Distressing Circumstances in High Life, *Examiner* (London), no. 434, April 21, 1816, at 241, 247–50, microformed on 7E Examiner nos. 419–522, 1816–17 (Univ. Microfilms).

181 Byron's earlier hesitancy regarding potential suits for libel, exhibited in his desire to suppress
among the reading public was principally established by the publication of *Cain, A Mystery* in 1821, the serialization of *Don Juan, Cantos I–II* (starting in July 1819), and *Cantos III–V* (December 1821). The latter two contained graphic (for the period) images of libertine behavior in a Turkish harem. With an eye toward marketability, Byron became somewhat more temperate in his later works and yet, regardless of their lesser measure of controversial narrative or verse, the public simply expected the writings to be similarly provocative, which made them more marketable and, at the same time, equally suspect.

---

a fifth edition of *English Bards and Scottish Reviewers*, did not extend to his running sardonic feud with Robert Southey. The two authors taunted each other mercilessly over the quality of each other’s works and Byron’s allegedly immoral lifestyle in Pisa with Coleridge, Shelley, and others. In 1821, in his *A Vision of Judgement*, a eulogy to George III written as poet laureate, Southey was not only effusive in his praise of the monarch, whom he depicted standing in judgment before St. Peter, but also took the occasion in his preface once again to chastise those “men of diseased hearts and depraved imaginations,” to which Byron responded by challenging those qualities and continuing his practice of referring to Southey as “the author of Wat Tyler.” *Introduction to the Vision of Judgement*, in 4 *The Works of Lord Byron* 476–79 (John Murray 1901). Byron’s piece was eventually sent to John Hunt for anonymous publication in *The Liberal* but without corrections or the intended explanatory preface. Hunt was subsequently prosecuted for libeling the late King and “disquieting the mind” of his successor George IV in *R. v. Hunt*, (1824) 2 St. Tr. (N.S. 100) (K.B.).

---


183 For example, Murray filed a copyright infringement claim against a piracy of Byron’s frivolous *Beppo* a year following his claim regarding piracy of Byron’s decidedly more outrageous *Cain*. While *Beppo* might have been seen as exalting adultery at the expense of the sanctity of marriage, Murray preemptively argued that it was “a work perfectly innoxious, and consists of mere irony and fun, not containing any of that obnoxious matter that has been attributed (I do not say how deservedly) to the greater portion of Lord Byron’s works . . . I assure your Lordship [that] it is perfectly inoffensive.” *Murray v. Dugdale*, C13/1684/2 (Ch. 1816). At that point, Eldon seemed satisfied with that assurance, probably because *Beppo* had been published in eight editions since 1818 and had not been subject to any content-based challenge at law. Robert Mortenson, *The Copyright of Byron’s ‘Cain’*, 63 *Papers of the Bibliographical Soc’y of Am.* 5, 11 n.4 (1969). Mindful of the controversial nature of Byron’s other works, Eldon nevertheless granted an injunction and pressed for immediate notice so the defendant could petition for its dissolution by questioning the works’ property value. Eldon, citing *Priestley*, cautioned that the law could give no relief to publications of a particular nature—“that where the common law will not award damages, this Court can give no injunction.” *Id.* Eldon anticipated the criticism that by not granting the injunction, he “open[ed] the door to a mischief much more extended in nature . . . [by] giving considerable publicity to the offensive matter,” and responded that he had no criminal jurisdiction and, as a judge, had a duty to uphold “what I take to be the law of the
However, while there were numerous piracies of the first five cantos of Byron's *Don Juan*, none were contested, leaving no trail of judicial rulings as to whether one could legally claim property interests in them.\(^{184}\)

To further complicate our interpretation of how Eldon handled the question of property in Byron's works, Eldon was only directly involved in one copyright infringement claim involving them—Murray's complaint regarding unauthorized publication of Byron's *Cain*.\(^{185}\) In that hearing, the defendant provided no response or documentation whatsoever and, as there had not been prior hearings regarding property in the work at law, Eldon was left to formulate an independent judgment on whether the blasphemous tendency of the work precluded his injunctive interference at that stage.\(^{186}\) Consistent with his past practice, Eldon refused to grant injunctive relief on the ground that the work provided to the court could not "beyond a reasonable doubt" be certified as "innocent," i.e. without an illicit tendency. Yet he invited the plaintiff to

---

\(^{184}\) Murray's publication of *Don Juan, Cantos I-II*, which listed only the printer's name, protected all parties except the printer from criminal prosecution (he was never prosecuted) but thereby denied the author and his consignee the legal ability to claim property in it. The book was immediately pirated by both Joseph Onwhyn and William Sherwin, but claims were never filed for fear of legal reprisals if Byron's authorship, though widely assumed, were publicly divulged. Katz, *supra* note 128, at 13–14. Murray's refusal to claim copyright in *Cantos I-II* signaled to all potential pirates that the work was fair game, which Eldon critic Nassau William Senior bluntly anticipated when he wrote "no sooner was it whispered that there was no property in 'Don Juan,' than ten presses were at work, some publishing it with obscene engravings, others in weekly numbers, and all in a shape that brought it within the reach of purchasers on whom its poison would operate without mitigation...." *Art. VI, supra* note 62, at 128. By 1823, *Cantos III-V* had been pirated by Onwhyn, Sherwin, and Fairburn, and the whole (*Cantos I–V* inclusive) had been pirated by Griffin, Sherwin, Dolby, Benbow, Hodgson, and Jones, but no infringement claims were filed. ST CLAIR, *supra* note 49, at 683–85.

\(^{185}\) Murray v. Benbow, C13/1743/26 (Feb. 1822).

\(^{186}\) In *Cain*, Lucifer presents the Creator's fundamental arbitrariness and amoral insensitivity as the cause of man's wretched condition, rendering Cain a sympathetic figure whose crime was understandable, if not justified. See, e.g., Paul Cantor, *Byron's 'Cain': A Romantic Version of the Fall*, 2 KENYON REV. 50 (1980) (providing a detailed textual analysis of the Biblical references in *Cain*); Peter Schock, *The 'Satanism' of 'Cain' in Context: Byron's Lucifer and the War on Blasphemy*, 44 KEATS-SHELLEY J. 182 (1995) (describing Byron's iconoclastic handling of Christian mythology as part of the movement known as "romantic Satanism"). By any conventional understanding, *Cain* would have been considered blasphemous, despite its presentation in the classical format of a speculative dialogue between mythological figures, presented by Byron as "a drama, not a piece of argument," *Letter from Lord Byron to Mr. Murray*, EXAMINER (London), Mar. 10, 1822, at 152, in an effort to portray the work as literary, rather than advocacy, in intent.
petition a court of law for damages and, if successful, to return for equitable relief as well, indicating that while the work might not be entirely innocent, there could still be property in it that might warrant protection by his court. But Murray did not pursue his claim at law, most likely because of the long delays manifest in gaining a judgment, during which the commercial damage to his property in *Cain* would have already occurred, rendering any subsequent injunctive relief useless.

Clearly Byron’s reputation as a “Satanist” colored any claims he or his consignees may have considered filing against piracies of *Don Juan*. Ironically, after a careful reading and taking questionable passages in context, *Cantos I–II* may well have passed Eldon’s “reasonable doubt” standard and qualified for injunctive relief had they not been immediately blanketed by William Hone’s hyper-satirical publications. His “*Don John*” or *Don Juan Unmasked*, was a critical review with lengthy excerpts exposing Byron as the author and Murray as the publisher. Hone’s own *Don John, Canto the Third*, an ostensibly London-based continuation published shortly after the Peterloo massacre, intimated, however unfairly, that *Don Juan* might be seen as a veiled radical tract. When Murray

---

187 While there was no published nominate report for *Murray v. Benbow*, two nominate reporters of stature, Edward Jacob and John Walker, took notes at the hearing, which became the only source for the reasoning behind Eldon’s ruling and which were subsequently published in Murray’s QUARTERLY REVIEW. Art. VI, supra note 62, at 128–30. Accordingly, while Eldon’s refusal to grant an injunction involved substantive conclusions about the nature of the work, it can be interpreted as a procedural judgment that the work was sufficiently questionable to deny an injunction at that time, even though Eldon acknowledged that it may lead to wider dissemination. However, his reasoning was again cautiously structured—Eldon stated that the primary remedy for copyright infringement was a suit at law for damages, while maintaining that his court could consider the nature of the work independently only if he were satisfied beyond a reasonable doubt that the law court would (if asked) find property in the work.

188 Katz, supra note 128, at 19–20; Mortenson, supra note 183, at 6–10.

189 Schock, supra note 186, at 191–98. Ironically, Byron’s works, especially *Don Juan*, were actually a commentary on the decadency of a social and economic order that was in fact already passing, rendering him somewhat passé as a social reformer. See Edward Dudley Hume Johnson, *Don Juan in England*, 11 ENG. LITERATURE & HIST. 135, 140–43 (1944) (discussing the emerging sentiments of Methodism and Evangelicalism that run contrary to establishment efforts to suppress challenges to Anglican doctrine). On the other hand, the free morality construct of the harem narratives of *Canto III* and in places more indelicately in *Cantos VI–VIII* would have been considered particularly obnoxious to the rising popularity of evangelical conservatism, which pressed for a tightening of social moralism in reaction to the unsettling vibrancy of socioeconomic change in England and a sentiment with which Eldon sympathized. Id.

190 MARSH, supra note 51, at 101.

191 Hone feasted frequently on the works of Byron, including publishing a cheap, unauthorized but unchallenged issue of *Lord Byron’s Poems* and *The Corsair* before issuing his satirical review, *Don John* and his parody, *Canto the Third*. See Peter J. Manning, *The Hone-ing of Byron’s Corsair*, in *READING ROMANTICS: TEXTS AND CONTEXTS* 216–37 (1990), and more generally, Donald
shied away from publishing *Cantos VI-VIII*, concluding that they would likely draw criminal prosecution and portended huge financial losses, Byron consigned the rights to John Hunt.\textsuperscript{192} Hunt published it in three editions at different prices, the cheapest “common” version designed to co-opt the piracy market priced at one shilling.\textsuperscript{193} It was nonetheless also pirated, first by William Hodgson and later by William Dugdale, probably in anticipation of healthy market demand based on the salacious nature of the previous cantos.\textsuperscript{194} On behalf of Byron, Hunt filed for an injunction against Hodgson, which he gained from Vice-Chancellor Leach with simple assurances that there was nothing objectionable in work and that no part of *Don Juan* had previously been the subject of a request for injunctive relief.\textsuperscript{195} As anticipated, Hodgson did not contest the preliminary injunction and withdrew his issue.\textsuperscript{196}

Three weeks later, Hunt filed a similar claim in Byron’s name against Dugdale, anticipating a similarly expeditious withdrawal.\textsuperscript{197} However, Dugdale unexpectedly contested the grant of a preliminary injunction with the affirmative unclean hands defense, even reading numerous passages aloud in the hearing which he claimed were licentious.\textsuperscript{198} Byron’s barrister countered that not a single passage was illicit in tendency or intent and likened them to commonly accepted love songs and romantic passages found in established

Thomas, *Press Prosecutions of the Eighteenth and Nineteenth Centuries: The Evidence of King’s Bench Indictments*, 32 LIBRARIAN 315 (5th ser. 1977), documenting trends in prosecutions for sedition, blasphemy, obscenity and defamation, in particular through the 1820s.

\textsuperscript{192} ST CLAIR, supra note 49, at 325–27.

\textsuperscript{193} Id.

\textsuperscript{194} Id. at 686 (documenting the immediate pirating of *Don Juan, Cantos VI–VIII*). All of Hunt’s editions acknowledged him as the publisher but continued to honor Byron’s insistence on authorial anonymity. When the work was pirated by Hodgson within days of Hunt’s issue, Byron abandoned anonymity and initiated a copyright infringement claim against him. *Byron v. Hodgson*, (1823) 37 Eng. Rep. 928 (Ch.).

\textsuperscript{195} Byron v. Hodgson, as reported in TIMES (London), no. 11928, July 19, 1823, at 3.

\textsuperscript{196} Id.

\textsuperscript{197} Byron v. Dugdale, (1823) 1 L.S. Ch. 239 (Ch.); TIMES (London), no. 11940, Aug. 2, 1823, at 3.

\textsuperscript{198} TIMES (London), no. 11946, Aug. 9, 1823, at 2. Dugdale argued that the work at issue was “wholly unworthy of the protection of the court, that its tendency was immoral in the highest sense, most calculated to effect the minds of the public, licentious, in every way dangerous, and most destructive of the morals of the community.” He also argued that the work was more dangerous than Lawrence’s lectures on physiology, litigated before Eldon in *Lawrence v. Smith*, (1822) 37 Eng. Rep. 928 (Ch.), because “they were written in such a warm poetic style” and pleaded with the court to “read the work through.” Id. That Dugdale a month earlier had not contested an injunction against his piracy of Byron’s *Beppo* might indicate that he expected that a standard unclean hands defense would not be applicable to that work. See supra note 183 and accompanying text. It was also assumed (correctly) that Dugdale was in dire financial straits and unable to sustain a protracted and costly litigation.
literary culture.\textsuperscript{199} Such a construction, he argued, raised the prospect that only "a corrupt and profligate mind would turn [those] expressions to an improper sense, which a pure mind would never discover," and while the work neither contained nor intended any corrupt meaning, "corrupt meaning could only be implied by those who were themselves corrupt."\textsuperscript{200} After discussing the authority of \textit{Walcot}, \textit{Southey}, and \textit{Lawrence},\textsuperscript{201} Leach directed "that in the protection of literary property, a court of equity followed a court of law," and since most of the cases cited as authority were decided nisi, "a trial at law should be directed to obtain a verdict of a jury."\textsuperscript{202} He thereupon dissolved the injunction, affording Byron "[the] opportunity of proceeding at law to recover damages," and if he were to succeed, he would be entitled to protection of equity court by injunction.\textsuperscript{203}

\textsuperscript{199} \textit{TIMES} (London), no. 11946, Aug. 9, 1823, at 2.

\textsuperscript{200} \textit{Id.} at 2, and 12 (no. 11948, at 2), 1823; \textit{MORNING CHRON.} (London), Aug. 9 (no. 16944) and 10 (no. 16945), 1823.

\textsuperscript{201} Leach had inquired whether the cases the plaintiff had cited had been reported, to which Byron's barrister replied that \textit{Southey} had, and the broader point of all three (\textit{Walcot}, \textit{Southey}, and \textit{Lawrence}) was that the court "would look at the whole scope and tendency of the work, [not specific passages only] and judge whether it was upon the whole a licentious and immoral book," [the true question being] "whether they were criminal at law..." He then noted \textit{Form, Gale, Dubost,} and \textit{Hime} as additional authorities, arguing "that unless the works was [sic] actually libelous, a court of law would not refuse damages, and a court of equity, consequently, would not refuse its protection." \textit{TIMES} (London), no. 11946, Aug. 9, 1823, at 2.

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} \textit{Id.} The \textit{TIMES} responded editorially that the case revealed what at the time was commonly assumed—that statutory damages were generally insufficient to protect literary property and that it fell to a court of equity to do so by injunction. Nonetheless, the \textit{TIMES} countered, injunctions were being denied "upon collateral grounds," establishing a doctrine [the Clean Hands Doctrine] that had until then only been insinuated in \textit{Walcot} and \textit{Southey}. The doctrine derive[d] its origin from no statute, decision, or legal authority, but was founded on a single passing observation which fell from Lord Chief Justice Eyre (in Dr. Priestley's action against the hundred), but which was neither applied nor acted on. It has, however, revolutionized the state and condition of literary property....

\textit{Id.} It also criticized the court for accepting what it considered to be a common law principle ("[B]ut we humbly desire to ask, where that principle is to be found?...that there can be no property in a seditious, defamatory or immoral libel"), rhetorically asking when the courts began to accept such a charge from the mouth of a defendant who admits his criminality, "setting up his criminality towards the public as an excuse for his villainy towards the author [?] It is nothing to say that both are libellous: if this be so, let both be prosecuted in a court of criminal law." \textit{Id.}
The record of how the literary works of Shelley fared at equity is far more sketchy—only one case was tried, but it did not involve a copyright claim, while another case heard at law did not even include Shelley as a party. Both, however, alluded to the nature of his literary work as the deciding point. The record is further complicated by the fact that most of Shelley’s works were not published commercially in his lifetime, and whatever copies reached the reading public were compliments of pirates working from privately published copies.204 It is to these copies that we direct our attention, focusing primarily on Shelley’s Queen Mab; A Philosophical Poem; With Notes. The poem was widely pirated in either full text and lengthy excerpts and, while generally anti-Christian and anti-government in sentiment, was either so immersed in classic literary style and verse or considered standard political commentary as might easily have still passed Eldon’s “reasonable doubt” standard had it come before him as an issue of property.205 But it was Shelley’s scandalous marital life and contested guardianship of his children that brought him before Lord Eldon at chancery, where Queen Mab and other writings were presented as evidence of his immoral and atheistic dispositions in a child custody battle between he and his deceased wife’s parents in a manner that would indirectly solidify the acceptance of the Clean Hands Doctrine at equity.206

204 ST CLAIR, supra note 49, at 165.
205 Most of Shelley’s politically or morally controversial works were distributed privately among friends and filtered out into the literary world, provoking published reviews of both high praise and scornful admonition. While they were not published during his lifetime, many were then pirated and sold commercially, with little success. ST CLAIR, supra note 49, at 320. Besides Queen Mab, one other notable exception was his Shakespearian tragedy, The Cenci, which was classical in both narrative and motif but was rejected for staging by numerous London theaters because its themes of incestual rape and patricide would not pass government censorship. Instead, it was published in book form in Italy, anticipating that printers in London would balk at the controversial content, and sold in London without government prosecution, popular enough to warrant a second edition in 1821. See JAMES BIERI, PERCY BYSSHE SHELLEY: A BIOGRAPHY: EXILE OF UNFULFILLED REKNOWN, 1816–1822, at 136–37 (2005) (describing publication of the Cenci and its reviews).
206 Shelley v. Westbrook, (1817) 37 Eng. Rep. 850 (Ch.) 850–52. The plaintiff, a renowned poet, sued for permanent guardianship of his children from their maternal grandparents after the suicide of his estranged wife. See Rousseau Burch, The Case of Shelley v. Westbrook, 11 AM. LAW. 339, 339–41 (1903) (describing the marital background leading to Shelley’s divorce are filing for custody). As Chancery Court had temporary guardianship over the welfare of his motherless children, Shelley’s petition came before Lord Eldon and was countered persuasively by what was becoming a standard ex turpi causa, or unclean hands defense. The defendants argued that the plaintiff had, by his generally immoral treatment of his wife and an extra-marital liaison that resulted in a child out of wedlock, demonstrated his unfitness for guardianship. THOMAS
Written in nine cantos and accompanied by fifteen philosophical (and often anti-Christian) notes in an appendix but never commercially published, *Queen Mab* fantasized a monologue by the fairy queen before a subservient listener (and thereby the reader) in which she explained the harsh realities of the past, present, and future. *Queen Mab* was extravagantly published, structured in this manner, with lengthy philosophical notes tucked in the back, such that only persons of position and means would likely buy and display a copy (though they would hardly be expected to read it). Shelley presumed that the more blatantly anti-government and anti-Christian sentiments expressed in the notes would be considered an authorial afterthought, especially as they were so esoterically written that they would dissuade most readers from attempting to decipher them, thereby lessening his chances of criminal prosecution for blasphemous libel. They were written, in essence, for his own select discursive community, encrypted with coded phraseology to be ignored by all others.

Shelley had privately printed 250 copies of *Queen Mab*, and circulated about seventy to friends and literati, including Byron, whose attention he valued. 

---

**MEDWIN, THE LIFE OF PERCY BYSSHE SHELLEY** 463–86 (1913) (Appendix III Chancery Papers related to Shelley's children by Harriet). Added to this was *Queen Mab*'s documentation of Shelley's publicly expressed atheistic beliefs, as it arguably contained blasphemous passages, and Shelley's unpublished *A Letter to Lord Ellenborough*, a pamphlet that argued prejudice by the Chief Justice in the blasphemous libel conviction of Daniel Isaac Eaton in 1812. Kyle Grimes, *Queen Mab, Libel, and Forms of Shelley's Politics*, 94 J. ENGL. & GERM. PHILOLOGY 1, 5–7 (1995) (describing Shelley's caution at not publishing works that might jeopardize his paternal rights). Eldon concluded that the children ought not to be brought up in a blasphemous and amoral atmosphere; in effect, Shelley had petitioned for equity with "unclean hands," disqualifying him from succeeding in what was a fairly standard paternal custody claim. Despite Shelley's assertions, it would be too simplistic to argue bias on Eldon's part. In fact, Eldon ruled that both parties were unsuitable and deferred to the Master to consider proposals from each of them as to suitable third parties. *Shelley*, 37 Eng. Rep. at 850–51. The case ultimately settled in favor of Shelley's second choice, with both parties contributing annual support. *Bieri, supra note 205*, at 26–31. After this ruling in 1817, however, writers including Byron, became reticent to claim authorship, particularly in equity, of works of questionable nature. *See Simon, supra note 164*, at 244–55.

---


209 Dyer, *supra note 208*, at 509–11; ST CLAIR, *supra note 49*, at 318. Shelley had carefully removed the publishing information from the copies individually distributed, and the remaining copies were stored in William Clark's bookshop in London. Assumedly, it was from the latter storage that Clark secured a copy for pirating, and one of the private circulated copies was...
One of those copies was reviewed at some length in 1815 in The Theological Inquirer, a then-new periodical to which Shelley himself likely contributed.\footnote{Grimes, supra note 206, at 10–11.} The next year he reshaped the first two cantos into a more veiled work: The Daemon of the World.\footnote{Privately printed in his ALASTOR; OR, THE SPIRIT OF SOLITUDE: AND OTHER POEMS (1816). Daemon was still radical, but the protagonist was ostensibly apolitical and a-religious Shelley was careful to cloak his authorship of Queen Mab, but not Alastor, the first work in which he published his name as author. See Mary Quinn, The Daemon of the World: Shelley's Antidote to the Skepticism of Alastor, in 25 STUDIES IN ENG. LITERATURE, 1500–1900, at 755 (1985) (describing Shelley's careful revisions in “Daemon” to avoid prosecution for blasphemous and seditious libel); The Queen of the Universe: Shelley's Revised “Queen Mab,” in 4 SHELLEY & HIS CIR. 1773–1822, at 487, 497–514 (Kenneth Neill Cameron ed., 1970) (detailing the compositional reduction of “Queen Mab” into “Daemon” for publication in Alastor).} When it was submitted as evidence against his moral character in the 1817 custody hearing, Shelley publicly denounced the work as naïve and “(f)ull of those errors which belong to youth, as far as imagery and language and a connected plan is concerned. But it was a sincere overflowing of the heart and mind, and that at a period when they are most uncorrupted and pure.”\footnote{Timothy Webb, SHELLEY: A VOICE NOT UNDERSTOOD 86 (1977) (quoting letter from Percey Shelley to Mr. Waller (Nov. 22, 1817)). This lament has been the primary source of the parallels drawn between Shelley's Queen Mab and Southey's Wat Tyler. See supra note 118} However, this public confession did little to counter the charge that his writings gave graphic illustration to his avowed atheistic and free-love views and lifestyle, as offered against his fitness in the custody hearings regarding his children by his first wife.\footnote{Medwin, supra note 206.}

More critical to the legal consideration of Queen Mab's tendencies was William Clark's unauthorized publication of the 1813 private issue in two entered in evidence at the custody hearing by Shelley's father-in-law, John Westbrooke in 1817. Shelley v. Westbrooke, (1817) 37 Eng. Rep. 850 (Ch.) 850, also as reported as Westbrooke v. Shelley, in TIMES (London), no. 11948, Aug. 12, 1823, at 2.

Grimes, supra note 206, at 10–11. Three of the earliest pirated versions of Queen Mab can be attributed to manipulations by the radical activist and publisher George Cannon, who had secured a copy of the work from Shelley in 1815 and had published extensive excerpts of it in The Theological Inquirer under the pseudonym of “Erasmus Perkins” that same year. Grimes, supra note 206, at 10–11. As a review, it would have easily escaped any copyright infringement claim under the Statute of Anne (though perhaps not as an unpublished manuscript under common law, the Priestley ruling notwithstanding) and, as it was carefully edited, was not prosecuted for criminal libel. Cannon then persuaded Benbow, a struggling bookseller, to publish a full version (the so-called “New York edition”), issued in London in the summer of 1821 under a false imprint reading only “New York, 27 October 1821” in an effort to derail any possible criminal prosecution as a “foreign publication.” See McCalman, supra note 151, at 152–77; Grimes, supra note 206, at 10–11.
editions, one complete and the other expurgated, both elegant, upscale, and distributed through the black market in 1821. These caused Shelley to publish his disavowal of his earlier sentiments and to declare his intention to file a claim at equity for an injunction, which he apparently never filed. At the same time, Clark himself was prosecuted for publishing a blasphemous libel by the Society for the Prevention of Vice and was convicted and sentenced in November 1822 to four months in prison. Shortly thereafter, William Benbow included extensive stanza excerpts in a review of the Clark piracy in John Bull’s British Journal, after which he published his own complete piracy, the so-called “New York edition,” in October. Also from the 1813 copies in storage, bookseller Richard Carlisle published his own issue in four separate editions, and dozens of pirated editions flooded the market between 1821 and 1830, mostly after Shelley’s untimely death in 1822.

Ironically, Shelley had been persuaded to not publish Queen Mab, a text that friends advised him was too dangerously libelous, and certainly not published in a manner that would qualify it for copyright protection under the Statute of Anne. Nonetheless, between its small private printing and circulation among friends in 1813 and the Clark piracy in 1821, Queen Mab developed an extensive radical following; this was based almost entirely on published reviews and accounts of the text drawn from testimony at Shelley’s custody trial, becoming an ersatz “Bible for Chartism,” especially among radicals and the discontented.

214 2 POETRY OF SHELLEY, supra note 208, at 509–10; ST CLAIR, supra note 49, at 680.
215 EXAMINER (London), July 15, 1821, no. 706 (“I regret this publication, not so much from literary vanity, as because I fear it is better fitted to injure rather than serve the sacred cause of freedom. I have directed my Solicitor to apply to Chancery for an injunction to restrain the sale; but after the precedent of Mr. Southey’s Wat Tyler (a poem written, I believe, at the same age [nineteen], and with the same unreflecting enthusiasm), with little hopes of success.” The reference to Southey was intentional. There is no evidence in the court record or mention by those who reviewed court proceedings that such a claim was actually filed.).
216 Queen Mab, TIMES (London), Dec. 11, 1821, at 2. For detail of this and a dozen other piracies based on the private copies in Clark’s possession, see 2 POETRY OF SHELLEY, supra note 208, at 497–513. Less than twenty years later, respected London publisher Edward Moxon published a four-volume compendium of Shelley’s works, including Queen Mab, with the parts cited in the Clark indictment asterisked out. Moxon’s second edition however, published as a single volume in 1840, included those reputedly illicit parts and private prosecution was brought against him in R. v. Moxon, (1841) 4 ST. TR. 693 (Q.B.). Illustrative of the increased difficulties gaining convictions for blasphemous libel in literary works, Moxon was convicted but never sentenced, the jury unwilling to find illicit intent, effectively marking the end of blasphemous libel prosecutions based on claims of atheism. See MARSH, supra note 51, at 90–98; Donald Thomas, The Prosecution ofMoxon’s “Shelley,” 33 LIBRARIAN 329 (1978).
217 2 POETRY OF SHELLEY, supra note 208, at 508–12.
218 2 id. at 509–10.
219 2 id. at 491–98.
As with Byron, Shelley’s lifestyle, combined with his professed atheism and satirical rants against governmental tyranny, had become his public persona even before any of his writings were pirated. Associated with others known as Satanists, Shelley’s reputation alone may have been sufficient to meet the requirement of “reasonable doubt,” which Eldon used to determine whether writings were illicit enough to be debarred from copyright protection until property in them had been established in a damages claim at law.

Then why pay any attention to Shelley at all, since he never claimed property in his works at law or in equity? Certainly the unpublished *Queen Mab* would have qualified for copyright protection under common law, notwithstanding any public policy concerns that may have been raised by its content. More to the point, both Byron and Shelley represented authors of literary works that were both satirical and politically and culturally iconoclastic, and either because of or despite that, they achieved significant popular acclaim. They had cleverly evaded criminal prosecution by cloaking their coded narratives in sophisticated metaphorical language and classical poetical forms sufficient to cause any jury to question whether the works were merely presenting allegories in classical poetical form or advocating immorality. Such adaptability revealed how unsettled libel law was with respect to literary works, and it emboldened authors not only to write but also to seek copyright protection for more marginal works. The Eldon practice of deferring questions of property to law, which was previously dissuasive to plaintiffs because of the presumption that juries


221 Shelley’s most critical writings, while circulated among friends, were only published posthumously, including his *Letter to Lord Ellenborough*, which criticized Ellenborough’s jury direction in the 1821 trial of Daniel Eaton for blasphemous libel, while circulated among friends, were only published posthumously; *The Devil’s Walk and Declaration of Rights* (both in 1812), whose distribution by hand and by mail led to the arrest of Shelley’s servant, Daniel Hill; *The Masque of Anarchy*, which Shelley wrote in outraged response to the Peterloo Massacre, criticizing government officials, including Eldon, by name; and a tract sent for publication in the *Examiner* (London) but which the editor withheld.

222 That distributor Clark was convicted does not lessen this point, since his intent to distribute was “calculated to do harm,” whereas an author’s intent would be a moot point prior to publication. The same could be observed of the present-day *United States v. Stagliano*, 693 F. Supp. 2d 25 (D.D.C. 2010), in which Stagliano, like many in the commercial pornography industry, worked a niche within the fluid, safe margin of pornographic content and insulated himself from the distribution of his products, making prosecution unlikely. Richards & Calvert, supra note 4, at 547–60. When the OPTF prosecuted him, he was easily acquitted. See supra note 69 and accompanying text.
would find most such works objectionable, had become less threatening as the range of acceptability of literary works became more fluid.

VI. THE LEGACY OF CLEAN HANDS IN COPYRIGHT

Reflecting on the case law from the Eldon period and before, we must conclude that the pedigree of the Clean Hands Doctrine, and more specifically its application to copyright law via the obscenity defense, is scattered and ambiguous at best, causing us to reconsider the origins of its basic elements. Both Pound and Chafee cast doubt upon whether “clean hands” ever rose to the level of a legal maxim or principle which Pound defined as “an established rule of the strict law.” Often, whether a legal maxim was intended to be a statement of law or simply “moral rules, which do not obtain as positive law,” could only be determined after a decision had been rendered. However, the development of the Clean Hands Doctrine seems far less principled than we might have expected. Instead, at its core appears to be a range of legal decrees that were then reduced to a set of fixed or strict rules and adapted into equity by absorbing its traditional obligation to restore an equitable balance among the parties, tailored to the particulars of the specific case. Based on Francis’s compilation of equitable maxims, assumedly grounded in broader principles he had discerned from a scattering of discrete rulings and then applied more systematically by Chancellors Hardwicke and later Eldon, to the point that their rulings were accepted as authority, equitable doctrines emerged. Arguably, equity in Eldon’s time had already crystallized into settled principles uniformly applied, signaling Roscoe Pound’s lament for “the death of living equity.”

225 Francis, supra note 26.
226 Roscoe Pound, The Decadence of Equity, 5 COLUM. L. REV. 20, 25 (1905). It is no simple matter to discern when equity moved from seeking judicial consistency by rendering like decisions in analogous case circumstances to relying on a line of specific case authorities. See Croft, supra note 157, at 121–55 (describing four stages by which precedent develops in the eighteen and nineteenth centuries). Both Hardwicke and Eldon found and relied on what they saw as equitable principles underlying prior rulings and felt obliged to honor those principles unless the result was grossly inequitable. Id. at 129–37. At no point did either suspend that reliance in favor of a volume of cases as illustrations or cite a single case as binding, the principles considered self-evident enough to stand on their own. Eldon’s consistent referral to Priestley as an illustration or tag of a self-evident principle is the case in point, as the facts in Priestley are not consistent with any subsequent Eldon rulings. See Croft, supra note 157, at 133–37. See generally W.H.D. Winder, Precedent in Equity, 57 L.Q.R. 245, 251–58 (1941); Duxbury, supra note 52, at 58–110.
For Pound, the refinement, or modernization, of equity toward mechanistic application of fixed rules signaled the demise of its original function—restoring equitable balance—and also allowed parties to manipulate the predictability of outcomes to their own advantage by using the equity court to legitimize or support inequitable consequences of not-quite-honest dealings, mostly in contractual agreements and marital arrangements. In turn, defendants took advantage by deflecting legitimate equitable actions against them by arguing that the plaintiffs had not adhered to accepted principles or maxims of moral behavior, as in patent or copyright claims, in effect having "unclean hands" and tacitly manipulating the judicial process to their own inequitable ends. Ironically, the application of systematic equitable rules intermittently produced or sustained inequitable results regardless, creating an asymmetry between the mitigating effects of equity on legal decisions and the aggravation that resulted from departing from the rule of law by discretionary judgments.

If we assume that the Clean Hands Doctrine evolved from general principles rather than discrete rulings, our search for early applications of the clean hands maxim needs to broaden beyond rulings at equity. That leads us to consider a wide range of metaphorical references to "clean hands" in cases of fraud and other forms of misrepresentation in contracts and agreements long before the vaunted Eyre rulings and raises the prospect that the clean hands metaphor...
adopted by Eldon, if not explicitly by or from Eyre, was an adaptation of a broader legal principle from contract law to copyright infringement cases. Whether that rendered it a stand-alone equitable principle or doctrine, or simply a convenient reference for a discretionary ruling, remains an open question. Eyre may have applied the clean hands metaphor in Priestley to a plaintiff seeking damages for lost property value at a time when the principles of property rights were still somewhat unsettled, especially with regard to the relatively new concept of literary property. This precipitated a period of legal adjustments in which common law and statutory interpretations of what constituted literary property were sorted out by informal sets of equitable procedures, the formalization of which is usually identified with Eldon.230

Eldon’s rulings regarding copyright infringement can be read as fundamentally procedural, i.e., who decides whether a literary work is immoral and whether that is sufficient to disqualify a plaintiff from copyright protection rather than substantive. If he was simply following precedent, as he was often reputed to do with almost dogged determination, we need to be more

Small v. Brackley, (1707) 23 Eng. Rep. 993 (Ch.) (“[T]he Lord Chancellor... dismissed the bill; the plaintiff having been guilty of as great a fraud and breach of trust, as could be, and not be criminal; and having agreed to make some satisfaction he ought not to be relieved in equity.”); Evert v. Williams, (Ex. 1725), belatedly reported in Note, The Highwayman’s Case, 9 L.Q.R. 197, 198 (1893) (plea by one highwayman for equitable distribution of stolen proceeds dismissed “for scandal and impertinence”); Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82 (Ch.) 100 (“This court has an undoubted jurisdiction to relieve against every species of fraud.”); Monetfiori v. Monetfiori, (1762) 96 Eng. Rep. 203 (K.B.) 203 (“[F]or no man shall set up his own iniquity as a defence, any more than as a cause of action...”); Neville v. Wilkinson, (1782) 28 Eng. Rep. 1289 (Ch.) 1290 (misrepresentation in a contract is fraud, and “A court of justice would make itself ridiculous...” if distinctions as to the degree of fraud were further drawn). In fact, the process by which equity proceedings became governed by settled principles and rules has more accurately been identified with Hardwicke, and then later “completed during the two Chancellorships of Lord Eldon...” William S. Holdsworth, Blackstone’s Treatment of Equity, 43 HARv. L. REV. 1, 1 (1929).

230 Prior to Priestley, Eyre applied the clean hands metaphor in two cases on the equity side of the Exchequer, neither involving literary property but both involving the broader principle. In Scott v. Scott, (1787) 29 Eng. Rep. 1206 (Ex.) 1211, he ruled that misrepresentation based “only on general tendency, and general immorality of such conduct,” did not disqualify the plaintiff from equitable relief. He followed the same line of argument in Dering v. Earl of Winchester, (1787) 29 Eng. Rep. 1184 (Ex.), when he accepted that the plaintiff had behaved in an immoral manner prior to litigation but concluded that behavior was insufficiently related to the litigation to spoil his claim. Ironically, and inappropriately, Dering later became cited as the first equitable application of the clean hands doctrine. Clearly, Eldon’s dictum regarding the compelling nature of Eyre’s ruling in Priestley was consistent with his effort to establish fixed rules by which equity would become less discretionary, a trend also lamented by Pound (“In the very act of becoming a system, it becomes legalized, and in becoming merely a competing system of law insures its ultimate downfall...”). Pound, supra note 226, at 25.
discerning regarding his particular role in the evolution of the Clean Hands Doctrine in equity before we can examine more closely the American cases that built upon what they considered to be established doctrine. Recognizing that the application of fixed rules and doctrines at law would, on occasion, produce inequitable consequences, law courts and later equity courts adopted the maxim "equity cannot create inequity" as a common law principle. After the passage of the Statute of Anne, application of that principle to copyright infringement cases necessitated injecting a degree of discretion into statutory interpretation that itself could lead to inequitable results and questions about the integrity of the judicial process. To avoid such consequences, equity courts began to pattern their rulings after lines of authority derived from the more positivist tradition of law courts, resulting in the development of a set of fixed principles designed to guide decisions into more predictable and uniformly equitable directions. 231

Complicating our ability to affix Eldon’s role in the Clean Hands legacy is the ambiguity regarding the ratio decidendi for the procedural imperative reflected in his rulings. This is particularly noticeable in his consistent referral of determination of property rights to courts of law before he would consider equitable relief. This was, in fact, a practice that preceded Eldon’s tenure at chancery and had been frequently applied in the eighteenth century. 232 Regardless of whether Eldon’s rulings were compatible with or driven by his subjective political (or religious) ideology, they were consistent with precedent regarding the preeminence of the law courts in findings of fact and were therefore a stabilizing force in equity jurisprudence. 233 Eldon’s adherence to

231 For Eldon, it was clear that the continuity of equitable rulings took precedence over incidental inequities or even challenges to the public welfare, as long as recourse was available either by appeal to the House of Lords or by legislation. His penchant for avoiding the appearance of discretionary judgment is illustrated in Gee v. Pritchard, (1818) 36 Eng. Rep. 670 (Ch.), where, in reference to the claim that the basis of rulings by successive Chancellors varied as much as did their foot size, Eldon wrote, “Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this court varies like the Chancellor’s foot.”). See also C.J. Rossiter & Margaret Stone, The Chancellor’s New Shoe, 11 U.N.S.W.L.J. 11, 11-16 (1988) (describing criticism of Eldon for vacillation in ruling on cases regarding questionable material).

232 See Dennis R. Klinck, Lord Eldon on ‘Equity,’ 20 LEGAL HIST. 51, 52-53 (1999) (documenting Eldon’s adherence to principles and rules established in precedent cases to maintain judicial consistency, even at the expense of “abstract justice,” a practice that can be identified with both Lord Hardwicke fifty years earlier and with Sir William Grant, who was Master of Rolls during Eldon’s tenure, noting that “[t]he kinds of dicta that we associate with Lord Eldon’s characteristic outlook may, then, have been something more like judicial commonplaces”).

233 Id. at 60. Eldon assumed that the interests of justice were best served by establishing facts beyond a reasonable doubt and then applying maxims of equity to them. The debate lingered as
precedent has been interpreted as bringing fixed rules to equity, thereby reducing its capacity to arbitrarily dispense equity.\textsuperscript{234}

In this light, Eldon's rulings appear essentially jurisdictional, rendering equitable relief on issues of property when property could be documented by the plaintiff. Whether a plaintiff had property in a literary work was treated like all other matters of property—to be determined as a question of subject matter jurisdiction at law by a jury. The clean hands maxim had evolved as a mechanism for sorting out property claims at law, and particularly after enactment of the Statute of Anne, plaintiffs claiming property in literary works progressively sought more immediate and meaningful relief from copyright infringement at equity, as damages at law were widely considered inadequate to protect a copyrights value.\textsuperscript{235} It was inevitable that equity would attempt to standardize the determination of literary property by a procedure for directing questionable claims regarding literary property to law. That procedure emerged in the Hardwicke era and was consistently accepted as authority by Eldon, who cited Eyre's dicta from non-copyright cases, thereby solidifying how the Clean Hands Doctrine was applied to copyright.

The critical question was whether a plaintiff, who had himself committed wrongdoing related to his property claim, should be denied a hearing at equity from the outset or denied relief in a discretionary judgment based on public policy concerns. For Eldon, referring an issue of property to the law courts was a standard procedure in cases where any "reasonable doubt" arose as to the nature of the work at issue. In that manner, he was not precluding equitable


relief but rather delaying such consideration until property was certified at law.\textsuperscript{236} That was not the same as declaring a plaintiff "disqualified" from receiving equitable relief; while a plaintiff had a legal claim to the property at issue, public policy precluded relief, allowing the claimed and legally recognized inequity to remain. This language, found intermittently in early equity rulings resting on the Clean Hands Doctrine,\textsuperscript{237} implied a moral structure to the legal doctrine, not so much that the merits of the plaintiff's claim warranted legal action, but rather that certain moral conditions must be met before standard equitable doctrines could be applied.\textsuperscript{238} It might be argued that this preserved the court's integrity because the court did not countenance immoral behavior. Yet, the court still had to balance the doctrine's deterrence of potential plaintiffs with "unclean hands" against the public policy of upholding clear legal rights according to established standards irrespective of moral consequences, which was arguably the more traditional core element of the court's integrity.\textsuperscript{239} As legal doctrines became the foundation of judicial integrity in courts at law, the role for discretionary justice increasingly took precedence in courts at equity until

\textsuperscript{236} This use of judicial discretion to withhold even temporary injunctive relief until a plaintiff could establish a rightful claim for damages at law immediately became controversial from several vantage points. First, it was largely presumed that the delay mandated by such a sequence of hearings at law would all but eviscerate the value of a plaintiff's property, even if he were vindicated in a ruling at law. In that, Eldon assumed he was simply following established precedent, though the consequence may have been inequitable to the plaintiff in contradistinction to the avowed purpose of equity court. It was on this basis that Eldon's decisions were criticized in the Quarterly Review (Art. VI, supra note 60) and later by Story (supra note 57). Second, it was charged that denial of temporary injunctive relief would cause an immediate proliferation of unauthorized publications of illicit works, a consequence still voiced today.


\textsuperscript{238} See Ori J. Herstein, A Normative Theory of the Clean Hands Defense, 17 LEGAL THEORY 171 (2011) (U.K.). This has been identified with the tu quoque ("You too!") maxim, in which the court does not negate the truth-value of the plaintiff's claim but instead rules that his complaint is not one the court is obligated to hear because the plaintiff has engaged in wrongful behavior similar to the wrongdoing by the defendant. Id. at 191–98 (describing the clean hands defense as an issue of standing). While this seems simply to restate the Clean Hands Doctrine as a "working proverb," it also implies elements of moral retribution, in that the plaintiff loses access to relief as a sanction against his own hypocrisy. It also effects a rectification, in that denial of access in effect annuls any ill-gotten or unfair advantage the plaintiff has acquired through his own wrongdoing. Both of these reflect onto the plaintiff's behavior as an ad hominem argument and have little to do with the integrity of the court, which has allowed the plaintiff to "do equity" in the interim as a method of regaining access.

\textsuperscript{239} Id. at 183–91 (reflecting on different bases of the concept of court integrity).
chancery itself began to move in the same direction by establishing rules and procedures of its own. In effect, the legal doctrine of the clean hands maxim at law begat the Clean Hands Doctrine at equity.

One might, therefore, conclude that Eldon's embrace of a Clean Hands Doctrine as a fixed standard directing the determination of property in a work to the law courts was primarily based on procedural precedent. It was the province of the law courts, and specifically a jury, to make that final decision on the nature of the work and whether the plaintiff had property in it. However, such a legal detour could only be avoided, in Eldon's view, if a work was "clearly innocent," which was admittedly still a discretionary call. Plaintiffs claiming property in questionable works first had to successfully plead for statutory damages at law in order to qualify for equitable consideration. They were not then "disqualified" from equitable relief by a referral to law as much as they were being denied standing at equity until their property could be established at law. That most plaintiffs chose not to pursue that course spoke to their wariness of being vulnerable to subsequent prosecution or the costs and delays endemic in the law process. If they succeeded at law and returned to chancery, they would be eligible to claim equitable relief and probably would have prevailed.240

So, Eldon's doctrinal contribution may not have been as morally prejudicial as has often been implied. If Eldon treated Hardwicke's earlier rulings as binding precedent in determining if a plaintiff had property in a literary work, with some discretion as to reasonable doubt that the work was illicit, plaintiffs could be assured that this procedure would be followed in each subsequent instance. Following that, equity courts were able to ground their integrity not in the equitability of the results of each case but rather in its uniform treatment of all claims brought before it. As chancery's use of form and precedent edged closer to the more doctrinally rigid law courts, any moral aspect there may have been in the doctrine became more a matter of considering statutes than fairness, forcing the chancery to wrestle with the vagaries of statutory language and intent.

240 This occurred very rarely. In Cary v. Longman, (1801) 170 Eng. Rep. 613 (KB.), the plaintiff, denied an injunction at equity and directed to law, won nominal damages but did not return to chancery. In Murray v. Edison, (1822) 106 Eng. Rep. 1331 (KB.), the plaintiff initiated an action for damages at law after his injunction had expired, but a year after filing, he was denied relief without explanation and the case did not return to chancery. In Byron v. Dugdale, (1823) 1 L.J. Ch. 239 (Ch.), the court lifted an injunction with the specification that if the plaintiff successfully sued for damages at law, the injunction would be reinstated. The plaintiff did initiate action at law, but abandoned it when it became apparent that the defendant Dugdale was destitute.
VII. ADOPTION OF THE OBSCENITY DEFENSE INTO AMERICAN COPYRIGHT LAW

English common law was rather haphazardly adopted into American jurisprudence during the first decades after the ratification of the U.S. Constitution. Some state courts were reticent to recognize the authority of English court decrees, preferring instead to establish their own common law traditions. Uniformity of adoption was further complicated by the sheer diversity of court structures from state to state, each having developed its own indigenous legal practices. Also, the virtual absence of legal literature in the United States, as usually found in law reports, manuscripts, and treatises, made recognition of English or American case authorities nearly impossible. While an increasing range of English treatises on equity theory and procedures had been published by the early nineteenth century, few had wide distribution in the United States. Scarcer still were copies of published nominate reports of English cases, which those treatises portrayed as governing.

The Clean Hands Doctrine of the Eldon period was at first absorbed into American practice through a general awareness of and reliance upon the


242 Having no official judicial status, court reporters in England were not considered authorities, and the quality of their published reports was known to be uneven. This raised skepticism about their authority, causing American courts to rely more on reasoning from broadly defined common law principles from legal treatises.

243 See Seipp, supra note 241, at 1439–40. Early reports of state rulings were scattered at best, varying from state to state in quality and accessibility, with official state reporters only appointed beginning in 1824 and becoming more prevalent only by the 1850s. Id.

244 Kempin, supra note 241, at 34–37; Aumann, supra note 241, at 334–43.

245 The absence of English and American case reports inevitably led to an early judicial reliance on English treatises and texts for explication of principles. 1 ROSCOE POUND, THE FORMATIVE ERA IN AMERICAN LAW 151–53 (Boston 1938); Simpson, supra note 26, at 668–74. That reliance may not have been formalized as citations in American cases, due in part to the reticence of state court systems to cite “foreign sources.” These included English decisions after independence, as well as rulings from civil law-based courts from other countries and even decisions from different U.S. states. Seipp, supra note 241, at 1424–35.
established principles of equity. Courts probably accessed these through English treatises and reports on equity which, even before the end of Eldon's tenure as Chancellor, had begun to gather doctrinal statements from eighteenth- and early nineteenth-century English rulings governing copyright cases of equity. These served as a structural guide, if not the exact content, for the first American treatises and law texts on equity, which identified fundamental equitable principles and perhaps the broader maxims from which they were derived, but offered scant discussion, if any, of the facts of the English cases cited or whether the *ratio decidendi* in each was consistent with the principles they were said to reference.

Moreover, the principles identified in the English treatises on equity were largely procedural and not referenced to case authorities, though they were clearly drawn from the Hardwicke and Eldon rulings. For example, it was commonly accepted that a right to literary property must initially be determined at law under the direction of the court of equity to which a copyright infringement claim had been directed, if and when a claim of a property right was disputed or a "fair doubt" existed. In the interim, a temporary injunction could be granted until notice was issued, an answer was received, or a dispute over the property right was resolved. Furthermore, it was a standard caveat
that there could be no property in a published work with an immoral or illicit tendency calculated to injure public morals or disturb the public peace, the criminal aspects of which were the province of the law courts. With respect to those types of works, it was consistently held that a court of equity had no jurisdiction over criminal matters nor any moral obligation to tailor an equitable judgment so as to protect the morals of society. In particular, that a court of equity would not interfere when the plaintiff could file an action for damages at law was staunchly maintained.

English treatises on equity identified as common practice that which had been established during Hardwicke’s tenure and doctrinally fixed by Eldon. Specifically, they maintained that upon receipt of a bill charging copyright infringement and requesting both injunctive relief and an account of profits, a court should first consider the technical matter of the plaintiff’s claim of a property right in the literary work at issue, whether there was sufficient doubt to direct the matter to a court at law. In normal course, the judge or his designee, such as the Master of Rolls, would read the work at issue and compare it to the claimed infringement. He would then form a judgment as to whether the nature of the work was sufficiently morally suspect such that a right to property in it might be denied on public policy grounds, a question usually reserved for a

246, at 366–67; and Jeremy, supra note 246, at 321 (citing Wakot, 32 Eng. Rep. at 1, Burnett, Lawrence, Murray).


252 See Petersd., supra note 128, at 558n (citing Priestly); Eden, supra note 246, at 315; Starkie, supra note 247, at 142–43 (citing Wakot, 32 Eng. Rep. at 1; Southey, 35 Eng. Rep. at 1006; Byron v. Dugdale, (1823) L.L.J. Ch. 239 (Ch.). These principles were then replicated in 2 Story § 937 (supra note 57), which itself referenced Petersdorff.

253 There is clear evidence that Eldon read the works at issue in most of his cases that required substantive consideration, including Wakot (The Works of Peter Pindar), Southey (Wat Tyer), Murray v. Benbow (Cain), and Lawrence (Lectures in Physiology). In Southey, 35 Eng. Rep. at 1007, Eldon initially stated that having not yet read the work, he assumed it was of such a nature as to be criminal, in which case he could grant no jurisdiction. The next day, however, after he had read the work, all the affidavits, and precedent cases, and while still embracing Eyre’s statement of principle in Priestley, Eldon argued that he would not consider the nature of the work since it was unnecessary to its civil dispensation in equity court. Southey, 35 Eng. Rep. at 1008. Alternatively, in Murray v. Dugdale, (1823) C13/1754/36 (Ch.), Eldon reiterated the governing principle established in Priestley and considered reading Byron’s Beppo unnecessary, as it had already been published in multiple editions over a five-year period without criminal challenge. Mortenson, supra note 183, at 11 n.14.
During Eldon’s tenure, such an issue could only be resolved if the plaintiff first filed for damages under the Statute of Anne, even though damages at law were universally considered inadequate to protect property in literary works, and subsequent equitable relief would be required as an appropriate supplement to an action.\(^{255}\)

By the end of Eldon’s tenure, English treatises and other texts defined a standard set of equitable rulings to be guiding illustrations of established principles. They centered on his rulings in *Walcot* and *Southey* and usually made reference to the Clean Hand Doctrine as was first stated in *Priestley* and his reiteration of it in *Lawrence v Smith* and *Murray v. Benbow*.\(^{256}\) Amongst these, the seminal ruling was always *Walcot*, which preceded *Southey* and its initial published reference to *Priestley* by fifteen years.\(^{257}\) These core cases were often supplemented with reference to several rulings at law regarding whether there could be property in works of illicit nature, with *Fores, Dubost*, and often *Hime* considered guiding.\(^{258}\) With these as illustrative guides, it was a simple next step for commentators to divide the cases by type of works typically excluded from copyright protection, such as works of seditious, blasphemous, or obscene tendency, and works that were calculated to discredit the church or the government. Such classification schema were characteristic of several prominent English legal treatises in the early nineteenth century, such as Godson’s *Practical Treatise on the Law of Patents for Inventions and of Copyright*,\(^{259}\) which asserted that a principle that equity provided no protection for that which was calculated to harm the public had been established, citing virtually all of the rulings discussed above.\(^{260}\)

\(^{254}\) This was particularly the case after passage of Fox’s Libel Act in 1792 ("An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel"), which capped a lengthy debate between judges and juries by authorizing juries at law, not only to determine the fact of publication but also to rule on the tendency of the work at issue (§ 1), consistent with the evolving practice in the eighteenth century and arguably with the Constitution. See James Oldham, *English Common Law in the Age of Mansfield* 218–35 (Thomas A. Green et al. eds., 2009) (describing trends in jury consideration leading up to the enactment of Fox’s Libel Act).


\(^{257}\) See supra note 16 and accompanying text; *Walcot*, 32 Eng. Rep. at 1.


\(^{259}\) Godson, supra note 246, at 212–16.

\(^{260}\) Id. Godson directly cited Eldon’s rulings in *Walcot*, *Southey*, *Murray v. Benbow*, and *Lawrence*,...
This manner of clustering of illustrative cases found a more systematic elaboration five years later in Robert Maugham's *A Treatise on the Laws of Literary Property*²⁶¹ which identified categories of works excluded based on “the nature of their injurious or illegal character” regarding public morals, religion, public peace, justice, and libels of private individuals. Maugham based these categories on the same set of cases but relied heavily on Petersdorff's *Abridgement*,²⁶² published that same year, for its reporting and analysis of those authorities.²⁶³ Beyond the more detailed treatment of the accepted authorities, Maugham provided the first doctrinal explanation of Eldon's jurisdictional distinction between works in which a plaintiff's claim of property was clear, such that equity could render a judgment, and works for which there was “reasonable doubt,” necessitating an action of law. This was, perhaps, the first open examination, however brief, of the juxtaposition of broad equitable maxims and established equitable doctrines in copyright infringement with the notion of “clean hands” in the consideration of copyright claims.²⁶⁴

The categories of works excluded from copyright protection became a staple in subsequent treatises and other texts on equity, many built directly on Maugham, including George Tickner Curtis's *Treatise on the Law of Copyright*,²⁶⁵ supplemented by law rulings in *Priestley, Fores, Hime, Dubost, Gale*, and, characteristic of earlier but not later treatises, *Burnet*. Ironically, Godson later argued that an author retained full power over his unpublished manuscripts and could maintain an action when they were trespassed, noting that “with only the dissentient voice of Mr. Baron Eyre,” presumably referring to Eyre's ruling in *Priestley*, that there could be no property in illicit writings. *Id.* at 222.


²⁶⁴ For example, with respect to the plaintiff in *Lawrence*, (1822) 37 Eng. Rep. 928 (Ch.), Maugham queried, “Was this ‘coming into court with clean hands?’ Was it consistent with the principle which maintains that a man shall not avail himself of his own wrong?” *Id.* at 91, n.2.

²⁶⁵ GEORGE TICKNER CURTIS, *TREATISE ON THE LAW OF COPYRIGHT* (Boston 1847).
the first major American legal treatise on copyright in which the soundness of English precedent cases was sorted out for discussion and critique. Following the lead of Story’s Commentaries, Curtis took issue with Eldon’s presumption that a work’s tendency could compromise a plaintiff’s property in it, preferring instead to give the benefit of the doubt always to the petitioner as a matter of property right. Reliance on Maugham continued in Copinger.

In particular, Curtis examined whether the technical determination of property in a work, and hence its protection under the Statute of Anne, could legitimately be suspended based on an estimation of its moral nature and effect upon the public morals, stating that in England, the prima facie right of property is the same in all publications; and the rule of public policy merely withholds that protection to which the publication, but for its character and tendency, would be entitled . . . . In America, there has been no decision involving this question; but the English authorities have established certain general principles, some of which are sound while others are open to objection . . . .


Id. at 149.

Story dutifully reported the established principle that, on public policy grounds, no copyright could exist in works that were “clearly irreligious, immoral, libellous, or obscene” and repeated the caveat that the court only withheld its aid, rather than acting as a censor morum regarding “the circulation of offensive and mischievous books.” STORY, supra note 57, §§ 936–937 (citing EDEN, supra note 246; COOPER, supra note 247; and PETERSD., supra note 128; and citing generally Walcot, 32 Eng. Rep. at 1; Southey, 35 Eng. Rep. at 1006; Lawrence, 37 Eng. Rep. at 928). However, Story pointedly took issue with the degree of discretion exercised by Eldon, who was apparently ready to deny “the protection of an injunction in matters of property upon mere doubts,” whereas in principle, “prima facie the copy-right confers title; and the onus is on the other side to show clearly, that, notwithstanding the copy there is an inherent defect in the title.” STORY, supra note 57, § 936 n.1 (citing Lawrence, 37 Eng. Rep. at 928).

[T]o decide dogmatically upon the character and bearing of such discussions, and the rights of authors growing out of them” [in such an absolute manner], Story argued, “may sap the very foundations, on which [equity relief] rests . . . [so as to] retard, if not entirely suppress, the means of arriving at physical, as well as metaphysical truths.

Id. § 938.

With regard to Priestley specifically, in which Eldon was seen as over-reaching, Curtis differentiated between the right of property defined as profits lost to piracy and the right of property as exclusive control over the work itself. He then maintained that only in the circumstance of a plaintiff arguing lost profits does the work’s tendency become germane, specifically if there was some doubt whether it could be legally sold, which was essentially Abbott’s argument in Stockdale v. Onwhyn, (1826) 176 Eng. Rep. 75 (K.B.). Id. In claims regarding works of questionable tendency, Curtis, like Story, leaned toward protecting a plaintiff’s legitimate claim to property, regardless of its nature, arguing that injunctive relief should be granted unless the work’s illegality was clear. Id. at 165.

WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART 49–50 (Stevens & Haynes 1870) (identifying the doctrinal source as Priestley and likewise quoting extensively from Petersdoeff). Copinger also derived the nature of property in literary works from its profits, based on its legal right to sell, and its core ideas, based on Locke theory of labor
Shortt,\textsuperscript{270} and Drone,\textsuperscript{271} the standard texts in copyright law in both English and American legal practice in the latter half of the nineteenth century.\textsuperscript{272} Each of those described in varying detail the basic equitable principles outlined in earlier treatises and focused on the Eldon rulings in Walcot and Southey.\textsuperscript{273} Yet, none specifically mentioned the clean hands maxim or any versions of its doctrinal application in copyright, conservatively focusing on the listing of accepted doctrinal principles and acknowledgment of seminal illustrative rulings.\textsuperscript{274}

\textsuperscript{270} \textbf{JOHN SHORTT, THE LAW RELATING TO WORKS OF LITERATURE AND ART} (Horace Cox 1871) (adhering to the principles and English case citations contained in earlier treatises, while acknowledging the abandonment of holdings related to moral content, such as \textit{Burnet}). Shortt also stated that the fundamental standard remained whether or not an action could be sustained at law. \textit{Id.} at 3–9. All works excluded thereby would be labeled criminal libels. \textit{Id.} at 297–344.

\textsuperscript{271} \textbf{EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY} 181–82 (Little, Brown, & Co. 1879). Following Maugham, Drone stated what had become the established doctrine ("In refusing protection to publications having an injurious moral or political tendency, the court does not act as the guardian of public morals, or as a censor of the press. On the contrary, in declining to interfere with the piratical publication and sale of an obnoxious book, it removes an obstacle to its wider circulation. For this evil there are other remedies . . . The publication of a seditious, blasphemous, immoral, or libellous production is a violation of law, and therefore such a work is not entitled to protection as property. The court simply refuses to grant remedies to which the author is not entitled by reason of the objectionable nature of his property."). Drone also differentiated areas of criminal libel in which a plaintiff could not claim property, but like Curtis and, implicitly, Story, he criticized Eldon's willingness to render judgments based on his own, rather than a jury's, conclusions about the nature of a work, referencing only Lord Campbell's contemporaneous critique of Eldon in his \textit{Lives of the Chancellors} \textit{Id.} at 183 n.1.


\textsuperscript{273} This was also characteristic of two other dominant texts after mid-century: John Paxton Norman, \textit{The Law and Practice of the Copyright, Registration and Provisional Registration of Designs} (S. Sweet 1851) ("No copyright can exist in a design having a tendency contrary to public morality or order, as if it were indecent or libelous."); \textit{id.} at 88 (citing \textit{Walcot}, 32 Eng. Rep. at 1; \textit{Hime}, 170 Eng. Rep. at 1070; \textit{Dubost}, 170 Eng. Rep. at 1235; \textit{Fores}, 120 Eng. Rep. at 654; \textit{Lawrence}, 27 L.Q.R. at 123; \textit{Stockdale}, 176 Eng. Rep. at 75); and Charles Palmer Phillips, \textit{The Law of Copyright in Works of Literature and Art} (V. & R. Stevens, Sons & Haynes 1863) (the "dictum of Lord Chief Justice Eyre [in Priestley] is also often quoted and properly so, to show that, in his opinion, the criminality of a work deprived it of the character of property."); \textit{id.} at 21.

\textsuperscript{274} Clearly, the issue lurking beneath the Curtis and Drone critiques of Eldon—that Eldon had overreached his authority in forming conclusions about the nature of the works involved—could be varyingly interpreted as either Eldon supplanting the authority of Statute of Anne, and thus the legal sanctity of copyright, or Eldon allowing criminal violations to go unpunished. The latter became the basis of consequentialist critiques found selectively in several earlier American rulings and in criticisms of more recent rulings such as \textit{Mitchell Brothers and Jartech}. 

https://digitalcommons.law.uga.edu/jipl/vol20/iss2/2
The first explicit textual reference to the Clean Hands Doctrine in equity appears to have been in Spence’s *Equitable Jurisdiction of the Court of Chancery.* Spence acknowledged that the general principle, that “[t]he principle of this Court is not to give relief to those who will not do equity,” had been extended to include broader moral duties consistent with the court's traditional role of adding conscience to justice, and its “modern acceptation of a doctrine nearly allied to, and a descendant of the above, namely, ‘that a person must come into court with clean hands.’” Spence then referenced Eyre's dictum in *Dering* that there must be “an immediate and necessary relation [of alleged inequitable behavior by the plaintiff] to the equity sued for,” as a condition to the general maxim. This trend in treatise construction was subsequently formalized in Snell’s more theoretical *The Principles of Equity,* a text designed for training law students that prefaced its basic description of accepted doctrinal positions with an outline of the general maxims of equity, one of which was explicitly phrased, “He who comes into equity must come with clean hands.”

Over a decade later, these general maxims were more elaborately described in Pomeroy’s *A Treatise on Equity Jurisprudence,* which is considered the first treatise to substantively acknowledge the clean hands maxim. However, Pomeroy clarified that the maxim was not a doctrine derived from rulings but “rather a universal principle, and broadly regulate[d] the action of equity courts . . . in their administration of any and every species of relief” regarding the conduct of a plaintiff, as long as it is related to the matter in litigation and...
with which the opposite party had a concern. If it were found that the plaintiff who brought the action had in some manner acted against conscience, good faith, or any other equitable principle, "then the doors of the court will be shut against him [and the court would] refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

The connection between the clean hands maxim and the piecemeal evolution of doctrinal principles from the Eldon rulings in Walcot and Southey was fused with the publication of Corpus Juris. This was an encyclopedic American work whose section on copyright identified as standard an affirmative defense to copyright infringement based on the clean hands maxim, stating authoritatively:

An immoral work will not be protected; but general immorality or illegal acts not affecting the particular right asserted in the suit is no defense... Where plaintiff's work is itself a piracy, plaintiff does not come into court with clean hands, and equity will afford him no relief, although the infringement is clearly established.

---

282 Id. § 399.
283 Id. § 397. Interestingly, Pomeroy only references very early English cases such as Boddy's Case when focusing on courts' refusal to enforce illegal contracts as a form of prior criminal conduct that might violate a plaintiff's obligation to act in good conscience. Pomeroy mentions none of the Hardwicke or Eldon rulings on the civil side, nor the several standard treatises based on them. Id. § 402 n.1.
284 13 C.J. COPYRIGHT AND LITERARY PROPERTY § 12 (William Mack & William Benjamin Hale eds., 1917) (stating "Literary matter must be innocent in order to be the subject of property. No protection will be accorded by the courts to what is illegal, immoral, or against public policy."). See id. § 12 nn.81–83 (citing Walot, 32 Eng. Rep. at 1; Southey, 35 Eng. Rep. at 1006; Gale, 171 Eng. Rep. at 588, and several American cases, and stipulating that this doctrine has been criticized by Drone, Shortt, and Story). Consistent with the earlier classifications of works excluded from protection, it maintained that

on the ground that the law will not lend its aid to protect the author or the owner of an unlawful production, no copyright can be acquired in a work which is of an indecent or immoral character, or which is otherwise illegal, as a libel, a blasphemy, or a mere gambling device or instrumentality. But the illegality or immorality must be inherent in the work.

285 13 C.J., supra note 284, § 390.
Most critical was its formal recognition that the “equitable doctrine of unclean hands [w]as a defense in a copyright infringement action,” specified explicitly as the “unclean hands defense.”

VIII. THE COPYRIGHT CLAUSE AND THE VAGARIES OF OBSCENITY

Because of the amorphous nature of the English legacy, the inclusion of the Clean Hands Doctrine into American jurisprudence provides more than a few twists and turns. Similar to the English patterns discussed above, the only equity principles in early American case law were commonly accepted maxims attributed directly to the Clean Hands Doctrine itself, mostly as applied to contract performance and marital agreements. The earliest cases regarding literary property also depended on the authority of general equity principles and established the practice of citing legal treatises. These cases followed the rubric

———

286 Id. § 13.09B. However, the equitable doctrine of unclean hands as a defense was noted as seldom used and only when transgressions were serious and related to the subject matter of the infringement action, such as misusing court process, falsifying evidence, or misrepresenting the scope of copyright.

287 See, e.g., Mattox v. Mattox, 2 Ohio 233, 234 (1826) (regarding divorce proceedings: “This application is to the equitable jurisdiction of the court, and must be decided by the principles which prevail in courts of equity. The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains. These parties are in pari delicto, and to grant relief to either of them would be offering a bounty to guilt,” citing “prevailing principles.”); Bank of the U.S. v. Owens, 27 U.S. 527, 538, 539 (1829) (“[N]o court of justice can in its nature be made the handmaid of iniquity... There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal. That this is true of contracts violating the laws of morality, is recognized in the familiar maxim, ‘ex turpi causa non oitur actio....’”); Cathcart v. Robinson, 30 U.S. 264, 276 (1831) (regarding specific performance: “The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled... It is said that the plaintiff must come into court with clean hands”; citing Maddock’s reference to Francis’ Maxims); Tufts v. Tufts, 24 F. Cas. 288 (C.C. Mass. 1847) (regarding specific performance: “When a trust or agreement is desired to be enforced in chancery, under its extraordinary powers over trusts and specific performances, it is a settled principle that it is to be done only in favor of those who have themselves acted legally, if not equitably, in respect to the subject.”); Creath’s Adm’r v. Sims, 46 U.S. 192, 204 (1847) (regarding specific performance: “[T]he following principles of equity jurisprudence, which may be affirmed to be without exception,—that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith,” alluding only to the authority of “general principles”); Bein v. Heath, 47 U.S. 228, 247 (1848) (regarding a surety: “It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted [o]n behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity,” termed a “principle” in chancery.).
of “clean hands,” rather than delving deeply into the case law of the Hardwicke or Eldon eras.\textsuperscript{288}

Unlike their English antecedents, however, American applications of the Clean Hands Doctrine were complicated by the authorizing language of the U.S. Constitution: “to promote the progress of science and the useful arts.”\textsuperscript{289} That federal authorization followed the adoption of copyright statutes in twelve of the thirteen original states between 1783 and 1786, which were adjudicated according to the disparate judicial structures and customs in each state.\textsuperscript{290} Nonetheless, those state statutes were all geared toward advancing science and knowledge to the public benefit, coinciding with Congress’s legislative purpose.\textsuperscript{291} To conjoin English common law principles with that constitutional language, American courts focused primarily on the original intent of the constitutional empowerment itself. In practice, courts discerned whether a particular literary work conformed with the statutory requirements for copyright registration but also, and more importantly, with the broader constitutional purpose of contributing materially to the promotion of progress.\textsuperscript{292}

\textsuperscript{288} The first case to establish the constitutional and statutory basis for copyright protection was \textit{Wheaton v. Peters}, 33 U.S. 591 (1834), which denied any common law authority other than that embodied in the Constitution or federal statutes. \textit{Id.} at 658. The opinion focused on whether rights created by the Copyright Act of 1790, and the preconditions established therein, were within congressional empowerment. \textit{Id.} at 660–67. Like many of the cases heard by Eldon, \textit{Wheaton} involved a petition for injunction in a copyright matter, such that the district needed first to establish that right at law. \textit{Wheaton v. Peters}, 29 F. Cas. 862 (case no. 17,486) (C.C.E.D. Pa. 1832), overruled by \textit{Wheaton v. Peters}, 33 U.S. 591 (1834) (as to whether the works at issue were the subject of literary property, “Let the complainants go to the law side of the court, and if they shall establish their right there, they may return and claim the aid of this court to protect that right.”). See Howard B. Abrams, \textit{The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright}, 29 Wayne L. Rev. 1119, 1178–85 (1983) (discussing common law copyright in England and colonial and early Republic America).

\textsuperscript{289} U.S. CONST. art. 1, § 8, cl. 8 reads: “The Congress shall have the power . . . [to promote the progress of science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” with the selection of means at its (limited) discretion under art. 1, § 8, cl.18. That Congress has chosen to protect copyright, patents and trademarks in different ways by statute under this empowerment has led to a rich and complicated case law and secondary literature, especially since both patent and trademark laws specify exclusion of certain types of works, while copyright law has, since 1909, purposely avoided such specification, presuming to promote the broadest range of literary creativity thereby, as discussed in \textit{Mitchell Brothers}, 604 F.2d 852, 855 (5th Cir. 1979).

\textsuperscript{290} Kempin, \textit{supra} note 241, at 47 (discussing the difficulty in discerning patterns of how state jurisdictions followed previous case rulings).

\textsuperscript{291} Abrams, \textit{supra} note 288, at 1171–77.

Critical to understanding the federal empowerment was the founders' intent behind the words "progress" and "science" and the latitude with which Congress could legislate toward those ends. In its eighteenth century meaning, "science" encompassed the broadest range of learning and knowledge. With few exceptions, the courts eschewed narrowing copyright protection to only specifically scientific or useful works and resisted the temptation to evaluate the contributory worth of any particular work. However, the core notion of "progress" presented a somewhat more complex interpretive issue. In particular, courts grappled with whether "progress" constituted a constraint on the direction and latitude of congressional action or a precondition on which any discrete work could be disqualified for copyright protection. In the end, American jurisprudence tended to view Congress's latitude very liberally and assumed that if Congress wished to impose content restrictions on copyright eligibility, it would do so.

For example, in the American case of Keene v. Kimball, the court initiated the practice of interpreting the intent of the constitutional prescription in the

---


See 2 Patry on Copyright, supra note 47, § 3 (describing the Constitutional grant of authority regarding "progress" in "science").

The view that the copyright clause narrowed copyright eligibility to works that demonstrably and positively contributed to basic knowledge within certain prescribed parameters was largely abandoned in Bleistein v. Donaldson, 188 U.S. 239 (1903). Justice Holmes declared with regard to copyright of circus posters:

- It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation... At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt.

Id. at 251-52. Holmes thus countered Harlan's narrower and dismissive view that "a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution." Id. at 252. See 2 Patry on Copyright, supra note 47, §§ 3.7, 3.9 (describing the Court's adoption of a nondiscrimination principle regarding determination of a work's copyright claim derived from Bleistein and thereafter focusing copyright eligibility on minimalist definitions of originality).

See 2 Patry on Copyright, supra note 47, § 3 (examining the historical evidence regarding the original intent of section eight as both a grant and a limitation).

82 Mass. 545 (1860), overruled in part by Tompkins v. Halleck, 133 Mass. 32 (1882). This was one of at least three suits brought by Laura Keene against proprietors of other theatres that were
context of subsequent copyright statutory language. The court concluded implicitly that the protection of illicit or immoral materials was not reasonably consistent with that purpose, yet it recognized that social mores would inevitably change over time.297 Similarly, in what is commonly considered the benchmark American copyright case regarding works of questionable nature, in *Martineti v. Maguire*,298 the court upheld the defendant's legal claim to property in a theatrical play but simultaneously denied him copyright protection because the play was deemed immoral and not the kind of material originally intended for protection.299 Neither *Keene* nor *Martineti* held that the copyright of the staging Tom Taylor's comedic "Our American Cousin." Keene had purchased the American production rights in 1858 but had not published it in a traditional manner to claim copyright under statute, instead claiming copyright under common law. In *Keene v. Wheatley*, 14 F. Cas. 180 (1860) (C.C.E.D. Pa.), defense counsel countered persuasively that the play had been presented to an indiscriminate audience night after night, in effect rendering it "public" to the degree that those who could remember it could easily produce a rendition without infringement, an argument then repeated in *Keene v. Kimball*. However, both rulings turned on whether Keene had property in the play under the language of the Copyright Act of 1856 and only in passing mentioned its ribald or satirical (and perhaps libelous) parts of the script. In other words, no unclean hands defense was claimed or needed as Keene was denied exclusive use since she had presented the play publicly. In the later *Keene* ruling, the Court revisited many English and American case rulings (including *Southey v. Sherwood*, (1817) 35 Eng. Rep. 1006 (Ch.) and *Murmay v. Elliston*, (1821) 166 Eng. Rep. 1331 (K.B.)) and treatises (especially CURTIS, supra note 265 and EDEN, supra note 246) and considered it well settled that an author of a play relinquished common law copyright by its first performance in public. *Keene*, 82 Mass. at 545.

297 *Keene*, 82 Mass. at 548-49 ("Courts will not interfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production; but the particular application once made of this rule of the common law, in conformity with the peculiar opinions, sentiments or prejudices of one generation of men, will not control its application in a state of society where different views prevail."). As to strictly informational works, statutory intent had been the basis of an earlier ruling that newspaper copy was ineligible for copyright protection because a newspaper was not considered a book and was not suited by its nature to promote science within the meaning and intent of the Copyright Act of 1790, 1 Stat. 124. *Clayton v. Stone*, 5 F. Cas. 999 (1829). The statute's protection was "not intended for the encouragement of mere industry, unconnected with learning and the sciences," *id.* at 1003, supported by *Baker v. Selden*, 101 U.S. 99, 105 (1879).

298 *Martineti* v. *McGuire*, 16 F. Cas. 920 (C.C. Cal. 1867). The "Black Crook," the musical song and dance extravaganza featuring semi-nude women, was initially staged in New York, then licensed by the author to theater owners around the country. 2 RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS 304-07 (1988). It became the subject of litigation when staged by an unlicensed entrepreneur in San Francisco.

299 *Martineti*, 16 F. Cas. at 922-23 (the play was "a mere spectacle...an exhibition of women 'lying about loose' or otherwise, [and was] not a dramatic composition, and, therefore, not entitled to the protection of the copyright act... [It was] grossly indecent, and calculated to corrupt the morals of the people...[and not] 'suited for public presentation'...[not] promot[ing] the progress of science or useful arts."). Although the court dawdled momentarily on whether the play was a "dramatic composition" as specified by the Copyright Act of 1856, its
literary property at issue was illegal or inappropriate but only that the immoral nature of the works at issue was inconsistent with the constitutional purpose of protecting copyrights, thereby disentitling these works to court protection.\textsuperscript{300} Martinetti seemed to countenance denial of copyright protection on policy grounds related to obscene content, and in the process, it presaged how ambiguities regarding the immorality and the prevailing social mores of one age might be considered differently years later, anticipating an inevitable easing in permissiveness.

The fluidity of moral standards was graphically illustrated in two cases that seemingly came to contrary conclusions. The court in \textit{Broder v. Zeno Mauvis Music Co.}\textsuperscript{301} denied copyright protection to song lyrics considered to have "an indelicate and vulgar meaning," even though testimony attributed to a unique cultural context.\textsuperscript{302} Yet in \textit{Simonton v. Gordon},\textsuperscript{303} twenty-seven years later and in a different state’s court, the plaintiff author, whose novel depicted the conditions of life in rural West Africa, won injunctive relief despite its inclusion of crude and shocking content.\textsuperscript{304} In these and other American cases, the purported obscene content was challenged rather than the legality of the copyright itself, and yet the very subjectivity of the doctrines defining obscenity rendered ruling was primarily predicated on the statutory language that confined copyright protection to compositions "designed or suited for public presentation." \textit{Id.} This language was subsequently removed in 1870, as noted by the Fifth Circuit in \textit{Mitchell Bros.}, 604 F.2d 852, 855 (5th Cir. 1979). In \textit{Martinetti}, it was the staging of the performance, rather than its scripted or unscripted book, that spawned charges of immorality.\textsuperscript{300} Martinetti was the first American case to set aside the pure common law argument that there can be no property in obscene works and to argue that works for which a copyright was legitimately registered under law could still be denied copyright protection because of public policy and the purpose of constitutional provisions and statutes establishing copyright protections. Problematically, it did so without citing authority from previous English or American cases, or from treatises or other works on equity.

\textsuperscript{301} \textit{Broder}, 88 F. at 78 ("Musical compositions of an immoral character not being protected by copyright.").


\textsuperscript{304} \textit{Id.} at 124 ("Neither the book nor the [plagiarizing] play is elevating... both are unnecessarily coarse and highly sensual. They nonetheless purport to deal with actual conditions as they are known to exist in tropical countries, and, if such conditions be dealt with in a manner that is not calculated to arouse lust in those who read the book or see the play, it is doubtful if a charge of immorality may successfully be maintained."); see also Rogers, \textit{supra} note 57, at 398.
uniform application more and more unsustainable as moral standards inevitably changed over time, as Keene anticipated.305

Over time, the conflation of cultural regulation of immorality and statutory regulation of obscenity came to dominate the legal debate over whether materials of questionable content could be registered for copyright at all and, if so, whether registration might in some manner require their equitable protection regardless of content. In England, questions of evil tendency in literary works initially focused on whether mainstream political or religious values were being publicly challenged. But by the 1840s, criminal prosecution for seditious or blasphemous libel had become sporadic, in part yielding to the difficulty of persuading juries of the eminent evil tendencies of any given literary work.306 Following the passage of the Obscene Publications Act of 1857,307 which provided no operative definition of obscene tendency, the English courts were pressed to develop their own notion of obscene tendency in order to guide juries hearing prosecutions of allegedly illicit literary works.

That process was complicated by long-standing jurisdictional precedent dictating which courts oversaw protection of public morality under common law. The result was a juxtaposition of two centuries of scattered common law precedent onto statutory language that provided no definition of the criminal offense.308 Moreover, debate continued over whether juries had authority to render findings of fact regarding a work’s tendency, or even to consider an author’s intent.309 While these issues might have been considered resolved by

305 See supra text accompanying note 296.
306 MARSH, supra note 51. Even before the passage of Fox’s Libel Act, juries had become disenchanted with being charged only with determining whether or not a defendant published the work in question and had begun to openly consider a defendant’s intent, despite bench directives to the contrary. This produced in some cases “mixed” verdicts, where the jury found the defendant guilty of publishing the work as a question of fact but not guilty of an intent to undermine public morals. See Alexander, supra note 53, at 420–23 (discussing the degree to which juries could consider a defendant’s motive rather than intuiting it from his alleged action).
307 See supra note 56 and accompanying text; see also M.J.D. Roberts, Morals, Art, and the Law: The Passing of the Obscene Publications Act, 1857, 28 VICTORIAN STUD. 609 (1985) (discussing the debates surrounding passage of the Act); Harling, supra note 158, at 110 (discussing the difficulties in attaching subversive meanings to radical language, especially in lyrics or parodies, as writers learned evasive styles of writing; after the 1792 Fox Libel Act, juries returned verdicts of “guilty of publishing” after the government failed to prove malicious intent); Manchester, Lord Campbell’s Act, supra note 56.
308 See Roberts, supra note 307, at 615–20 (discussing the debates surrounding the passage of the Act).
309 See generally Alexander supra note 53, at 420–25 (discussing the jury’s role in applying the Obscene Publication Act of 1857).
Fox's Libel Act in 1792, they remained very much at play in the English courts, where judges were reticent to concede that prerogative. All of these issues reached a loggerhead in R. v. Hicklin, a simple obscene libel prosecution of a defendant who had distributed pamphlets critical of the Catholic Church. For the first time, the jury was directed to use a specific definition of the criminal obscenity—literary works of illicit tendency were those which tended to "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." At that point, the statutory vacuum was filled by a doctrinal "test" for whether a literary work had an illegal obscene tendency. It was utilized consistently for the next seventy-five years and additionally allowed courts to deny copyright protection on substantive grounds.

310 See Oldham, supra note 254, at 230–35 (describing the enactment of Fox's Libel Act).
311 See supra text accompanying note 309.
312 (1868) L.R. 3 Q.B. 360. See generally Alexander, supra note 53, at 414–26 (analyzing the Hicklin ruling in doctrinal context of obscenity law at the time).
313 Hicklin, L.R. 3 Q.B. at 371. The "Hicklin test" was doctrinally established by its use in Steele v. Brannan, (1872) 7 P.C. 261, 266–67 (Eng.) ("The book is one which would manifestly tend to deprave and corrupt the morals, more especially of the young and inexperienced . . . and . . . is consequently obscene within the meaning of the statute . . ."). It was followed in R. v. Bradlaugh, (1877) 2 Q.B.D. 569, and was then doctrinally confirmed in W. Blake Odgers, A Digest of the Law of Libel and Slander 404 (1881). The Hicklin Test also arguably followed a line of earlier common law precedents reflected in Starkie, which maintained that "It is now fully established, that any immodest and immoral publication, tending to corrupt the mind, and destroy the love of decency, morality, and good order, is punishable in the temporal Courts. . . ." Starkie, supra note 247, at 447.
314 The Hicklin test was amalgamated into American jurisprudence after the Supreme Court ruled in Ex parte Jackson, 96 U.S. 727, 736 (1877), that Congress was empowered to refuse the use of the U.S. Postal Service to distribute matter "injurious to the public morals." See Alexander, supra note 53, at 426–27. See generally Donna Dennis, Obscenity Law and Its Consequences in Mid-Nineteenth Century America, 16 Colum. J. Gender & L. 43 (2007). The Hicklin test was first held governing in United States v. Bennett, 24 F. Cas. 1093, 1102 (S.D.N.Y. 1879) and United States v. Clarke, 38 F. 732, 733–34 (1889). But it was later tempered by rulings that took into consideration the positive societal value contributed by the literary work at question, such as United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913) (Judge Learned Hand cautioning that strict adherence to the Hicklin test would "reduce our treatment of sex to the standard of a child's library in the supposed interest of the salacious few."). See also United States v. Dennett, 39 F.2d 564, 568–69 (2d Cir. 1930); Commonwealth v. Friede, 271 Mass. 318 (1930) (finding Theodore Dreier's American Tragedy, which was considered an important literary work criminally obscene); Stephen Gillers, A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II, 85 Wash. L. Rev. 215, 232–59 (2007) (discussing Hicklin's effect on American jurisprudence).
315 Ironically, as the issue of the publisher's intent came within the purview of the jury's consideration, focus tended to shift to the anticipated negative effect of distributing the work in public—whether it could or did undermine social mores and, in particular, whether that effect
Likewise, defining illicit sexual tendency in literary works became a recurring consideration in the latter half of the nineteenth century in American jurisprudence. While a number of states passed anti-obscenity statutes after 1820, few cases were actually prosecuted, and those focused on procedural questions or the exact statutory language regarding prohibition. The few earlier cases that broached the issue of constitutional interpretation treated Hicklin as singularly governing. In later cases, however, the judicial landscape came to be dominated by federal prosecution under the Comstock Act of defendants who sent allegedly obscene publications through the mail.

The watershed in the evolution of American obscenity doctrine undoubtedly was the litigation surrounding James Joyce's *Ulysses*, which had been serialized in over twenty installments in *The Little Review* between March 1918 and its prosecution in October 1920. The book was only prosecuted when the publishers began mailing copies to potential subscribers, inadvertently sending one to the daughter of a prominent New York attorney. Only the first four pages could be produced by a reader's exposure to isolated passages or the underlying narrative of the entire work, and whether negative effects could be mitigated by or even become supportive of social mores. This opened the prospect that a work, while including questionable passages or a narrative that challenged social mores, might serve some broader purpose consistent with the Statute of Anne ("the encouragement of learning") and the U.S. Constitution ("to promote progress").

While earlier state prosecutions were based on common law, such as *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (1815) (display of lewd paintings) and *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (publication of an obscene book including lewd prints), later prosecutions were largely directed at violations of state laws prohibiting publishing, selling, or distributing immoral or indecent pictures, newspapers, and magazines, which arguably offered little literary value. See Frederick F. Schauer, *The Law of Obscenity* 9-14 (1976) (detailing the historical evolution of American obscenity law and its doctrinal facets).

In *United States v. Bennett*, 24 F. Cas. 1093 (C.C.N.Y. 1879), the court relied entirely on Hicklin, which focused on the illicit effect of parts of a literary work on any subset of the possible audience and its presumption of illicit intent drawn from the work itself, rather than on protestations of benign or even good intent. See Alexander, supra note 53, at 426-30 (discussing how basic regimes of criminal law of obscene libel carried over into *Bennett*) and Gillers, supra note 314, at 225-46 (describing the basic tenets of Hicklin and Bennett as the first American case to cite it).

38 Cong. Ch. 90, March 3, 1865, 13 Stat. 507 (Mar. 3, 1873) (prohibiting the mailing of obscene publications and strengthening 13 Stat. 507 § 16 (1865), the first federal criminal obscenity statute prohibiting such use of the mails, which was subsequently upheld in *Ex parte Jackson*, 96 U.S. 727 (1877)). The Act also precipitated a wave of obscenity prosecutions associated with Anthony Comstock. See Schauer, supra note 316, at 12-22. During the same period, customs officers attempted to develop operative definitions of obscenity consistent with enforcement of the Custom Law of 1842, 5 Stat. 566 § 28, which called for the seizure and destruction of any obscene materials attempting to enter the United States.

See Gillers, supra note 314, at 251-62 (describing the prosecution of the serialization of
issues were registered with the Copyright Office under the publisher's name under the Copyright Act of 1909, after which postal authorities began to suppress issues and revoked the magazine's second-class postage privileges. The publishers were subsequently fined $100 and enjoined from publishing the work further, as the court found that parts of the work, in their "frank expression," were harmful to the morals of the community. 3 2 0 Effectively ostracized from publishing his work in book form in America, Joyce agreed to its full text publication in English under French imprint in 1922 and later to its importation to test its legality under relatively unsettled Customs obscenity standards. 3 2 1 Its admission, if allowed, would signal that American publishers might safely consider issuing their own editions and would render the work immediately vulnerable to piracy, depriving the author of the argument that it

Ulysses in The Little Review in 1920); Robert Spoo, Copyright Protectionism and Its Discontents: The Case of James Joyce's Ulysses in America, 108 YALE L.J. 633, 636–38 (1998) (describing the revocation of mailing privileges for The Little Review as probable cause for it not seeking copyright registration for its issues after 1918). Suppressive actions by the Post Office may have dissuaded the publishers from registering later installments, presuming the Copyright Office was implicitly authorized to deny registration by the dictum enunciated in Hoffman v. Le Traunik, 209 F. 375, 379 (N.D.N.Y. 1913), that "to be entitled to be copyrighted, the composition must be 'original, meritorious, and free from illegality or immorality.'" This phraseology of the dictum was likely quoted from 9 CYCLOPEDIA OF LAW & PROC. 907–10 (William Mack & Howard Nash eds., 1903), which cited Blastian, Broder, Martinetti, Stockdale, Southey, Lawrence, Walcot, and indirectly Shook, and was subsequently published in digests, treatises, and cases as the accepted interpretation of section five of the Copyright Act of 1909, which, in fact, contained no reference at all to exceptions based on content and was clearly included in the Act to caution against any such interpretation.

3 2 0 People v. Anderson & Heap (N.Y. Sup. Ct., Feb. 22, 1921). The publishers chose not to appeal, assuming a loss at the appellate level would compromise Joyce’s ability to publish the unexpurgated work as a book in the United States, see Gillers, supra note 314, at 264 (describing the legal implications of losing at the appellate level). Yet, there is some question as to whether an appeal would have lost, given the changes in how courts treated obscenity in literary works, particularly moving away from the presumptive harm of the Hicklin test. Id. at 268. Justice Learned Hand presaged this shift in United States v. Kennerley, 209 F. 119, 120–21 (S.D.N.Y. 1913), by dissenting that obscenity must be gauged against an author's "honestly relevant" effort to explore ideas, speculating that a time could come "when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words." Successful countersuits against the New York Society for the Suppression of Vice for malicious prosecution also changed the trend, as in Halley v. N.Y. Soc’y for the Suppression of Vice, 185 N.Y.S. 931 (N.Y. App. Div. 1920). See Gillers, supra note 314, at 265–74 (detailing a sequence of prosecution losses between 1918 and 1922).

was yet unpublished or that he could secure a valid copyright in the United States. 322

When the Paris edition succeeded in gaining entry into the United States, freed from Customs impoundment by the now-seminal ruling of John Woolsey, 323 Random House rushed an American edition into print and filed for copyright registration, touching off decades of legal debate over whether the American edition could be copyrighted at all. 324 Most germane to the substantive issues regarding the work's copyrightability was Woolsey's finding that, while the author's narrative contained some dicey language, 325 the work did not (on balance) convey the impression of one calculated to elicit lustful thoughts. 326 More critical to our discussion was the ruling by the second circuit affirming Woolsey, finding in part:

Art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique. The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding

322 Even if Joyce had succeeded in importing copies of *Ulysses*, he was precluded from registering it for copyright (and from claiming infringement) as a full text publication in the United States based on § 15 of the 1909 Act. This provision that copyright eligibility was preconditioned on first or simultaneous publication in the United States, which had been impossible in 1922 following the conviction of *The Little Review*. See Spoo, *supra* note 266, at 644–47 (explaining the foreign language exception in the 1909 Act and how it applied to *Ulysses*). Shortly after Customs's seizure of 500 copies of *Ulysses* in late 1922, New York publisher Samuel Roth, without authorization, began to print expurgated installments of the work *Two Worlds Monthly*. Joyce's only legal recourse was to sue Roth for unauthorized use of his name as author in 1927, gaining an injunction in *Joyce v. Roth* (N.Y. Sup. Ct. Dec. 29, 1927), which the court ordered unreported but reprinted in *Transition*, no. 16-17 (Paris, June 1929), at 205–06. By that time, however, the *Monthly* had gone out of production due to sagging sales. A year later, Roth published the first unauthorized book-length version of *Ulysses* and was jailed again for parole violation from a previous obscenity conviction. See Gertzman, *supra* note 321, at 39–40.

323 *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933) (ruling that Customs seizure of the book was inappropriate as it was not obscene). This was subsequently sustained by *United States v. One Book Entitled "Ulysses" by James Joyce,* 72 F. 2d 705 (2d Cir. 1934) (rejecting the *Hicklin* precedent because it precluded consideration of intent or relied solely on isolated passages, which was considered an inaccurate reading of *Hicklin*).


325 *Ulysses*, 5 F. Supp. at 184 (though considered “dirty” and perhaps shocking to some, the colloquially descriptive language used by Joyce was admittedly known “to almost all men, and . . . to many women, and are such words as would be naturally and habitually used”).

326 In fact, this mirrored the jury's finding in *Hicklin* and other cases in which the defendant was found guilty of the act of publication but not guilty of any intention to harm the public.
by the jury under a charge by Lord Denman that the publication of Shelley’s “Queen Mab” was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves. We think that Ulysses is a book of originality and sincerity of treatment and that it has not the effect of promoting lust.\footnote{One Book Entitled “Ulysses,” 72 F.2d at 708. That the court was compelled by whether the work was a “sincere treatment” seemed to follow Learned Hand’s “honest relevancy” test introduced in United States v. Kennerly, 209 F. 119 (S.D.N.Y. 1913). Woolsey’s reference to Lord Chief Justice Denman’s charge to the jury was from his hearing, during the blasphemy prosecution of Edward Moxon for publication of a complete volume of Shelley’s works, including, for the first time, an unexpurgated Queen Mab, in R v. Moxon, (1841) 4 St. Tr. 693 (Q.B.). See supra note 216 and accompanying text.}

As testament to the durability of the Clean Hands Doctrine, even in its apparent abandonment of the Hicklin test, the Court continued to rely on the interpretation of Eldon’s equity rulings as substantive rather than procedural and his\textit{ratio} as the bellwether for the paternalistic protection of traditionalist values.\footnote{Chief Justice Denman’s charge reflected his view that while it was up to each man of learning to judge for himself arguments regarding Christian faith, the prosecution had placed before the jury the obligation to decide whether the indicted lines were “calculated to shock the feelings of any Christian reader . . . [and, if not] neutralized by any remarks in the margin, by any note of explanation or apology . . . they were libels on God, and indictable.” R. v. Moxon, (1841) 4 St. Tr. at 721. At no point could one argue that Eldon “proscribed” the works of Byron or Southey beyond his sustaining the doctrinal practice of directing questionable works to law to determine whether an author could claim property in them at equity. Ironically, as even Eldon himself realized, rather than proscribing Southey’s\textit{Wat Tyler}, his ruling precipitated its immediate wider distribution. See supra note 125 and accompanying text. As stated above, Byron’s claims to property in his works were mostly sustained at equity, except for those regarding\textit{Cain} and\textit{Don Juan} VI-VIII, which were directed to law.}

The effect was a progressive judicial balancing of the anticipated evil effect of such an appeal to sensual curiosity on the behavior of some against the potential broader public good served by the work’s overall literary value, which the courts had recognized could not be measured contemporaneously. There were simply too many instances in which one generation’s literary transgression could easily become the next generation’s literary classic. It was this type of balancing that became established, again by dictum, in\textit{Roth} in 1957, with subsequent refinements attempting to recalibrate how the court could evaluate social value, estimate imminent effect of illicit tendency, and doctrinally accept the elements.\footnote{See supra note 10 and accompanying text. That the enforceable definition of obscenity remains an unsettled area of law is commonly understood. See, e.g., Alexander, supra note 53, at 393–97.} That works of social value could overcome suspicion of illicit
nature and impact reopened the question of the general copyrightability of questionable works, which had been only of peripheral concern in *Ulysses*.330

Inevitably, the rush to copyright such materials, which was a prerequisite to filing claims for copyright infringement, was dramatic, placing pressure on the Office of the Attorney General to rule on whether such materials could under copyright law be denied registration. Predictably, but to the dismay of those concerned with the proliferation of pornographic materials in society, the Attorney General advised that while the law did not preclude denial of registration of materials that met all formal requirements on grounds of public policy, it also did not mandate administrative screening of such materials nor provide standards that might be used to do so.331 The lack of statutorily-prescribed standards for exclusion of works from copyright eligibility, combined with court rulings that reflected that standards “vary from time to time,”332 effectively made it impossible for the Register to screen works with appropriate due process and raised the broader policy question of whether it was “appropriate for the Register to undertake to be a conservator of public morals.”333

In a sense, then, it may be more apropos to assert that the Clean Hands Doctrine was established by the authors of legal treatises on equity in the later part of the nineteenth century rather than by Eldon or even Hardwicke. That those treatises invested little effort in deciphering the *ratio* behind the cases they rather routinely cited as governing insured that the Doctrine would be widely cited and little understood based on its nuanced application. Moreover, despite

330 Random House understood that *Ulysses* was legally unprotectable under the ad interim requirements of the 1909 Copyright Act as a foreign work published in English and effectively already in the public domain. *See* Spoo, *supra* note 319, at 643–47. Beyond that, Random House could only rely upon the trade’s practice of “courtesy copyright,” an informal agreement of other publishers not to publish a work already published by one of their own, as a means of avoiding unauthorized publication. *Id.* at 656–59.

331 41 Op. Att’y Gen. 395 (Dec. 18, 1958). While acknowledging that copyright law does not restrict eligibility for registration based on “content which is or might be illegal,” *id.* at 399, the report nonetheless noted the common law assumption “that seditious, libellous, obscene or immoral works are not entitled to copyright,” *id.* (citing DRONE) and arguing that such judicial authority existed because no rulings had been found to the contrary, and in fact, such authority had already been exercised in a range of American cases, including *Martinetti, Broder, Barnes v. Miner*, 122 F. 480 (S.D.N.Y. 1903), *Bullard v. Esper*, 72 F. Supp. 548 (N.D. Tex. 1947), and *Hoffman*. The basis of that authority “[wa]s not spelled out in the opinions with either precision or uniformity.” 41 Op. Att’y Gen. at 399.


333 *Id.* at 402. In fact, the report acknowledged that copyright protection had, in the past, been denied to otherwise duly-registered works more as “an exercise of equity discretion rather than upon copyright law.” *Id.* at 400 n.4.
variations in how rulings distinguished between a work’s content and its potential immoral or illicit tendency, the application of the Clean Hands Doctrine to literary property began to shift. The doctrine began to focus not on the battles over proprietary rights but instead, however implicitly, on the right of the public as a third party to be insulated from the evil tendencies of immoral or illicit published works. Whether that line of legal argument added up to a doctrine is questionable, given that Mitchell Brothers seemed to abandon it so easily.

334 In later American cases, courts differentiated carefully between works (particularly “art” works) that had intrinsically immoral content (as had apparently been ruled earlier in Fores v. Johns, (1802) 170 Eng. Rep. 654 (K.B.), from those that portended immoral consequence (such as in Priestley, supra note 58, and Dubost v. Beresford, (1810) 170 Eng. Rep. 1235 (K.B.)). For example, in Richardson v. Miller, 20 F. Cas. 722, 723 (C.C.D. Mass. 1877), regarding an affirmative obscenity defense of an unauthorized replication of the plaintiff’s playing card design, the court found “there is nothing immoral or improper in the prints themselves, the fact that they may be used by persons to violate laws against gambling, does not, of itself, deprive them of the protection of the law.” Similarly, in Egbert v. Greenberg, 100 F. 447 (C.C.N.D. Cal. 1900), the court turned aside defense arguments that plaintiff’s copyrighted racing forms, though “expressly and exclusively designed to facilitate [legal] gambling operations...[and] in no sense [contributed] to human knowledge,” had legitimate uses sufficient to provide copyright protection. Id at 449.

335 This point was made explicitly in Shook v. Daly, 49 How. Pr. 366 (N.Y. Sup. Ct. 1875), which initially enjoined the defendant from producing a variation of a play. That the plaintiff had purchased the production rights in the United States arguably merited common law copyright. Ironically, on rehearing, the defendant’s variation of the play was found to be sufficiently different from the plaintiff’s work, and his own claim to property was then upheld. However, the court continued the injunction because it considered the play immoral:

If this play, or any literary production, is of that [immoral] character, it is no part of the office of this court to protect it by injunction or otherwise. The rights of the author are secondary to the right of the public, to be protected from what is subversive of good morals.

Shook, 19 How. Pr. at 368. That protection of an author’s rights should be of secondary importance to the broader public interest was later supported in United States v. Paramount Pictures, 334 U.S. 131, 158 (1948). The Paramount court sustained the extension of copyright protection to all works regardless of their respective quality in order to fulfill the broader purpose of promoting creative genius in some of them, citing Fox Film Corp. v. Doyal, 286 U.S. 123 (1932). As the Court stated in Fox

the copyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one... The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.

Id. at 127. More to the point, a general grant of copyright protection would more fully benefit the public than would extending copyright to a discrete work. Id. at 130.
The Clean Hands Doctrine remains a significant common law basis for affirmative defenses in many areas of American jurisprudence; the question is whether it has doctrinal weight in American copyright law beyond procedural considerations. From its English antecedents emerged an awkward juxtaposition of statutory prescriptions onto established common law precedent. This created an apparent doctrinal exclusion of property in immoral works whereby a court could not extend copyright protection to such works as a matter of public policy. This was drawn into the earliest American copyright infringement cases involving such works, with little statutory

336 T. Leigh Anenson argues that because the merger of equity and law in the 1930s was widely considered procedural and that an affirmative defense based on the Clean Hands Doctrine was considered fundamentally substantive in that it focused on the content of works as related to plaintiff's behavior, practitioners and courts assumed that an unclean hands defense did not involve procedural considerations. Anenson found, instead, that since the merger, courts have focused principally on the degree to which a plaintiff's conduct might have biased the legal proceeding—basically a procedural consideration. Ironically, the substantive outcome initially sought through the Clean Hands Doctrine was the protection of the integrity of the judicial system. Anenson, supra note 46. See also T. Leigh Anenson, Treating Equity Like Law: A Post-Merger Justification of Unclean Hands, 45 AM. BUS. L.J. 455 (2008).

337 In the English circumstance, the purpose served by the Statute of Anne was described in its preface: “for the encouragement of learned men,” 1710, 8 Ann., c. 19, a purpose alluded to as governing in early English case law but which was abandoned in subsequent statutory language while still being retained as a governing principle in case precedent. In American jurisprudence, the purpose of copyright legislation was drawn from the explicit language of the Copyright Clause. U.S. CONST. art. 1, § 8, cl. 8. Subsequent statutory language built upon it, interpreted through the filter of common law precedent.

338 Keene v. Kimbal, 82 Mass. 545, 548–49 (Mass. 1860) (“Courts will not interfere to vindicate the claims of any party to the exclusive enjoyment or disposal of an immoral or licentious production” as an application of “this rule of the common law”); Shook v. Daly, 49 How. Pt. 366, 368 (N.Y. Sup. Ct. 1875); Richardson v. Miller, 20 F. Cas. 723 (C.C. Mass. 1877) (the works were “not the fit subject of copyright [since] Courts of justice will not lend their aid to protect the authors of immoral works”); Broder v. Zeno Mauvais Music Co., 88 F. 74, 78–79 (C.C.N.D. Cal. 1898) (the work containing lyrics that had “an indelicate and vulgar meaning,” rendering the song “morally objectionable, musical compositions of an immoral character not being protected by copyright”); Hoffman v. Le Traunik, 209 F. 375, 379 (N.D.N.Y. 1913) (stating in dictum that to be entitled to copyright, a work must be “original, meritorious, and free from illegality or immorality”); Simonton v. Gordon, 12 F.2d 116, 124 (S.D.N.Y. 1925) (“The rule that there can be no copyright in any blasphemous, seditious, immoral, or libelous work rests in sound principles of public policy.” (citing ARTHUR W. WELL, AMERICAN COPYRIGHT LAW 195–96 (1917))). All of these authorities were then summarized (but accurately portrayed as “scattered”) by the Office of the Attorney General:

It has been generally accepted for years that seditious, libellous, obscene or immoral works are not entitled to copyright . . . Judicial authority to support this
guidance on specific types of works that were intended for protection beyond mixed views of the imperatives of the copyright clause itself. The purpose of the Clean Hands Doctrine itself, however, remained unequivocal, consistent with earlier chancery rulings:

The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean view exists; none has been found to the contrary. While the basis for the conclusion is not spelled out... with either precision or uniformity, copyright protection has been denied in a number of cases at least in part because of the obscene or immoral content of the work involved.


It was, in effect, a doctrinal authority by inertia and to some degree default, soon thereafter reflected in Dane v. M. & H. Co., 1963 WL 8060 (N.Y. Sup. Ct. 1963) ("[T]he work, while entertaining and amusing, was not copyrightable."). Dane was based on several doctrines subsequently criticized as "vestiges of a bygone era... that judges should act as conservators of the public morality," Mitchell Brothers II, 604 F.2d 852 (5th Cir. 1979).

Martinetti v. Maguire, 16 F. Cas. 920 (C.C.D. Cal. 1867) was the first ruling in which a court found a work ineligible for statutory protection because it did not promote progress as the Copyright Clause directed and because it did not comply with statutory specification as neither a dramatic composition nor suitable for presentation in public. Id. at 922. Later, in Barnes v. Miner, 122 F. 480 (C.C.S.D.N.Y. 1903), the court argued by implication that while the Constitution precluded obscenity from the realm of copyright protection, a work that was shocking and depraved in part could still be protected if the overall narrative was morally contrite. Yet the court did not extend constitutional authority to the Register of Copyrights to deny registration to such works. See also Schneider, supra note 66, at 702 (arguing that even if obscenity is not copyrightable subject matter, "it is a long, and perhaps unfounded, step to the principle that the Registrar has authority to deny registration of a claim to copyright where the claimant tenders obscene material"). Other cases alluding to statutory purpose or language as governing were Cain v. Universal Pictures, 47 F. Supp. 1013, 1018 (S.D. Cal. 1942) (stating that the legal definition of obscenity was a matter of statutory language); and Bullard v. Esper, 72 F. Supp. 548 (N.D. Tex. 1947) ("Copyright provisions... were never intended to protect illegality, or immorality. They are for the purpose of promoting the 'progress of science and the useful arts.'"); Khan v. Feist, 70 F. Supp. 450 (S.D.N.Y. 1947), aff'd 165 F.2d 188 (2d Cir. 1947) (finding the plaintiff's work "salacious, immoral and lewd," and "not subject to copyright protection"). These were substantively and persuasively contradicted by United States v. Paramount Pictures Corp., 334 U.S. 131, 158 (1948) (the purpose of copyright protection is served by providing support for all works or potential works, not simply those of any one author); and culminating in Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973) ("There is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity, the soundness or unsoundness, of the views embodied in a copyrighted work... It is surely not a task lightly to be assumed, and we decline the invitation to assume it."). See also Jean S. Perwin, Copyright - Infringement- Fraudulent Materials Copyrightable - Belcher v. Tarbox, 16 BOSTON COL. L. REV. 132, 138–39 (1974) (discussing the court's distinction between material that was the proper subject of copyright, yet substantively undefined in statutory language, and duly copyrighted material that should not be assisted in equity because of its consequence).
hands... The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.\textsuperscript{340}

The court was often forced to equivocate when it became clear that standards of morality shifted with succeeding generations and changes in cultural values,\textsuperscript{341} or when the statutory language on which cases had been decided earlier was changed or abandoned in subsequent statutes,\textsuperscript{342} or when the court adopted new standards for judging the obscene nature of works.\textsuperscript{343}

The weak link was that standing at equity initially required a legal finding of property in the work, an issue that arguably had currency only until the merger of equity and law. Whether chancery felt that to find a work illicit as a matter of fact was a prerequisite for standing, rather than deferring the issue to action at law if any doubt existed, was a short-lived consideration. The concept passed into obscurity beginning with the court's abandonment of Burnett and was replaced with the doctrine of deferring to action at law, which was already considered governing by Eldon's time. While the Clean Hands Doctrine clearly called for equitable relief only for those who behaved in an equitable manner,

\textsuperscript{340} Olmstead v. United States, 277 U.S. 438, 483–84 (1928) (Brandeis, J., dissenting).

\textsuperscript{341} See, e.g., Keene v. Kimball, 82 Mass. 545, 548 (1860); Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y. 1925) (“Since, however, this principle rests in public policy, cases decided in one age are not a safe guide, on their facts, in subsequent times, and the present tendency...is to allow much more latitude than formerly to free speech...”).

\textsuperscript{342} In Mitchell Brothers, 604 F.2d at 855, the Fifth Circuit interpreted an explicit intent not to place content restrictions on copyright eligibility from Congress's removal of previously added statutory phraseology. Congress first removed reference to works “designed or suited for public representation,” initially added in the 1856 Amendment from the Omnibus Copyright Act of 1870; second, Congress removed language that works should be “connected to the fine arts,” added in the 1874 Amendment but deleted from the Omnibus Copyright Act of 1909. See Ronald L. Green, The Obscenity Defense to Copyright Revisited, 69 KY. L.J. 161 (1980–1981) (discussing the degree to which Mitchell Brothers was portrayed as a “radical departure” from pre-existing doctrine).

the determination of that relief was reserved for courts at law to decide whether the work was criminally libelous. Even if the work were libelous, the issue remained as to whether copyright protection, as provided and specified by statute, was accorded to all works that were original and that fulfilled the procedural prescriptions, or whether it only applied to those which, at law, had been adjudged of innocent tendency.

Mitchell Brothers raised, and to a large extent seemed to resolve, most of these issues. It was an almost delightfully arcane case, by contemporary copyright standards, in which a film was pirated in a similar manner as were books and plays in the eighteenth century.344 The defendant had secured and shown copies of the plaintiff’s copyrighted film without permission in his own theater. When advised that the showings were unauthorized publications and ordered to desist, the defendant refused, and the Mitchell Brothers filed suit, seeking an injunction and damages under the Copyright Act of 1909.345 The federal district court refused relief, accepting the affirmative defense that copyright protection has not been and cannot be provided for obscene works,346 specifically citing the Clean Hands Doctrine347 and the general inconsistency of

---

344 See supra notes 11–13 and accompanying text (describing the factual situation in Mitchell Brothers and the changing nature of copyright claims). In Mitchell Brothers, the theft of the plaintiffs’ film property and its copying by public performance harkened back to the early twentieth century when films were shown in downtown public theaters by operators in reel-to-reel projection booths, and the property was tangible, distributed in large canisters. See supra note 12 and accompanying text. Stagliano’s film property, on the other hand, was copied from stolen digital glass masters and distributed commercially by mail as DVD forgeries, targeting a home-viewing consumer. See supra note 1 and accompanying text. Most contemporary copyright infringement cases relating to film products involve producer/distributor claims of product theft by unauthorized file-sharing of an intangible digital product, allowing anyone to find, download, and view copyrighted films. See supra notes 12–13 and accompanying text.


346 In rather standard fashion, the district court referenced, without discussion, Martinetti, Barnes, Bullard, Khan, Broder, Simonton, and Cain, stating that while there were few cases from which to draw authority and none very recent, “the judicial rule proscribing protection to an obscene work remains unchallenged and in the opinion of the court should be followed in deciding this case.” Mitchell Bros., 192 U.S.P.Q. (BNA) 138, 142 (N.D. Tex. 1976). In fact, the 1976 Mitchell Brothers was the first copyright infringement case in over three decades in which the obscenity defense had been raised, and the defense’s first mention since the Attorney General’s opinion memo in 1958. 41 Op. Att’y Gen. 395 (Dec. 18, 1958). Wilkinson, supra note 57, at 1041. Following this successful use of the obscenity defense, it was procedurally accepted a year later in Argos Films v. Barry International Properties, 77 Civ. 1062 (S.D.N.Y. 1977), again relying on Martinetti, Barnes, and Bullard, even though the film at issue, Oshima’s L’ Empire des Sens (1976), was then held not obscene. Wilkinson, supra note 57, at 1041 n.34.

347 Mitchell Bros., 192 U.S.P.Q. (BNA) at 142 (citing Stone & McCarrick v. Dugan Piano, 220 F. 837 (5th Cir. 1915)) (recognizing that the court in Belcher v. Tarbox, 486 F.2d at 1087 had disagreed, ruling that materials which might be fraudulent or false were still entitled to copyright protection).
pornographic works with the purpose and language of the Copyright Clause.\textsuperscript{348} On appeal, the Fifth Circuit reversed, pointing out that the history and language of the Copyright Act indicated a clear legislative intent that copyright protection be content-neutral.\textsuperscript{349} With regard to whether copyright protection could include obscene works, the court recognized that the purpose of the constitutional grant was expansive—to promote creativity—and that it was for Congress to decide if restraints on content were consistent with that purpose.\textsuperscript{350} While the district and appeals courts both discussed the applicability of national obscenity standards, neither applied those standards substantively.\textsuperscript{351}

Most critically, the Fifth Circuit resolved the issue of whether the Copyright Clause itself set a precondition that works statutorily protected by copyright must actually promote science and the useful arts. It found that Congress was empowered to promote such ends generally and to choose the appropriate choices, which it acknowledged might result in "the protection of a great deal of chaff."\textsuperscript{352} In so doing, the court dismissed judicially-created affirmative defenses as "largely vestiges of a bygone era"\textsuperscript{353} and ruled that any defense not authorized by Congress would frustrate the purpose of copyright protection.\textsuperscript{354} The court also ruled that the maxim of unclean hands was essentially irrelevant.

\textsuperscript{348} Id. at 142–43 ("Sacrificial days devoted to such creative activities deserve rewards commensurate with the service rendered" (citing \textit{Mazer v. Stein}, 347 U.S. 201, 219 (1954))).

\textsuperscript{349} \textit{Mitchell Bros.}, 604 F.2d 852, 854 & n.3 (5th Cir. 1979). The court explicitly rejected "the underlying judicial moral conclusion that the work is not worthy of protection [because of its content]," noting that the doctrine "has not been adopted in this country . . . and should not be." \textit{Id.} at 861. The position is supported by the elimination of wording implying content-based restrictions from previous copyright acts, \textit{supra} note 342 and accompanying text, and sustained further by Holmes' rejection of the role of judges as arbiters of public taste in \textit{Bleistein v. Donaldson}, 188 U.S. 239, 251–52 (1903) and in \textit{Bekker}, 486 F.2d at 1087.

\textsuperscript{350} The appeals court stated further that moral standards change over time, as had been acknowledged in \textit{Martinetti}, and that "[m]any works that are today held in high regard have been adjudged obscene in previous eras. English courts of the nineteenth century found the works of Byron, Southey and Shelley to be immoral." \textit{Mitchell Bros.}, 604 F.2d at 857.

\textsuperscript{351} The fundamental issue was whether the film at issue should be adjudged under \textit{Roth} standards or the more recent \textit{Miller} standards that emphasized local values, and both courts ultimately decided that the more lenient would be appropriate, with the district court then, without benefit of expert testimony from either party, viewing the film and declaring it obscene. The appeals court, having declared the film's content irrelevant to its warranting copyright protection, did not rule on its obscenity.

\textsuperscript{352} \textit{Mitchell Bros.}, 604 F.2d at 860. This was, essentially, the same conclusion the \textit{Bleistein} court reached in 1903.

\textsuperscript{353} \textit{Id.} at 861 ("[T]he evidence is clear that the works in question are obscene, and it is not necessary to consider whether the film is obscene [or] whether it is obscene in the context of other works to which it is related," specifically contradicting \textit{Dane v. M & H Co.}, 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963)).

\textsuperscript{354} \textit{Mitchell Bros.}, 604 F.2d at 861–62.
to the case at hand since the maxim required a direct relation between the plaintiff's conduct, as well as an injury to the defendant, in essence, the Eyre position in *Dering* almost two hundred years earlier. While one might argue that distributing the film would cause harm to a third party, namely the general public, the film had not in fact been distributed, and the plaintiff was left to argue that it was the production of the film, rather than its distribution, that caused harm, clearly a vacuous point.355

Around the same period, the Mitchell Brothers were showing their pornographic films in adult movie theaters they owned in California, causing the Santa Ana City Council to declare the showings a public nuisance and revoking Mitchell Brothers's license to operate.356 As evidence toward that end, the city commissioned its counsel, James Clancy, to make recordings during showings of the films.357 Through their distributor, Jartech, Mitchell Brothers sued for copyright infringement but lost when the jury accepted the affirmative defense of fair use since no profits were secured by the recording and the content was obscene.358 The city then counterclaimed that since the films were obscene, the court should order them seized as contraband. However, the court ruled that it lacked jurisdiction to make a declaratory judgment of law and that seizure was not warranted because federal copyright law did not include a provision for excluding material from its protection because of content.359 In a third action, the trial court assessed Mitchell Brothers all attorney's fees, accepting the city's argument that the infringement suit was vexatious and harassing since the plaintiff had lost a similar suit in Texas in 1976.360 Mitchell Brothers appealed all three trial court actions.361

On appeal, the city maintained that Congress could not grant copyright protection to obscene material in defiance of the constitutional mandate to

355 Id. at 863–64. The Fifth Circuit ruled that the district court had erroneously conflated the narrower unclean hands requirement that a third party be somehow directly injured by fraudulent representation (consistent with *Dering*) with the broader argument that the public was harmed in a substantive manner by publication of obscene material. This was, not, however, at issue in the copyright claim since the plaintiff had not yet distributed the film and no general public harm could be argued. *Id.* at 865 n.25.

356 Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982).

357 *Id.*

358 *Id.* at 405. As the court deemed the copying to be a fair use, its finding that the film was obscene was not germane, especially since the defendants had not raised an obscenity defense in the trial.

359 *Id.*

360 *Id.* (referring to the 1976 district court ruling in *Mitchell Brothers*, 192 U.S.P.Q. (BNA) 138 (N.D. Tex. 1976)).

promote the progress of science and the useful arts. The court dismissed this argument by maintaining that Congress had statutory discretion under the Copyright Clause to effectuate that mandate in a content-neutral manner and had done so historically. The court upheld the district court’s ruling that defendant’s copies were a fair use, but it nonetheless denied the sustainability of the obscenity defense. The court also held that the Copyright Act did not empower it to seize and destroy the films as obscene, for settled law would first require a factual determination.

In most subsequent rulings, the Fifth Circuit’s ruling in *Mitchell Brothers*, supported by *Jartech* and *Nimmer*, has been accepted as authority, with its

---

362 *Jartech*, 666 F.2d at 403.
363 Id. at 406.
364 Id. In rejecting the Council’s obscenity defense, the Second Circuit found authoritative the Ninth Circuit’s ruling in *Belcher* that the statutory history of the Copyright Act did not authorize the court to sort out eligibility based on content. This was also supported by the Fifth Circuit’s ruling in *Mitchell Brothers*, 604 F.2d 852 (5th Cir. 1979), overturning the district court and sustaining enforcement of their copyright. The court also cited Melville B. Nimmer, *Nimmer on Copyright* § 2.17 (1980), which recognized the Fifth Circuit’s ruling as “the most thoughtful and comprehensive analysis of the issue” and as representing the “prevailing view on the issue.” Id. The court further argued that by sheer judicial pragmatism, to accept the obscenity defense would, in practice, necessarily fragment and thus thwart uniform enforcement of a national policy of copyright protection, hinging copyright enforcement on widely varying local community standards. *Id.*
365 Id. at 408.
366 See *Nova Prods., Inc. v. Kisma Video, Inc.*, 2004 U.S. Dist. LEXIS 24171, at 11-14 (S.D.N.Y. 2004) (denying the defendant’s request for summary judgment and ruling in part that a subsequent finding of obscenity in the works at issue would not be an adequate defense against copyright infringement (citing *Mitchell Bros.*, 604 F.2d at 852 and *Jartech*, 666 F.2d at 403)); *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 990-91 (9th Cir. 2009) (ruling that illegal use or operation of a work does not preclude damages for copyright infringement (citing *Belcher*, 486 F.2d at 1087 and Nimmer’s interpretation of *Mitchell Brothers* and *Jartech*)); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) (explaining that while the films at issue involved black men in homosexual acts, there was no suggestion raised that they were in any manner illegal, “and anyway the prevailing view is that even illegality is not a bar to copyrightability” (citing *Jartech*, 666 F.2d at 403; *Mitchell Bros.*, 604 F.2d at 860; *Belcher*, 486 F.2d at 1087; 1 *Nimmer*, supra note 47, § 2.17)); see also *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (“Congress need not require that each copyrighted work be shown to promote the useful arts,” “and neither the old nor the new copyright law” proscribed congressional discretion to protect copyright as it deems appropriate (citing *Mitchell Bros.*, 604 F.2d at 860)). *Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174 (S.D.N.Y. 1998) has been a frequently cited exception, at times accorded equal authority. In a preliminary hearing, the district court judge, after viewing three films representative of the over 200 titles at issue, declared them obscene and held that a “probable cause exist[ed] to believe that the plaintiff [w]as violating 18 U.S.C. 1466” by shipping obscene materials in interstate commerce. As the plaintiff requested a preliminary injunction, scrutiny of content was technically unnecessary, as was the issue whether films of certain content could still be copyright protected. Nonetheless, the district court summarily declared “the clearly criminal nature of the plaintiff’s
reasoning focusing not on content of the works at issue but rather on congressional discretion under the Copyright Clause. Perhaps more telling, however, is that rulings regarding infringement of allegedly, or even admittedly, obscene works have been infrequent, mostly because defendants have not raised the obscenity defense at all. Whether defendants have failed to argue obscenity defenses because they considered these fruitless after the Fifth Circuit's *Mitchell Brothers* opinion and its subsequent acceptance by copyright treatises is an open question. But in a large range of recent copyright infringement cases involving hardcore pornographic and arguably obscene films, the issue of noncopyrightable content has not been substantively raised and has become, in essence, a non-issue. The obscenity defense, largely dormant and perhaps considered arcane throughout much of the twentieth century, was raised in *Mitchell Brothers* in the district court, dismissed by the Fifth Circuit, and has since returned to dormancy.

operation,” then cited the Clean Hands Doctrine as the basis for refusing a preliminary injunction. *Id.* at 175. This argument was wholly dismissed in *Nova* as a conclusion that “must be left to a jury.” *Nova*, 2004 U.S. Dist. LEXIS 24171 at 12. Perhaps erring on the side of caution, *Liberty Media Holdings, L.L.C. v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444, 447 n.2 (D. Mass. 2011) offered that while the films at issue were hardcore, albeit legal, pornography and because the defendants did not raise the issue of obscene content in their motion to quash the plaintiff's requested subpoenas, the question of whether such a nature disqualified them from copyright protection was still “unsettled in many circuits,” including its own.

367 See *Flava Works*, 689 F.3d at 754 (involving works that were clearly pornographic but faced no affirmative defense as to their illegality); *Straughter v. Raymond*, No. CV08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (Aug. 19, 2011) (involving a defendant who invoked the Unclean Hands Doctrine not to claim content exceptionality but rather to argue that the plaintiff had overstated the reach of his copyright); *Liberty Media Holdings, L.L.C. v. Vinigay.com*, No. CV-11-280-PHX-LO4, 2011 U.S. Dist. LEXIS 153615 (Dec. 28, 2011) (involving a magistrate judge who acknowledged the pornographic nature of the films at issue and sustained their eligibility for damages, injunctive relief, or an order for impoundment). That other appellate courts have not reconsidered the Fifth Circuit’s *Mitchell Brothers* opinion in virtually any copyright infringement cases over the past forty years probably reflects that no defendants have seriously introduced the obscenity defense, including *Wong v. Hard Drive Prods.*, No. 12-CV-469-Y612, 2012 U.S. Dist. LEXIS 52551 (2012), a swarm case in which an identified defendant mentioned in passing that the absence of subsequent supporting Ninth Circuit or Supreme Court rulings rendered *Mitchell Brothers* non-binding.

368 It is fair to question whether Nimmer’s acceptance of *Mitchell Brothers* as “well-reasoned” foreclosed discussion among scholars and practitioners. See, e.g., Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. Cin. L. Rev. 581 (2004) (arguing that Nimmer’s interpretations expound normative positions on how copyright law should be interpreted). However, prior to 1979, Nimmer reported but did not take issue with doctrinal acceptance of the obscenity defense. *Mitchell Brothers* was argue well-reasoned from a constitutional standpoint, but it did not delve into the contextual weakness of the commonly-cited precedent cases, as this Article has done.
Arguably, *Mitchell Brothers* was not the fatal blow to the obscenity defense in copyright infringement. Instead, the defense had already been rendered moribund by the start of the twentieth century\(^{369}\) and had not been raised even incidentally in over three decades.\(^{370}\) Like the murder victim on the Orient Express,\(^{371}\) the obscenity defense absorbed numerous blows, some less overt than others, none definitive but all contributing. Many of these originated in the Constitution’s explicit empowerment of Congress to protect copyright in any manner and by whatever means it chose in order to promote progress in science and the useful arts, however it chose to define those. The result was a juxtaposition of that empowerment and its statutory manifestations onto a fairly unsettled collection of equitable doctrines arising from eighteenth-century English common law. This created a moralistic but impractical foundation for considering both the process and the consequences of copyright protection for illicit or at least questionable works.

The tension between procedural and substantive review stemmed from the separation of law and equity in the English courts and became manifest during the Eldon period in the first two decades of the nineteenth century. The solution to this tension lay in the procedural doctrines established by Hardwicke more than a half century before. By Eldon’s time, the moralistically arbitrary standard set by *Burnett v. Chetwood*,\(^{372}\) which might have been a watershed copyright ruling after Parliament enacted the Statute of Anne, was clearly untenable and largely abandoned. It was replaced by procedural rules that deemed issues of morality to be factual in nature and therefore appropriate for courts of law rather than for courts of equity.

The Eldon period was important for establishing procedural doctrines for considering copyright infringement. But its primary legacy was its initiation of

\(^{369}\) See *Bleistein v. Donaldson*, 188 U.S. 239, 250 (1903) (establishing that any material with a modicum of originality would be eligible for copyright protection “unless there is a restriction in the words of the act”); see also Oren Bracha, *Commentary on Bleistein v. Donaldson Lithographing Co.* (1903), in PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds.), http://www.copyrighthistory.org. It was a relatively straightforward matter to find the absence of content-based exception in current statutory language, which, combined with the broader interpretation of congressional empowerment under the Copyright Clause, rendered the obscenity defense irrelevant in copyright infringement cases. One could as easily argue that, to the degree that an explicit congressional effort to support creativity under the Copyright Clause requires uniform enforcement, any application of content-based exceptions based on local definitions of obscenity under *Miller* would have to yield until or unless Congress established a uniform national standard for criminal obscenity or amended copyright statutes to provide for an explicit content-based exception, thereby creating an obscenity defense.

\(^{370}\) See Wilkinson, *supra* note 57.

\(^{371}\) AGATHA CHRISTIE, *MURDER ON THE ORIENT EXPRESS* (1934).

\(^{372}\) See *supra* note 20 and accompanying text.
the consequentialist critique of copyright protection. Coming out of a decade of political upheaval filled with fear of sedition and governmental collapse, England turned its moral concern to normative cultural and religious values, which were challenged by the libelous satires of Peter Pindar, the republican adulations of a younger Robert Southey, the scientific interpretations of scripture in Lawrence’s lectures on physiology, and most of all, the swooning romanticism of sexual liberation, incest, and exotic temptations embodied in the works (and lives) of Shelley and Byron. These fears, combined with the vast expansion and voracious appetite of England’s reading public, exerted pressure for passage of the first obscenity law in England, which clearly focused on the social consequence of bringing moralistically challenging works to the masses. A similar pattern emerged about the same time in America, resulting in the passage of the Comstock laws.

The paradox of encouraging knowledge and learning while fearing its consequence at the social margins was anticipated by Lord Eldon, by Chief Justice Cockburn, by numerous American judges in the nineteenth and early twentieth century, and finally by Judge Woolsey and his judicial progeny. The succession of court decisions, from Roth to Miller and beyond, endeavored to achieve a public good by balancing social value with social contamination. In the process, the obscenity defense, a latent application of the Clean Hands Doctrine in an affirmative defense against copyright infringement, attained a level of notoriety far beyond its warrant. The deferral of a question of fact to the law courts, a standard doctrinal practice in English, and later in American, common law, became a pariah—a judicial countenancing of challenges to the values underlying the stability of society. The consequence, then as now, was considered far more threatening than any question regarding the integrity of the process.

Of course, the bellwether of this trend was Lord Eldon, who, by even temporarily denying injunctive relief to publishers of illicit works, virtually guaranteed the massive proliferation of those venomous works throughout society. By following a procedural discipline he knew to be integral to the legitimacy of judicial rulings and an orderly society, Eldon became pilloried then, and to a certain extent still, for hastening the moral decay of society. When the legislature did not then move to protect morality, it seemed only natural that judges should fill the breach. Ironically, it would appear that to do so, judges would have to accept the obscenity defense and thereby accelerate the distribution of questionable works at cheaper prices.

That the Stagliano copyright infringement suit should constitute any form of capstone on the long, slow, and very quiet passing of the obscenity defense may seem ironic to some, appalling to others, and to most, perhaps, merely an
amusing afterthought. In American jurisprudence, the Fifth Circuit’s ruling in Mitchell Brothers made clear that Congress has avoided restrictive language regarding the content of works eligible for copyright protection and has stripped language interpreted as being restrictive. Congress certainly has the capacity to restrict content eligibility but, however interpreted, has chosen not to do so. To that extent, the films of John Stagliano and other commercial pornographers remain equally eligible for copyright protection, as are any other literary, artistic, photographic or cinematic works, be they wheat or chaff.