Don't fence me in :
The many histories of copyright

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* Thesis' includes ' treatise', ' dissertation' and other similar productions.

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Introduction

Throughout the last three decades many writers have been stirred by a desire to map the origins and purpose of copyright. Different interpretations of this social and legal institution have ensued, differences flowing from the various assumptions and feelings writers have about what the key issues are that need to be addressed. Trying to provide some kind of overview of these histories brings to mind the Indian story about the blind men and the elephant-

> The story goes that a great number of recluses and brahmins were wandering about a certain village quarrelling, and by the force of their various views, "wounding each other with their tongues". The rajah called to a man to gather together in one place all the men in the village who were born blind. The blind men were presented with an elephant- one led to explore the head, another its ear, another its tusk, one the trunk, one the foot, back, tail and the tuft of the tail. When asked to describe the elephant, the one who had been presented with the head answered that an elephant is like a pot; the one who had explored the ear said it was like a basket; the one who explored the tusk thought it was like a ploughshare; the one who knew only the trunk said it was like a plough; one said the body was a granary; the foot, a pillar; the back a mortar; the tail, a pestle; the tuft of the tail, just a besom. They proceeded to argue to the point of fisticuffs. The rajah was pleased by the disorderly display. The Exalted One saw the meaning of the performance, and produced the following verse -
>
> *O how they cling and wrangle, some who claim*
> *Of brahmin and recluse the honoured name!*
> *For, quarrelling, each to his own view they cling.*
> *Such folk see only one side of a thing.*[1]

The history of copyright has been written from the perspective of lawyers, printers, authors, literary theorists, Marxist theorists, postmodern writers and postindustrial critics. All of these perspectives have contributed to our understanding of copyright, however this is not recognised in many of the works. In reading about copyright's history it soon becomes apparent that various writers are so engrossed in their own experiences that they can only

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[1] The story is from the Pali text *Udanam* vi 4. This account is taken from *The Minor Anthologies of the Pali Canon,* Part II, translated by F.L. Woodward (London: Oxford University Press, 1948) at 81-83.

meaningfully engage with others who come to the subject from a similar point of view. Writers from different disciplines are ignored, discounted, "corrected" or ridiculed.

A large number of individual works have contributed to our understanding of copyright, however when it comes to addressing the works of others, they have generally achieved more in clarifying the values of the discipline that the writer identifies with, than they have in breaching the gulf between this writer's work and the works of another discipline. What seems to be missing is a history of copyright that goes beyond a particular discipline's point of view.

This dissertation addresses copyright drawing upon the various perspectives of other copyright historians. It sees copyright through the eyes of Kings, Queens, Parliaments, printers, authors and their supporters, sub-cultures, counter cultures, new industrialists and their legal counsel. But rather than adopting the presumed point of view of any one class of participants, this paper looks at why, in different times and places, various classes of people have had different views about copyright, and it looks at how the law has dealt with that diversity.

As this dissertation consciously draws upon the many histories of copyright it is prudent to begin with a brief appraisal of the telling of the story so far.

What the legal historians have seen

The major contributions made by lawyers to the history of copyright date from the late 1960s when, within a year of each other, two American scholars,

Benjamin Kaplan and Lyman Ray Patterson, published their works.[2] Of these two books Patterson's offers the most detailed account of the development of copyright.

Patterson's history begins with the year 1557, the date when members of the book trade received a Royal Charter and became the Company of Stationers of London, which was able to award copyrights to its members.[3] This history is essentially an institutional history - it traces the statutory development of copyright and the failed attempt to have copyright judicially recognised as a common law property right. In addressing the early history of copyright the primary focus is on printers rather than authors, because Patterson argues that this is what copyright was concerned with as a matter of law, at least until the late eighteenth century.

Whilst Patterson explains copyright as it came to be defined by legislation and case law, Kaplan's book engages with the context of the struggle over copyright more freely. The book lacks the historical specificity of Patterson's work, however because it is written in a much more discursive style, the direction of copyright's development seems less inevitable than that suggested by Patterson. Ultimately Kaplan expects the reader to question the authoritativeness and coherence of copyright's legal formulation.

These two works remain primary references for other legal historians, such as Ricketson.[4]

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[2] Benjamin Kaplan, *An Unhurried View of Copyright,* (New York: Columbia University Press, 1967); Lyman Ray Patterson, *Copyright in Historical Perspective,* (Nashville: Vandebilt University Press, 1968).

[3] Id, at 4.

[4] Sam Ricketson, *Intellectual Property. Cases, Materials and Commentary,* (Sydney: Butterworths, 1994).

Publishers' and authors' perspectives

It is interesting to note that although "publisher" and "author" perspectives on the history of copyright emerged throughout the seventies[5] and, through the enormous output of John Feather, continue to flow in the nineties,[6] in neither Parsons', Bonham-Carter's or Feather's works is there any acknowledgment of the contributions made by the above legal historians.[7]

Ian Parsons' history of copyright was published in a book to celebrate the 250th anniversary of the House of Longman. The article discusses the relationship between printers and the Crown, authors and the Crown and authors and publishers. It is suggested that copyright is a property right, justified by the view that a man (sic) is entitled to the fruits of his labour, even though Parsons also notes that the judiciary decided against such a view in *Donaldson v. Beckett*.[8] This history is more about the practical relations of copyright than it is about its legal foundations.

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[5] Ian Parsons, "Copyright and Society", in *Essays in the History of Publishing,* (ed) A. Briggs, (London: Longman, 1974) p29; Victor Bonham-Carter, *Authors By Profession,* Volumes One & Two, (London: The Society of Authors, 1978).

[6] John Feather's works include the following: "The Book Trade in Politics: The Making of the Copyright Act of 1710", *Publishing History* 8 (1980) p19; "John Nouse and his Authors" 34 *Studies in Bibliography* (1981) p205; "The Publishers and the Pirates. British Copyright Law in Theory and Practice, 1710-1775", *Publishing History* 22 (1987) p5; *A History of British Publishing,* (London: Croom Helm, 1988); "Authors, Publishers and Politicians: The History of Copyright", (1988) 12 E.I.P.R. 377; "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part I: Legal Deposit and the Battle of the Library Tax", *Publishing History* 24 (1988) p49; and "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part II: The Rights of Authors", *Publishing History* 25 (1989) p45; "From Rights to Copies to Copyright: The Recognition of Author's Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries," *Cardozo Arts & Entertainment Law Journal,* Vol 10 (1992) p455.

[7] I was unable to find any passing reference to Patterson's or Kaplan's works in the above cited texts or in their footnotes. Nor is there any reference to the works in the select bibliography of Bonham-Carter's or Feather's books.

[8] (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

This perspective is also shared by Victor Bonham-Carter's *Authors by Profession*. So far as copyright is concerned Bonham-Carter builds upon Parsons' groundwork. Unsurprisingly, the work is far more concerned with linking the development of copyright in the eighteenth and nineteenth century with the rise of the professional author, than it is with considering the interests of publishers. Copyright is praised and/or criticised with reference to a judgement about how well it served the interests of authors, in particular the better known professional authors.

John Feather began to publish a great number of works dealing with the early history of British copyright in the 1980s. Feather's research has unearthed an enormous amount of detail about the nature and diversity of British printing practices from the fifteenth to the twentieth century. His book also tracks the role played by professional authors in the development of copyright. However, unlike Bonham-Carter's work, because of his deep understanding of the history of the printing trade and, in particular of the close ties between the large London printing establishments and some Parliamentary quarters, Feather does not show much surprise or alarm about the inconstant consideration of the concerns of "Grub Street". Rather than judge copyright with reference to the presumed interests of authors, Feather evaluates copyright with reference to local circumstances; personal and political relationships; parliamentary instrumentalism; and in this environment, the inability to achieve political consensus. We should not expect copyright to reflect any *one* party's hopes or desires given this context.

The publishers' and authors' perspectives emphasise the impact of political organisation, lobbying and petitioning Parliament on the "development" of copyright law. There is a tendency to presume that society is better served when the law addresses the "needs" of publishers and/or authors, however

these works actually say very little about the impact of the copyright regime on society.

The Foucaultian retort

Foucault's work "What is an Author?"[9] addresses the nexus between authors, publishers and copyright, but whereas Feather recounts the social factors that gave "rise" to the author, Foucault interrogates the philosophical presuppositions related to this "development", including the juridical and institutional system that places the author and her/his text in a system of property relations.

This work has had such an influence on the literary studies perspective on copyright that it seems to have become a convention to respectfully acknowledge or quote from this piece in opening paragraphs[10] - quite a curious practice given that "What is an Author?" criticises our compulsion to identify texts and discourses with Proper nouns.

Mark Rose's paper "The Author as Proprietor"[11] was one of the first to deal with the history of British copyright following Foucault's lead.[12] However Rose is not so much interested in writing about copyright's history as he is in using

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9 In *Textual Strategies: Perspectives in Poststructuralist Criticism,* edited by J.V. Harari, (Ithica N.Y., Cornell University Press, 1979) p141.

10 See, for example Martha Woodmansee, "The Genius and the Copyright: economic and legal conditions of the emergence of the 'author'", *Eighteenth Century Studies,* 17 (1984) p425; Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship", 23 *Representations,* (1988), p51; Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793", 30 *Representations,* (1990) p109; Martha Woodmansee, "On the Author Effect: Recovering Collectivity", *Cardozo Arts & Entertainment Law Journal,* Vol 10 (1992) p279 etc.

11 Id.

12 Woodmansee's article, "The Genius and the Copyright", (supra n. 10), predates Rose's work by a number of years, however this work is primarily about copyright and the development of a class of professional writers in eighteenth century Germany.

copyright's history to demonstrate the truth of Foucault's observations about authorship. This is why his paper centres on a discussion of the late eighteenth century case *Donaldson v. Beckett*.[13] In this decision the court addressed the argument that the author was a proprietor - a claim justified by Locke's theory of labour and romantic theory. The majority of the court failed to find any legal precedent for common law literary property having survived, if such an interest had ever existed, and declared that there being no common law right, the power to define (and limit) copyright rested with Parliament. Rose is interested in *Donaldson v. Beckett* because the decision demonstrates "the historicity of the seemingly 'solid and fundamental unit of the author and the work.'"[14] That is, the case shows that there is no necessary connection between authors and texts. Such a relationship was only constructed in the eighteenth and nineteenth century. However the view of "the author as proprietor" has been so widely circulated since then, that it is often assumed to be a universal, timeless truth. Uncritical histories such as Bonham-Carter's continue to advertise the "author myth". Rose's work tries to redress this ahistoricism.

In doing this Rose has made a valuable contribution to the copyright story. However what is troubling about his work is that it raises fundamental questions about the nature of the legal order, but it fails to take them very far. If property arguments were so dominant in the late eighteenth century, why was the majority of the court in *Donaldson v. Beckett* so unmoved by them? Rose suggests that the problem was that whilst Lockean ideas were current, romantic conceptions of authorship were still relatively new to Britain. Failing to appreciate what was, to the romantics, an essential difference between works of "art" and works of "industry", the courts could not see why literary

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[13] (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

[14] Supra n. 10, at 78.

works should be treated differently to mechanical works. Mechanical works were protected by patents. So the court treated copyright as a kind of patent for literary works - hence it remained a statutorily limited property interest.

The problem with this is not what it says, but rather with the way the explanation leaves off at this point. By leaving off here Rose implies that there was no acceptance of copyright as a natural right because the *Donaldson* court was basically a conservative one, imprisoned in their time and space, and so unable to appreciate the significance of the social movement coming their way. In reading "The Author as Proprietor" one is left with the feeling that if the "test case" for a common law right had come just a little bit later, there may have been a different result. "What if . . . ?" points are difficult to argue with. However Rose's failure to link up here with an earlier point he made about the eighteenth century ideal of an autonomous legal order causes some concern. If the importance of precedent was that it allowed law to "rise" above the rabble and their ever-changing fashions in ideas, and give law the authority that comes with "objectivity", there is no reason to presume a different result would follow a decade or so later, even though a "romanticised" civil society may have wanted it. To be caught by the past was no mere historical accident, it was an established strand of the politics of the common law courts.[15] *Donaldson v. Beckett* was not just a decision about the author's right to copyright, it was also about the authority of law and its relationship to society. Rose's account, however, is so preoccupied with the former issue that it fails to do justice to the latter.

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[15] Eighteenth century tensions over this tradition are discussed by Michael Lobban in "Blackstone and the Science of Law", *The Historical Journal,* Vol 30 No 2 (1987) p311.

The view of Edelman, a less popular French writer

Edelman's *Ownership of the Image*[16] does involve a detailed discussion of the nature of legal autonomy. The text is firmly based in Marxist theory, specifically drawing upon the work of Althusser. Edelman addresses the development of the philosophical underpinnings of copyright, but not just to make a point about the history of copyright. As a jurist he is also interested in exploring legal categories, private property rights and the social impact of this property rights discourse. He uses copyright and photography as the site for an exploration of bourgeois law and law making.

Edelman argues that copyright constructs the significance of works with reference to a network of existing commodity relations, and manages to make this appear as "natural". This happens because legal categories set out what the appropriate framework and language is for everyone to use. Law constructs the interests of society as (exclusively) the interests of private property holders. So in order to access the legal forum, one has to speak the language of property. When one does this, it then appears that the law is neutrally responding to the unified demands of society for respect for private property, when in reality, it is only in speaking the language of private property that one can address the law. This means that if we want to question the nature of our social relations we are bringing in "non-legal" considerations. We stop speaking the language of the law. Issues that do not relate to the orderly process of production, mass reproduction and consumption cannot be pursued in the legal forum. This allows the self-legitimating domain of law and of private property to continue unchallenged.[17]

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[16] The full title is *Ownership of the Image. Elements for a Marxist Theory of Law,* translated by Elizabeth Kingdom, (London: Routledge and Kegan Paul, 1979).

[17] For a more fuller account see Paul Hirst & Elizabeth Kingdom, "On Edelman's *Ownership of the Image*", *Screen* Vol 20, No 3/4, Winter 1979-80, p135-140; Nancy Anderson & David

In relation to photography Edelman traces its reclassification from a process involving manual labour and incapable of sustaining a copyright, to a creative endeavour deserving protection. When photography was a craft practised by small tradespersons and amateurs it was seen as a mechanical activity. There was no labour involved capable of attracting a copyright. However with the cinema industry attracting investment, particularly after the development of the talkies, the court changed the way it interpreted photographic activity. They "corrected" the error of their previous classification and recharacterised photography as a creative endeavour. Edelman argues that the subject served by this was not the creative photographer because s/he automatically consented to the disposal of her/his rights in the image by way of a labour contract. It was "capital" that copyright created and rewarded. Copyright reduced the risk to investors of a "plagiarised" film competing with the "original".

Compared to Foucault's work this analysis appears to have had little impact on the writing of the history of British copyright, perhaps partly because of the complexity of the analysis. This is not to suggest that Foucault is easy but Edelman is hard, but rather that Edelman's work is really written for those interested in and sympathetic to Marxist legal theory. Gaines argues that most literary theorists have treated legal theory as foreign terrain, and they have not given much priority to questions about the nature of the legal order.[18] Edelman's work is perhaps impenetrable to those without a commitment to pursuing the same kind of questions about law and legal ordering.

Greenberg, "From Substance to Form: Legal Theories of Pashukanis and Edelman", (1983) *Social Text,* Vol 7 p69; and Paul Edward Geller, "Book Review", (1990) 6 I.P.J. 113.

[18] See Jane Gaines, *Contested Culture. The Image, The Voice and The Law,* (Chapel Hill: University of North Carolina Press, 1991) at 2-4.

Of those interested in exploring questions about the nature of the British legal order many have expressed scepticism about the applicability of Edelman's analysis.[19] There are fundamental differences between French and British or American copyright.[20] Following *Donaldson v. Beckett's* determination that copyright was statutorily defined, one wonders if it should be considered a "right" at all. The court failed to give the nod to any of the obvious property "right" traditions - Did they leave copyright as a (statutorily limited) Lockean right of labour or was it a (limited) right of personality? Because of the inconclusive way the British legal order defined the "property" in copyright most are reluctant to draw too much on Edelman's history to explain the British experience.

The postmodern gaze

The one exception to this is the work of Jane Gaines.[21] In the introduction to her book *Contested Culture,* she praises Edelman's contribution, and reappraises it in light of the achievements of the Critical Legal Studies movement, and in terms of her own experience as a cultural studies scholar. Much the same way as Edelman examined the commodification of images, her book examines the way U.S. intellectual property law has recently accommodated investment in "celebrities". However she departs from Edelman's quite abstract exploration of this process, instead utilising a series of "real-life" legal case studies.

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[19] See for example Vincent Porter, "Film Theory and Edelman's Theory of Law", *Screen* Vol 20, No 3/4, Winter 1979-80, p141-148 at 144.

[20] For an historical analysis of these differences see David Saunders, *Authorship and Copyright,* (London: Routledge, 1992) Chapters 3-6.

[21] Supra n. 18.

This book was quite savagely reviewed by C.R. Westering in the *European Intellectual Property Review*.[22] The tone of the piece suggested quite a deal of irritation at the audacity of a non-lawyer presuming to evaluate intellectual property law after "reading a number of US judgments which lie more or less at the perimeters of copyright, contract, rights of privacy and publicity and trade mark law". Interestingly enough the reviewer failed to locate her work in the tradition of Edelman, and missing that connection suggested that "at the end of the day, it is a matter of taste how one wishes to ruminate on the curiosities of stardom." But this isn't a book about stardom, it is about the *properties* of stardom.

Perhaps this is just one of those bad reviews, but it is worth noting because it demonstrates so well Edelman's points about law and legal discourse. Westering's review is not really about the substance of Gaines' book, it is about maintaining control over the copyright discourse - who can address it and in what terms - policing the turf.

Gaines' perspective is actually quite similar to that of a lawyer- Rosemary Coombe. She believes that human beings "never speak in the name of the real, or grasp the world objectively, because the realities we recognize are shaped by the cultural contexts that enable our very cognizance of the world itself."[23] Thus Coombe maintains the need for an interdisciplinary approach to copyright, in order to make explicit the cultural specificity of the subject privileged by the law.[24] Like Gaines, Coombe also argues that the subject privileged by the law is capital. However her analysis differs from Gaines

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[22] [1994] 3 E.I.P.R. 140.

[23] "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue", *Texas Law Review*, Vol 69, (1991) at 1588.

[24] See "Introduction: The Potential for an Interdisciplinary Approach to Intellectual Property Scholarship", (1991) 6 I.P.J. 265.

because of her commitment to exploring the impact of the law on social practices. Coombe argues that we live in a postmodern society and our collective experience and memory is recorded with reference to mass media signs and symbols. To express ourselves we draw upon this experience. We treat it as our common heritage, and we use it individually, to affirm our identities. In revising this past we also generate new, future identities. However from an intellectual property point of view the reference points or cultural symbols we draw upon are privately owned, and therefore access can be prohibited. She gives examples of how corporate actors have used the intellectual property regime to ensure that only corporately appropriate (sanitised) messages circulate. She argues that this enables certain forms of political practice and constrains others. It permits the proliferation of "benign" identities, and silences others.

But is this history?

It may appear that as history, the postmodern perspective is erratic and piecemeal. However this is principally because it abandons the attempt to conjure up the past and represent it, back from the dead, intact and whole. Postmodern writers argue that all history is made up subjective perspectives, and so inherently there are different narratives within history. However this is not apparent when the historian presents her/himself as standing outside of the discourse. In order to demonstrate this problem the postmodern writer often deconstructs such histories to expose the subjectivity of the writer, and bring into view the perspectives s/he has forgotten or ignored.[25]

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[25] For a further discussion of this see Hayden White, "The Value of Narrativity in the Representation of Reality", in his book, *The Content of Form,* (Baltimore: John Hopkins University Press, 1987).

What Rose, Gaines and Coombe bring to legal study is a reading of the law as if it were a postmodern text. They address the personal narratives within it and the connections between these narratives. They also consider the way in which we carry these narratives with us, and how by that interaction, we construct possibilities for the future. As the focus of their legal histories is not just law and legal institutions, or simply the relationship between these and interest groups in society, it feels fragmented. But concreteness and continuity is provided by the discourse(s) to which they respond and reinterpret. Postmodern "histories" can be difficult to follow when one is not all that finely attuned to the conventional discourses.

The postmodern "history" of copyright has recently been explored and soundly criticised by the Australian writer David Saunders.[26] He is generally dismayed by ". . . this game, [which is] caught up in a pressure to be emancipatory (or emancipated), as if . . . every history of copyright law was required to be a critique of society or every account of the English common law had to be written in terms of indigenous 'resistances'. Historical description is disabled when all phenomena have to be treated within some version of the exhaustive antinomy of domination and subversion, blame and praise."[27] Saunders' own history of copyright is not only a history of events in the conventional sense of Patterson or Feather. It is peppered with a narrative that addresses the relationship between these histories and the post-structuralist work of Rose and others. His purpose is to distinguish the author as a legal subject from the author as a cultural construct.

Saunders wants to show that Anglo-American copyright, unlike the French, is not *organised* by the aesthetic figure of the "whole" human being, and

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[26] Supra n. 20.
[27] Id, at 3.

hence to save it from postmodern criticisms "preoccupied" with the text and the subject. The French model was based upon a natural right of personality, whilst the Anglo model developed out of trade regulation of booksellers and publishers. He cites the works of Patterson and Feather as authority. He suggests that because of this, though Anglo-American law can in places reflect aesthetic concerns, such occurrences are simply "fortuitous" historical accidents.[28] So far as copyright is a body of law, aesthetics doesn't touch its heart. In fact, as a body that emerged from a myriad of pragmatic considerations, Saunders questions whether it follows any particular direction at all.

Although in the Anglo-American legal world the received wisdom is that copyright is an economic right rather than a right of personality,[29] if you move beyond concerns for legal form (the origins of the law), Lockean and romantic conceptions of property are clearly evident and intermingling in the substance of copyright cases.[30] However Saunders fails to appreciate this because he only considers British case law in any depth, up to the decision in *Donaldson v. Beckett.* His main preoccupation is with the early *legislative* period. Saunders' discussion of "authorship" may be quite broad, but his analysis of law is really quite narrow.

To basically confine discussion to legislation is to focus on a very formal and expert source of law, alien to the bulk of the population. Most of us gain our understanding of the law informally, we grasp it in our day to day experience and interactions in the world. To most, thinking about copyright

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[28] Id, at 237.

[29] For a brief discussion of this see "The Sources of Australian Copyright Law", in Michael Blakeney & Jill McKeough, *Intellectual Property Law. Commentary and Materials,* (Sydney: Law Book Company, Second edition, 1992) at 13.

[30] This point is taken up in Chapter 6.

does not start at the Act of such and such a time and place. Rather copyright is the set of legal notions we rely upon to bound our activity and to suggest the possibilities of behaviour. Legislation is important because it provides us with a common source and frame of reference from which to view the law. But it is case law that interprets the significance of the legislation, and it is in case law that personal interpretations of what copyright permits are made visible and recorded for all to consider. As Jane Gaines writes -

> . . . the mechanism of intellectual property performs its work blindly; as it draws boundaries between what is and is not property, it doesn't ask about the content of what it does or does not recognize as a cultural property. It only sees value and interests. The judges who implement and interpret the law, however, are a different matter.[31]

The judge does more than assess the "truth" content of two conflicting personal interpretations of what is just and right when arbitrating on the propriety of the use of "another's" work. The judges' deliberations provide the language and framework for everyone's works -

> judicial opinions . . . undertake the function of institutional justification. That is, in these discourses, the institution that ostensibly serves the community justifies itself to the community that it serves, even as it explains the community to itself.[32]

In copyright cases, as they discuss the validity of a lawyer's representation of our personal interpretations of the law, judges also generate and regenerate the legitimacy of the set of values that "copyright" stands for. Thus the presence of romantic notions in the law is more than an historical accident: they form part of the whole, as it is legitimated as a whole. Judges articulate in abstract and universal terms the shape of our shared assumptions about the law. In this way the courts manufacture the *appearance* of the smooth, unbroken, inevitable development of copyright in each and every case, even though one may detect glaring inconsistencies between cases.

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[31] Gaines, supra n. 18 at 11.

[32] Id, at 13.

Whilst Saunders is right not to assume that copyright simply and passively reflects broader cultural forces, at the same time it is important to see how various courts read, consider, resist and redefine those forces. And it is also important to see how citizens respond to that process because -

> . . . the acceptance of legal ideology may be uneven, depending upon the particular case at stake. People do not, however, merely *follow* the law. They attempt to evade it, they bend it to their purposes and assert their own interpretations of what it is and should be . . . [33]

We need to understand what the legislature *and* the courts say, but we can't end the inquiry there either. Copyright is much more than an institutional response to a social force.

What is needed is a history that addresses what the social pressures were that led to the development of copyright law. We need a discussion of how the law responded to that challenge, and a discussion of the social ramifications of the legal position. We also need to evaluate the significance of opposition to copyright as it has been expressed in law, and reflect upon whether that opposition has engendered new approaches or whether it has merely made manifest sites of resistance to the existing law.

With a different "look and feel"

The recent run of articles, letters, and commentaries about copyright published in a growing number of "technoculture" magazines could be interpreted as a new phase in the history of copyright.[34] What seems to be emerging is an articulate, loosely organised "anti-intellectual property"

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[33] Nancy Anderson & David Greenberg, supra n. 17, at 82.

[34] See for example, Andrew Hutkrans, "U2 Can Sue a Sample Simon, Negativland Talks with U2's The Edge", (1992) *Mondo 2000,* Issue 8, p54; Steven Levy, "Cryto Rebels", (1993) *Wired,* May/June, p54; John Perry Barlow, "The Economy of Ideas: A Framework for rethinking patents and copyrights in the Digital Age," (1994), *Wired,* March, p84-89, 126-129; Sinson L. Garfinkel, "Patently Absurd", (1994) *Wired,* July, p105.

position, coalescing around frustration with the way that digital media is dealt with by the established copyright and patent regime.

Barlow argues that "Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum . . . Digital technology is detaching information from the physical plane, where property law of all sorts has always found definition."[35] Barlow's piece, subtitled "Everything you know about intellectual property is wrong", proceeds to challenge traditional views about what information is, how it is generated, conveyed and made valuable. A main focus of his attack on copyright is the idea/expression dichotomy.[36] He demonstrates the conceptual weaknesses in this concept, with particular emphasis on the difficulties of applying it to digital media.

In questioning the purpose of the copyright regime and the logic of the idea/expression dichotomy Barlow is not doing anything all that new. Benjamin Kaplan and David Vaver have, each in their own way, raised similar kinds of issues about the "property" in information before.[37] But what is significant about Barlow's contribution is that he is not addressing lawyers per se, but the creators and investors in multimedia. He is generating a copyright history for them- one that involves an analysis of the concept of "ownership", showing how the model of legal protection has changed since the Middle Ages in response to shifts in the economic base. He locates copyright law as part of the first and second waves of development, and argues, following

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[35] Barlow, Ibid.

[36] That is, the principle that copyright only gives protection to the expression of ideas, it does not restrict access to ideas.

[37] Kaplan, supra n. 2; David Vaver, "Some Agnostic Observations on Intellectual Property", (1991) 6 I.P.J. 125.

Alvin Toffler's analysis, that we are now in "The Third Wave" where information replaces land, capital and hardware as the "property" of value. Information is commodified differently to "hard" goods - put simply, value is not necessarily generated by controlling its circulation. Barlow predicts that because of this, copyright will lose its popularity as a means of protecting information and innovation. It will largely be superseded by licensing contracts and encryption of programs.

Whilst the technoculture writers like to present themselves as a sub-culture, (i.e. outside of the mainstream), it is interesting to note that even conventional copyright lawyers concede many of the same points about the limitations of copyright in this field. As one lawyer told designers and producers at a recent conference, "multimedia" is not an interest copyright even recognises - it only protects the component parts. But is a multimedia program comprising a cartoon animation a "computer work", an "artistic work", or a "cinematographic film", or could it be all of these?[38] The consensus appeared to be that whichever way you try to characterise it, the result is unsatisfactory. From a legal point of view it is unsatisfactory because of the absence of any clear precedent, from an "industry" point of view it is unsatisfactory because the designres and producers are required to slot themselves into boxes made for differently shaped objects.

The current state of the law

Copyright has entered a new age of uncertainty and, as was the case in the eighteenth and nineteenth century, we shouldn't expect the answers to be

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[38] N. Dilanchian, "Interactive Multimedia: A Design Case Study", *Proceedings of the Multimedia and Design Conference*, University of Sydney, 26-28 September, 1994, at 74. Similar points were made by another paper, P.G. Leonard, "Beyond the Future: Multimedia and the Law", *Proceedings of the Multimedia and Design Conference*, University of Sydney, 26-28 September, 1994, at 51.

found *within* any of the established perspectives - of law, industry, literature, or cultural theory. History shows that our understanding of copyright develops out of the interaction of all these perspectives, even though few writers seem prepared to acknowledge this. At first each discipline wanted to pursue their own definition of the subject. Later on definitions were built in reaction to these earlier territorial claims. The argument seems to be over deciding *what the legitimate interests and concerns of copyright are* and *who is authorised to speak for them.* There seems to be an unwillingness to make space for the diversity of experiences and interests involved with copyright. As with the blind men and the elephant it could be argued that copyright historians, broadly defined, have lost sight of the whole.

The path ahead

This dissertation argues that copyright is a reproductive right and so its history should be about the way the power to reproduce a work has been constituted. What kind of production relationship is involved here? What kind of object, event or experience is it that results from that relationship? What is the nature of the thing reproduced? How are ordinary people affected by copyright? What part have they played in copyright's development? How will they affect copyright's future?

My analysis of these questions is loosely organised around a chronological framework however the point is not to recount the epochal development of copyright from Renaissance to the late twentieth century but to focus always on identifying the diverse sources of our understanding of copyright - the many and varied philosophical trends, historical events, individual actions, and collective political interventions that encompass its development. By using a chronological approach it will be easier to identify the complex inter-

weavings between events and ideas across the years. We can differentiate continuities and discontinuities, dead ends and new beginnings. It is also easier to see how the "constant" features of the landscape are continually reinterpreted and renewed in the face of changing social, political and legal relations.

It may appear that law is being placed at the fringe of this inquiry, however this is not the case. This history continually addresses how various social and personal understandings of copyright have been made manifest in legal thought - how lawyers, judges and legislators have taken on board these concerns, how they have facilitated *and* resisted reinterpetations of copyright's purpose. Whilst it is passé to demonstrate that the law is flexible, that its implementation may be partial or subjective, there remains the challenge of explaining why it is so in a given set of circumstances. There is still a need to define the boundaries within which the legal understanding of copyright operates. This dissertation asks from a contemporary point of view, where are the legal fences and is there another way through?

It is hoped that after reading this history the reader will be able to see why copyright necessarily comprises many points of view. Whilst any evaluation of the merit of copyright will be affected by the experience against which one interprets it, in order to view copyright as a whole one needs to acknowledge the limits of everyone's experience. Copyright can be approached from within the constructs of any of the given disciplines, but to appreciate it in all its complexity requires a committed, ongoing, interdisciplinary effort.

Chapter One: The Property of the artist in the Early Renaissance

The author did not formally become a legal subject until 1709 with the passing of what has become known as our first copyright law, the *Statute of Anne*.[1] However for this to happen, for the author to become important enough that s/he is awarded some form of property in a work and its reproduction, the author first has to become recognised as a significant social subject in a broader sense. The Act provided no hints in this regard as "author" was nowhere defined in the Statute. What status did the author have at this time? What kind of property claim did she/he have, that is reflected in her/his copyright?

Most conventional histories of copyright start this kind of inquiry with a discussion of the author in the late seventeenth and early eighteenth century. The concerns of art and the concerns of literature are treated as separate matters, at least until the nineteenth century. The first copyright act was for "authors", therefore literature is treated as the model from which copyright develops. Legal historians undertake an exploration of the writer that maps her/his *progress* from a Renaissance scribe, paid by the page or line, to her/his flourishing as a romantic "author/artist" with a legitimate "right" to copyright. The change in terminology whereby the "author" also becomes an "artist" is seen as unproblematic, or at least in Saunder's case, only a problem because it overstates the significance in law of the author's claim to be an artist. Other categories of copyright are treated as "additions" to the basic model.

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[1] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned. (8 Anne c 19, 1710).

So why start with a discussion of the artist in the late Middle Ages and the early Renaissance?

This paper begins elsewhere because it is argued that the "progress" from scribe to romantic author followed in the steps of another craftsman more than a century earlier- that person being the artisan, who during the Renaissance, established his place as a creative artist.[2] Further the rise of the artist can also be attributed, at least in part, to the development of reproductive technology. The Renaissance artist used the printing press to establish and advocate his claim to a new level of importance. The artist's "rise" was also assisted by likening himself to the "poet". From an historical perspective the relationship between art and literature deserves more attention.

Whilst a comprehensive history of this relationship is not attempted here, I have focused on a few key issues of relevance to the eighteenth century development of an author's right. Of particular interest is an understanding of what it was that the creative artist, as compared to the artisan, "owned" and what it was that his artistic production "reproduced". This needs to be tackled from both the perspective of the artist and that of his patron. The reason for this is that although Renaissance artists discussed art works in terms of "genius", this did not necessarily transpire into the ability to effect a change in one's structural position vis á vis the patron. What the artist thought he reproduced in a work was not necessarily what his patron observed. Though in the eighteenth and nineteenth centuries patronage waned, this dependency

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[2] Whilst the use of gender-neutral language is generally to be preferred, at various points in this paper I have chosen to use only the male pronoun. The reason for this is taken up at the end of this chapter.

of the author and artist in determining the significance of their labour remained, the baton handed to their representatives in the marketplace.[3]

Legal historians such as Patterson are right to suggest that the Statute of Anne was not primarily a copyright *for authors,* but a way of attacking the long established printing monopolies of the Stationer's Company.[4] However this does not mean that authors necessarily identified themselves as "mere" artisans. I think that the long struggle for a form of "author's" copyright in the eighteenth and nineteenth centuries borrowed much from Renaissance discourse about the creative artist, and accordingly the relationship between artist and author, and scribe and romantic author, has been too superficially drawn in most studies. Legislative imprecision in identifying its subject has been carried over into scholarship. It is more helpful to address art and literature with reference to attitudes towards particular practices, than it is to rely upon very generalised empirical definitions of "crafts" that avoid such an inquiry.

Medieval attitudes to art and the artisan

As would be expected, in the Middle Ages the attitude to artistic practice was governed by traditions of communal religious life -

> Man was an artist because he possessed so little; he was born naked, without tusks or claws, unable to run fast, with no shell or natural armour. But he could observe the works of nature, and imitate them. He saw how water ran down the side of a hill without sinking in, and invented a roof for his house.[5]
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> 'Every work is either the work of the Creator, or a work of Nature, or the work of an artificer imitating nature'.[6]

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[3] This issue is taken up in Chapters Four and Five.

[4] Lyman Ray Patterson, *Copyright in Historical Perspective,* (North Carolina: Vandebilt University Press, 1968).

[5] Hugh of St Victor, as quoted in Umberto Eco, *Art and Beauty in the Middle Ages,* translated by H. Bredin, (New Haven: Yale University Press, 1986) at 93.

[6] William of Conches, as quoted in Umberto Eco, Ibid.

The artisan was at the service of God and community. The artisan's skill was directed to the construction of a useful end product, according to its own objective laws. Making an object may involve an individual or a collective effort, but in either case value was not derived from it being the expression of a particular creator. Individual artists were rarely recorded in stories, and where there is mention of them the tone is usually derogatory.[7]

The lowly status attributed to one who partakes of the "mechanical arts" derived in part from the classical belief that her/his experience and moral virtue was limited by the nature of the task - to produce as directed by one's employer -

> A man who follows such a trade . . . will be following one determinate occupation, and will discover an interest in promoting the interests of that occupation, and his own success in it; and his concern with what is good for himself, or for one interest group, will prevent him from arriving at an understanding of what is good for man in general, for the public interest, for human nature. Second, the experience that falls in the way of such a man will be too narrow to serve as the basis of ideas general enough to be represented as true for all mankind, or for the interests, even of his own country. Third, because mechanical arts are concerned with *things,* with material objects, they do not offer the opportunity for exercising a generalising rationality: the successful practice of the mechanical arts requires the material objects be regarded as concrete particulars, and not in terms of abstract and formal relations among them.[8]

It was thought that the artisan had a "practical intellect".

It was recognised that providing for human essentials required more than a slavish copying of nature. It required a level of imaginative thought. But Eco argues that all the medievals, whether Platonic or Aristotelian, believed the artist constructed by using "exemplary ideas" formed in the mind, and they were not unduly concerned about how this ingenuity could "appear" in the

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[7] Umberto Eco notes that where the artist is "honoured" he is also referred to as an object to be used and exchanged, supra n. 5 at 114; and Andrew Martindale, *The Rise of the Artist in the Middle Ages and Early Renaissance,* (London: Thames & Hudson, 1972) at 98-99.

[8] John Barrell, *The Political Theory of Painting from Reynolds to Hazlitt,* (New Haven: Yale University Press, 1986) at 7.

artisan's consciousness.[9] Aquinas, for example, wrote that the idea was formed by the *impulse* to imitate nature, and to put together known forms -

> . . . as when from the imaginary form of gold, and the imaginary form of a mountain, we construct the one form of a golden mountain, which we have never seen. But this operation does not take place in animals other than man, and in man the imaginative power is sufficient for this.[10]

Those who relied upon the artisan's skills did not believe that her/his contribution was either spontaneous or unique.

Hauser argues that -

> The artisans, who, as the heirs of the old Roman craftsmen, were still plentiful enough in the towns, worked within very modest limits . . . There were certainly specialist craftsmen on the royal palatinates and the bigger estates, where compulsory unpaid labour was still used, but they were regarded as part of the royal household and domestic staff and their work was still in the nature of purely domestic labour. . .[11]

Even in works of great significance such as cathedrals, the principle of organic, plant like growth was stressed and the existence of an architect to whom such a project could be ascribed was denied -

> . . . the intention was to ascribe the decisive rôle in the arts not to the painstaking and trained artist but to the artisan whose work was done not with conscious thought but simply in accordance with tradition.[12]

It was recognised that art could have an aesthetic and hedonistic value. However, at least in some quarters, this was treated with concern. For example, in the twelfth century the Cistercians and the Carthusians conducted a campaign against superfluous and overluxuriant art in church decoration. "Superfluidities" such as silk, gold, silver, stained glass, sculpture, paintings and carpets were denounced as a source of distraction of the faithful from their prayers and devotions.[13] St Bernard argued -

> In the cloisters meanwhile, why do the studious monks have to face such ridiculous monstrosities? What is the point of this deformed beauty, this elegant deformity? Those loutish apes? The savage lions? The monstrous centaurs? The half-men? The spotted

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[9] Eco, supra n.5 at 108.

[10] Id, at 110.

[11] Arnold Hauser, *The Social History of Art*, Volume One, (London: Routledge & Kegan Paul, 1951) at 175.

[12] Id, at 179.

[13] Eco, supra n. 5 at 6f.

> tigers? The soldiers fighting? The hunters sounding their horns? You can see a head with many bodies, or a body with many heads . . .[14]

In a similar vein Aquinas advised against the use of instrumental music in the Liturgy because it stimulates a pleasure so acute that it diverts the faithful from the path appropriate to sacred music.[15] Likewise poetry was considered "inferior learning". It served no didactic function. It did not assist one's knowledge of the divine, but represented, by means of metaphors, something delightful to man.[16] Perhaps poetry should be regarded as the medieval equivalent to our info-tainment.

Poetry however, was not a mechanical art, and it permitted personal recognition -

> The mechanical arts have bequeathed to us the names of only the most famous architects, but every poem has a definite author, who is aware of his own originality in style and thought. . . From the eleventh century onwards, poets were quite aware that their work was a means of immortality. . . the new generation of poets were always court poets, immersed in the life of the Aristocracy and honoured in the households where they lived. The poet did not work for God, nor for a community; he did not work at projects which would be completed by others after him; he did not try for the approval of the erudite. What he wanted was the glory of quick success and personal fame.[17]

The poet achieved a status quite different from the artisan who, even if aware of her/his importance, was encouraged to cultivate attitudes of humility and a desire for anonymity.

The artisan's lodge or guild contributed to this culture of anonymity. The guild was a powerful organisation when Church and town corporations were practically the only purchasers of works of art. These co-operative organisations facilitated the engagement of free labour for large projects. Large projects required a variety of labourers, many of whom would come from out of the town. These workers had to be able to work together efficiently, and

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[14] Id, at 8.
[15] Ibid.
[16] Id, at 105.
[17] Id, at 115.

be able to withstand interruptions and changes in tempo as work timetables fluctuated according to the funds available. What the guild did was provide the worker with a level of security in this environment, by developing precise rules regarding the taking on, payment and training of workers; the hierarchy within the workplace; and special restrictions on the intellectual property rights of members in their own work. Hauser argues that the aim of this was to ensure the "unconditional subordination of the individual to the artistic requirements of the common task".[18]

Only when the purchasing power of the town bourgeois had grown to form a regular market for works of art was an artisan in a position to leave the guild and settle in a town as an independent Master.[19] Painters and sculptors were the first to do this and until they began to gather together in workshops in Italy from the thirteenth century onwards there is little evidence to suggest that artisans were interested in and/or able to record individual artistic endeavours.[20]

The printing press as an agent of change[21]

Individual artists were already being singled out for praise as eminent citizens well before the invention of the press. Lavish papal patronage in Rome and by the Medici in Florence created centres which attracted artists in great numbers. Artists were also drawn to these centres because of the opportunity they offered to study an abundance of Antique sculpture and the

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[18] Hauser, supra n. 11, at 246.

[19] Id, at 248.

[20] Eco, supra n. 5 at 115.

[21] The title here is taken from the influential study by Elizabeth Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe*, (2 vols), (Cambridge: Cambridge University Press, 1979).

works of the Masters held there.[22] There were also several scribal treatises written by Florentine artists about themselves and their craft, indicating a sense of self-esteem and self-consciousness.[23] However it was the printing press that allowed artists working across Italy to sustain dialogues about the nature of their practice and in the process re-evaluate the virtue of their craft.

Eisenstein argues that -

> Until the advent of printing, classical revivals were necessarily limited in scope and transitory in effect . . . As long as texts could be duplicated only by hand, perpetuation of the classical heritage rested precariously on the shifting requirements of local elites.[24]
>
> . . . Humanism may have encouraged the pursuit of classical studies for their own sake, sharpened sensitivity to anachronism, and quickened curiosity about all aspects of antiquity, but it could not supply the new element of continuity that is implied by the use of the term "rise". Findings relating to lost texts and dead languages began to accumulate in an unprecedented fashion, not because of some distinctive ethos shaped in quattrocentro Italy, but because a new technology had been placed at the disposal of a far-flung community of scholars.[25]

Artists were quick to appreciate the value of the press and used it to intellectualise their practices, to enhance their fame and secure their immortality.

The press allowed for individual recognition of the creator of the work that had previously been denied to him -

> A given master might decide to place his own features of a figure in a frescoe or on a carving over a door; but in the absence of written records, he would still lose his identity in the eyes of posterity and become another faceless artisan who performed collective tasks. The same point applies to those occasional author portraits which survived from antiquity. In the course of continuous copying the face of one author got transferred to another text, and distinctive features were blurred or erased . . .
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> . . . the drive for fame moved into high gear; (at the same time that) the self-portrait acquired a new permanence, a heightened appreciation of individuality accompanied increased standardisation, and there was a new deliberate promotion by publishers and print dealers of those whose works they hoped to sell.[26]

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[22] Clare Robertson, "Italian Painting 1550-1600" in *Rubens and the Italian Renaissance,* (Canberra: The Australian National Gallery, 1992) at 16.

[23] Elizabeth Eisenstein, *The Printing Revolution in Early Modern Europe,* (Cambridge: Cambridge University Press, 1993) at 131.

[24] Id, at 125.

[25] Id, at 127.

[26] Id, at 133.

The best known of the Renaissance biographical art histories is Vasari's *Lives of the Artists* (1550). In his book Vasari accompanied each entry with a woodcut portrait of the artist. Each distinctive face suggested the importance of a new distinctive personality.

Of the *Lives,* Eisenstein writes -

> Vasari's was the first systematic investigation, based upon interviews, correspondence, and field trips, of the procedures used and the objects produced by generations of European artists.
> . . . It broke out of the limits imposed by Florentine civic loyalties and introduced no less than seventy-five new biographical sketches (in the second edition of 1568).[27]

Vasari explained the benefit of an intellectual approach to art in his dedication of the book to Cosimo de' Medici. He said the book had not been motivated by a desire to win praise for his writing, but was to praise the skill and keep alive the memory of the great artists, as well as to help practising artists, and please those who "follow and delight in the arts".[28]

The benefit to the artist of reading was stressed in the body of the work. For example, his introduction to the "Life of Leon Battista Alberti" began -

> Artists who are fond of reading invariably derive the greatest benefit from their studies, especially if they are sculptors or painters or architects. Book learning encourages craftsmen to be inventive in their work; and certainly, whatever their natural gifts, their judgement will be faulty unless it is backed by sound learning and theory. . .
> . . . When theory and practice coincide then nothing could be more fruitful, since artistic skills are enhanced and perfected by learning and the advice and writings of knowledgeable artists carry more weight and are more efficacious than the words or work of those who (whatever the quality of their results) are merely practical men.[29]

Books and in particular biographies, enhanced the notoriety of the great Masters, and they permitted the geniuses to exercise more control over their promotion. In this regard it is interesting to note Michelangelo's use of the press. Michelangelo was awarded an extremely lengthy appraisal in the *Lives* in which he was adored as both genius and saint. But he was reputedly

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[27] Id, at 132.

[28] G. Bull, "Introduction", in Vasari, *The Lives of the Artists,* Selected translation by G. Bull, (Middlesex: Penguin Books, 1965) at 14.

[29] Vasari, Id, at 208.

disturbed enough by some aspects of the discussion that in 1553, three years after the first publication of Vasari's work, his pupil, Ascanio Condivi, began to write an "authorised" biography, in order to correct those parts of Vasari's work that he did not like.[30]

What was it that the artist produced?

Whilst we tend to think of the romantic artist as a solitary character, the Renaissance artist was not solitary, even though it was believed that the act of creation was. He needed the city, not the country. He required the presence of other artists around him for inspiration, for emulation and for competition -

> The appearance of a man of outstanding creative talent is very often accompanied by that of another great artist at the same time and in the same part of the world so that the two can inspire and emulate each other. Besides bringing considerable advantages to the two rivals themselves, this phenomenon of nature provides tremendous inspiration for later artists who strive as hard as they can to win the fine reputation and renown which they hear every day attributed to their predecessors.[31]

The "progress" of the Renaissance artist differed from the Greek conception which was derived from a metaphor of organic growth. Organic growth comes to a stop once potentialities have been realised. But the modern view derived from the machine and its promise of infinite perfectability. Even though the "craft" was still taught by "copying", by the sixteenth century it was rarely a question of straight copying.[32] The artist progressed by handing on the torch, making his contribution and standing in the stream of history - a stream which art historians set in motion.[33] As Leonardo explained, it was a matter of course that the artist creates not to satisfy his customers but, as he puts it, "to please the first painters" who are the only ones capable of judging

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[30] G. Bull, "Notes on the Artists", supra n.28 at 477.

[31] Vasari, supra n. 28 at 125.

[32] David Jaffé, "The Italian Inheritance of Peter Paul Rubens" in *Rubens and the Italian Renaissance* (Canberra: The Australian National Gallery, 1992) at 27.

[33] E.H. Gombrich, "The Renaissance Conception of Artistic Progress and its Consequences", in *Gombrich on the Renaissance. Volume One: Norm and Form,* 4th edition. (London: Phaidon Press, 1985) at 4.

his work. "Those who do not, will fail to give their pictures the foreshortening, relief and movement that are the glory of painting."[34]

What the artist brought forth was a new life. However whilst he was to be judged by "objective" standards, carrying on an historical and a scientific heritage,[35] his genius was no longer seen as a mere technical mastery. Art, in particular painting, was widely thought of as a kind of poetry.[36] It lost its connection with the mechanical arts, and forged a place as a Liberal Art. This can be seen in Leonardo's suggestion -

> Now you have never thought about how poets compose their verse? They do not trouble to trace beautiful letters nor do they mind crossing out several lines so as to make them better. So, painter, rough out the arrangement of the limbs of your figures and first attend to the movements appropriate to the mental state of the creatures that make up your picture rather than to the beauty and perfection of their parts.[37]

Painting involves the capacity for invention, not execution. Drawing is not reminiscent of the craftsman's patttern, but of the poet's inspired but untidy draft.[38] Art became an activity of the mind. And "genius" lay in the *vision* the artist produced.

As a visionary the artist possessed a power analogous to that of the divine Maker -

> The divinity which is the science of painting transmutes the painter's mind into a resemblance of the divine mind. With free power it reasons concerning the generation of diverse natures.[39]
>
> If the painter wants to see fair women to kindle his love, he has the power to create them, and if he desires to see monstrositities to arouse his fear, his amusement and laughter or even his compassion, he is their Lord and Creator. . . In fact whatever exists in the universe either potentially or actually or in the imagination, he has it first in his

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[34] Id, at 9.

[35] Heller notes that Michelangelo quite radically rejected theories such as Leonardo's that linked art with science. For him art mirrored the Ideal, not nature. Agnes Heller, *Renaissance Man,* translated by R. Allen (London: Routledge & Kegan Paul, 1978) at 411.

[36] Gombrich, "The Renaissance Theory of Art and the Rise of the Landscape", in Gombrich, supra n. 33 at 113.

[37] Gombrich, "Leonardo's Method for Working out Compositions", in Gombrich, supra n. 33 at 59.

[38] Id, at 60.

[39] Leonardo as quoted in Heller, supra n. 35, at 408.

> mind and then in his hands, and these (images) are of such excellence, that they present the same proportioned harmony to a single glance as belongs to the things themselves . . .[40]

The artist's originating power was also celebrated in calling Michelangelo "Il Divino", and in Dürer's self portrait of 1500 where he represented himself as Christ.[41] This power could be assumed within the strictures of Christianity, because the artist's vision was attributed to divine illumination. As Vasari explained of Michelangelo -

> . . . the benign ruler of heaven graciously looked down to earth, saw the worthlessness of what was being done . . . and resolved to save us from our errors. So he decided to send into the world an artist who would teach us how to attain perfection in design . . . Moreover, he determined to give this artist the knowledge of true moral philosophy and the gift of poetic expression so that everyone might admire and follow him as their perfect exemplar in life, work, and behaviour and in every endeavour, and he would be acclaimed as divine.[42]

In Vasari's eyes Michelangelo is the son of God sent to earth. However the production of art also entailed paternal *reproduction* in a more mortal sense, in the relationship the artist has with the works he created. The essence of this relationship is captured in the following tale Vasari recounts in his "Life of Michelangelo" -

> A priest, a friend of his, once told him: "It's a shame you haven't taken a wife and had many sons to whom you could leave all your fine works."
> Michelangelo retorted: "I've always had only too harassing a wife in this demanding art of mine, and the works I leave behind will be my sons. Even if they are nothing, they will live for a while. It would have been a disaster for Lorenzo Ghiberti if he hadn't made the doors of San Giovanni, seeing that they are still standing whereas his children and grandchildren sold and squandered all he left."[43]

This tale reflects the continuance of the Aristotelian view of creation whereby the child reproduces the father's image, and thereby secures for him a kind of immortality. Like the father in familial reproduction, the artist is the active, formative party. Whilst divine imagination determines the vision the work

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[40] Leonardo as quoted in Gombrich, supra n. 36 at 112.

[41] Roslyn Parker & Griselda Pollock, "God's Little Artist", from their book *Old Mistresses. Women, Art and Ideology,* (London: Routledge & Kegan Paul, 1981) at 87.

[42] Vasari, supra n. 28 at 325.

[43] Id, at 428.

produced, the work is clearly intended to represent the mortal creator, as well.

Furthermore artistic reproduction is seen as essentially *solitary*. Thus Vasari argued -

> Anyone who wants to devote himself to the study of art must shun the society of others. In fact, a man who gives his time to the problems of art is never alone and never lacks food for thought, and those who attribute an artist's love of solitude to outlandishness and eccentricity are mistaken, seeing that anyone who wants to do good work must rid himself of all cares and burdens: the artist must have time and opportunity for reflection and solitude and concentration.[44]

Artists required the company of others, to boast to or receive praise from. However the creative act itself required the artist alone, contemplating his place in the tide of history.

This philosophy allowed the genius to discriminate between legitimate and illegitimate artistic births. This can be seen in Michelangelo's dispute with a competitor, the "divine" Raphael. According to Vasari's account, Michelangelo had had to flee Rome after an incident in which he refused Pope Julius admission to see his progress with the painting of the Sistine Chapel. During his absence a friend of Raphael, who had the keys to the Chapel, allowed Raphael to see the works and study Michelangelo's technique. Vasari suggests that after doing so, Raphael immediately repainted some of his works, though they had already been finished, so that they might have "more majesty and grandeur". Michelangelo felt he had been wronged by this event, at the expense of Raphael's reputation and benefit.[45]

What was the "wrong" done here, given that imitation of styles and themes was a legitimate artistic practice? It could be that an unauthorised viewing,

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[44] Vasari, supra n. 28 at 419. This passage is also a defence of Michelangelo, who as Vasari accounted, was frequently criticised for his arrogance, aloofness and obsessive secrecy whilst he worked.

[45] Id, at 298.

particularly of a partly completed work, is a breach of propriety. However that explanation goes to the issue of possible damage to Michelangelo's reputation by judging his talent by an incomplete work. But Michelangelo was not concerned here with his own good name, but with Raphael's. This suggests that the "wrong" goes to the properties of Raphael's art and the reputation that flows from it. I think that the "wrong" here flows from retouching his own work, after viewing the Master's creation, and still claiming that work as his own work of genius. Raphael's work is not the product of a solitary contemplation. It was compromised by his own lack of faith. Rather than acting like a God, he changed his mind and copied, like an artisan. The wrong flows from behaviour unauthorised of any artist worthy to the title of genius, from dressing up an illegitimate birth as a legitimate work of genius. At least in Michelangelo's eyes, Raphael's work is not worthy to be known as *his* son.

It is interesting to note that Raphael's work, though illegitimate as an act of genius, is not illegitimate in the same fashion as women's imaginative works were thought by some to be. His work may not truly reflect its paternity, but her works were monsters. Tales of women's monstrous births were extremely popular in the Renaissance. The best-known example of this is the story of the so-called hairy virgin -

> Charles IV, the emperor and king of Bohemia, was shown a virgin completely covered with hair like a bear; she was born thus deformed, and hideous because her mother had gazed too intently upon a effigy of St. John dressed in animal skins which hung at the foot of her bed when she conceived.[46]

It was argued that divine imagination was a quality women lacked. Women, it was thought, though strongly affected by images, were unable to read their significance. The mother reproduced what she saw without discrimination.

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[46] Pierre Boaistuau, as quoted in Marie Helene Huet, *Monstrous Imagination,* (London: Harvard University Press, 1993) at 19.

She could not differentiate between a living model and its representation. Her troubled contemplation of images led to unnatural, monstrous births.

This view of women's imagination seriously circumscribed the identification of the female sex with the notion of artist.[47] During the Renassiance women could only appear as artists if they could assert some other claim to "nobility", by right of birth, education and other recognised accomplishments. Whilst the well known male artists of this period were rarely of the nobility, women artists whose activity was documented invariably were. Further the work done by these women artists itself advertises the noblewomen's attributes and activities, her "right" to be counted as a member of a cultured elite. In the self-portraits of Anguissola, for example, she represented herself holding a palette, being painted by her teacher, at work on a painting and playing a musical instrument. At the time when artists struggled upwards from the class of artisans, it was of advantage to a woman artist if she was already known as a member of the aristocracy.[48] But then, as a member of the aristocracy, she was never a "professional" artist.

What was it that the patron or customer owned?

By the middle of the sixteenth century artists had been largely freed from the restrictions of the guilds and the narrow requirements of ecclesiastical patronage.[49] For the professional artist, in addition to clerical patronage, there

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[47] It is interesting to note that whilst in medieval times there were women writers who identified themselves by name and sex without evidence of ridicule, between the 15th-17th centuries the authority of woman as writer also changed. Women writers stopped circulating works in their own name, but instead used a male pseudonym. In the 17th and 18th centuries, "she" rarely appeared as an author. See Jean Bethke Elshtain, *Meditations on Modern Political Thought: Masculine/Feminine Themes from Luther to Arendt,* (Pennsylvania: Pennsylvania State University Press, 1992) at 11.

[48] Parker & Pollock, supra n. 41 at 84-87.

[49] G. Bull, "Vasari and the Renaissance Artists" in Vasari, supra n. 28 at 18.

was princely and private patronage, guild patronage, and civic patronage.[50] However the artist was still dependent on the whims of the patron. Even, "Il Divino" had to *humbly* request autonomy over his practice, as is documented in his letter to Pope Clement VII (1524) -

> . . . And, further, if I am to do any work for Your Holiness, I beg that none may be set in authority over me in matters touching my art. I beg that full trust will be placed in me and that I may be given a free hand; Your Holiness shall see the work I will do and the account I will give of myself.[51]

With regard to the less weighty artistic concerns of the "common" painter, Vasari recounts a story told to Michelangelo by Menighelli -

> a peasant . . had asked him for a picture of St Francis and was disappointed when he found the robes painted grey since he would have liked something brighter; . . . (so) Menighelli put a pluvial of brocade on the saint's back, and the peasant was as happy as a lark.[52]

Despite the celebration of art and artists amongst the profession they were not necessarily freed from the more petty realities of life. They were answerable to pope and peasant alike.

However this does not mean that the judgement of the work was completely in the hands of the patron or customer. Where the work was to denote public virtue, in honour of a significant public figure and, in particular as a representation with great religious significance, the work could be subjected to wide debate and "interference" with the artist's vision.

The debate over the nudity in Michelangelo's Sistine Chapel painting, *Last Judgement* (1536-41) is well known. It was felt by many that the figures as painted were quite improper in so sacred a place as the Pope's private chapel.

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[50] For examples of work contracts see D.S. Chambers, *Patrons and Artists in the Italian Renaissance,* (London: Macmillan, 1970).

[51] *A Documentary History of Art. Volume II, Michelangelo and the Mannerists, The Baroque and the Eighteenth Century*, selected & edited by E. Holt, (New York: Anchor Books, 1958) at 11.

[52] Vasari, supra n. 28 at 429.

It was suggested that the fresco should be pulled down. In 1564 a compromise was reached and a former pupil of Michelangelo, Daniele da Volterra, was commissioned to paint "trousers" on some of the more offensive figures.[53] In another unusual example, Veronese was brought before the Inquisition in Venice (1573) in order to explain an "incorrect" image. The painting was supposed to be *The Last Supper*. Veronese included "buffoons, German soldiers and a man having a nose-bleed" which he justified to the Inquisition on the grounds of artistic licence, and on the ground that he had some space left over on the canvas and filled it with whatever ornament seemed pleasing.[54] The transitional status of the artist is indicated by the solution fashioned in this case - the painting was renamed and is now known as the *Feast in the House of Levi*. What the artist thought he reproduced, was one matter. Whether or not he would be permitted to reproduce in that manner, and claim the property of his issue, was perhaps a more relevant inquiry.

What was painted, where it was to be displayed, and who is was for, all seem to bear upon the relative autonomy of the artist and the patron to make a private judgement about the work of art. Whilst "ownership" may have been most absolute in the case of a private sale, even in the private home property reflected the morality of its owner. Gombrich speculates that even Cosimo may have been driven to hide the two large bronzes *David* and *Judith* in the Medici palace, for fear of attracting criticism of vainglory.[55]

A Medici purchase of a great Master obviously attracted more interest than that of the peasant's purchase of a "common" work, though both may have

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[53] Robertson, supra n. 22 at 16. But should the trousers have been removed during the recent "restoration" of the work?

[54] Ibid.

[55] "The Early Medici as Patrons of Art" in Gombrich, supra n. 33 at 41.

"lacked" moral judgement according to the contemporary tastes. Nevertheless what all these examples demonstrate is that the status of the parties connected with the work is all important. We need to know who the artist, patron or customer is before we can identify the respective rights of ownership in the artwork and begin to unravel what that "ownership" may involve.

Poets, artists and reproductive claims

The tendency of copyright historians has been to approach the question of reproductive rights by addressing cultural producers in terms of abstract, media specific groupings. However this leads to the clumping of all writers in one class and all artists in another. At least in the early Renaissance, from the perspective of reproductive rights, the divide that needs to be made is that which separates the elite from the mundane, the godly presence from the anonymous citizen, the sublime creation from the useful work, the one who masters original works from the many who merely produce likenesses to order.

The process by which one was judged as belonging to one class rather than to another was not uncomplicated. There was a world of difference between claiming to be an artist or a poet and being respected as such by one's peers. The decision was not as simple as looking at the nature of one's skill or practice. It involved a complex evaluation of the execution and reception of a particular work.

In order to be attuned to these subtleties, a real subject and her/his social relations need to be at the centre of the inquiry. What did this artist claim to have reproduced? On what terms did her/his peers accept such a claim? This brings to the fore problems of selection and exclusion - why focus on *this*

poet or *that* painter? - however at least through this process of inquiry we are always made aware of who the subjects are that comprise the "representative" models.

We should not forget that reproductive claims did not develop in order to encompass any one kind of media practice or category of work. Reproductive rights were not inclusive but were exclusive. The challenge of unravelling copyright's history involves tracing how that territory has been opened up, and identifying whose works and practices still remain shut out.

Chapter Two: Acting companies, fishmongers, pamphleteers and poets - the complex origins of literary property

In many copyright histories a natural association is implied between a reproductive right and the press. Copyright is treated as a form of literary property that *developed from* the regulation of the press. There is no appreciation that a notion of a reproductive right might also develop as a consequence of other forces transforming Renaissance society, encompassing much more than the relations of book publishing. It is as if all copyright historians presume that there could be no such thing as a reproductive right outside of the technology of the press, because no one had given a thought to such a notion before reproductive technology arrived. However as is well known, medieval society had an extremely sophisticated understanding of the temporality of property rights, and apparently there was a medieval custom of selling or renting manuscripts so that they could be copied by hand.[1] Why isn't this seen as a precursor to modern copyright?

Part of the confusion about the nature of early literary property "rights" stems from the copyright histories - of Patterson,[2] Kaplan,[3] Parsons,[4] Feather[5]

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[1] Evelyn May Albright, "Notes on the Status of Literary Property, 1500-1545", *Modern Philology,* 17 (1919) at 439.

[2] Lyman Ray Patterson, *Copyright in Historical Perspective,* (Nashville: Vandebilt University Press, 1968).

[3] Benjamin Kaplan, *An Unhurried View of Copyright,* (New York: Columbia University Press, 1967).

[4] Ian Parsons, "Copyright and Society", in *Essays in the History of Publishing,* (ed) A. Briggs, (London: Longman, 1974) p29.

[5] John Feather, *A History of British Publishing,* (London: Croom Helm, 1988).

and Saunders[6] - collapsing the distinction between *the articulation of a claim* and the *formal recognition of it* by Crown and court. However as has already been discussed, one can believe her/himself entitled to "property" in a work regardless of the social acceptance of such a claim. One can also believe her/himself morally entitled to such a property, regardless of the formal legal status of such a claim. Likewise one can have a formally recognised legal claim and, as a practical matter, be unable to meaningfully assert the right because it lacks social legitimacy.

Writers, printers, publishers and universities all claimed some form of interest in the reproduction of texts in the period up to the passing of the Statute of Anne. The question is why did these parties believe themselves entitled to make such a claim? What kinds of claims were these? How were legal devices and processes utilised in support of these claims? What were the problems they faced in doing this?

It is difficult to address the above questions comprehensively. There was such an enormous range of literature published during the Renaissance it is hard to know where one should start. Apart from a wide variety of religious literature, there were books aimed at the "professions" such as law and medicine, calendars and almanacs with information about the weather, gardening, farming, veterinary and other useful information, astrological predictions, poetry, romance novels, prose, plays, ballads, folk tales, news broadsides, caricatures and political pamphlets. Such material was produced under a varying circumstances, with all sorts of motivations. This makes it difficult to make generalisations about the writer, publisher and customer, and in particular about what respective parties "rights" to a text may have been.

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[6] David Saunders, *Authorship and Copyright*, (London: Routledge, 1992).

There is a further complication - as licensing and censorship operated throughout the era there were strong motivations for all those involved in the production and consumption of printed material to keep the nature of their involvement with the literature hidden. We know most about those writing in the periods where such regulation was comparatively lax. This means that we need to be careful about drawing conclusions about writers in general, from the few that were recorded in history. How are these notables different to others? Why it is that we know of the literary property dealings of writers such as Milton and Pope, but we know comparatively little of the writer of the broadside, ballad or newsheet? Can we justify making any conclusions about literary property when we only know of the property relations of a few of the elite?

We know more of the poets than of the broadsheet writer, because poetry has been considered a superior art. It transcends daily political turmoil and, "above" history itself, is therefore ironically worth preserving for posterity. The poet has also been considered an "intellectual" subject worthy of the attention of all educated gentleman, in a way that the writer of popular fiction has not. A further reason we know of these particular poets is because they were later claimed as the forebears to the romantics. In the nineteenth century copyright debates they were held up as examples of the exploited, who suffered at the hands of avaricious booksellers. This has also enhanced perceptions of their historical significance. There is also the matter that we know of the famous poets because, at least occasionally, they took recourse to formal legal mechanisms in order to protect their "rights".[7] They are recorded in legal *and* in literary history. Could the ordinary writer exercise the same legal rights? Did

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[7] The view that writers asserted literary property rights prior to the Statute of Anne differs from that of most historians. It is based on the research into Milton's literary property dealings by Peter Lindebaum, "Milton's Contract", in 10 *Cardozo Arts & Entertainment Law Journal* (1992) p439. This is discussed further at p59.

they consider the possibility of such action? Did they pursue it, but because we don't know their names, that pursuit is now difficult to trace? Or did they oppose such a notion altogether, and that opposition has been overlooked?

From the few studies of the period dealing with literary property before the Statute of Anne we know that acting companies paid their playwrights a scribal fee for texts, and then registered the company as the "owner" of the reproductive right. We also know that playwrights, such as Ben Jonson, objected to the company's claim to own publishing rights which suggests by implication, that he thought the playwright was entitled to such profits.[8] We know that pamphleteers who sold short, topical works on street corners and in pubs appeared to have no use for literary property.[9] We know that the fishmonger, John Wolfe, worked his real trade pirating other printer's copies, and then worked as Beadle for the Stationer's Company when he was offered the position for twice the normal wage. He exploited the diversity of opinion as to the merits of literary property rights for his own ends, and was not all that concerned with the philosophy behind such a "right".[10] By way of contrast, it could be argued that Milton was unusually concerned about the precise nature and value of this right. What is striking about this period is the diversity of attitudes toward literary property.

After discussing these various property perspectives, this chapter considers the literary property claimed by Alexander Pope in the period immediately after the Statute of Anne. Pope's financial success is often attributed to his ability to fully understand and act upon the opportunity created for authors by

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[8] Joseph Loewenstein, "The Script in the Marketplace", 12 *Representations,* (1985) p101.

[9] John Friedman, "Censorship, Popular Publications and the Pulp Press", in his book *Miracles and the Pulp Press during the English Revolution. The Battle of the Frog's and Fairford's Flies,* (London: University College London Press, 1993) at 1.

[10] Joseph Loewenstein, "For A History of Literary Property: John Wolfe's Reformation", 18 *English Literary Renaissance,* (1988) p389.

the Statute of Anne. This implies that earlier writers failed to benefit because of the lack of legislative support for their rights. However comparative with other kinds of writers of their respective times, both Milton and Pope did very well. Accordingly, it is argued that the Statute alone was not the matter that determined the writer's success. Both Milton and Pope did well because they saw their works as their reproductive property, and *as poets* they were entitled to claim the market value of that property. It is argued that the difference between these two and the other, less fortunate writers, is their personal status in the context of the elevated standing of their chosen medium.

It is important to recognise this copyright "tradition" so as not to marginalise the copyright perspectives of those other kinds of writers whose works were not as illustrious as poetry. We should not presume that just because copyright worked for some poets, it worked for other kinds of writers. And further, as the language of property was universalised in the eighteenth and nineteenth centuries, we should not presume that just because it was deserved by poets, it was deserved by all other writers. We need to be more finely attuned to both the social relations of literary property and the social relations of literature in order to do justice to copyright's history.

Early regulation of the press

Albright argues that the early period of the press (1500-1545) was marked by a very lively, unprincipled competition amongst printers. She suggests that the first patents were granted in order to stabilise the market, printer's guilds being incapable of organising the trade at this time. However it should not be assumed that only printers qualified for Crown or Papal privileges. A patent was granted to the author Sabellico in 1486 for his work *Decades rerum Venetarium,* and by 1545 no non-theological work could be published

without the written consent of the writer. Whilst the latter could be seen as a prudent move in a culture where the offending writer might be burnt along with the offending book, Albright argues that authors benefited from this requirement.[11]

There is however a difficulty in transposing this Italian experience to the English case, because of the major differences in the way the trade developed in England. Whilst in Venice there were 200 printers by 1500,[12] England had to import skilled practitioners and craftsmen because the press was a continental development. In this way England was in a position of almost total dependence -

> At the end of the fifteenth and the beginning of the sixteenth centuries, therefore, one would expect to find in England a number of stationers of foreign origin, and in Cambridge they would likely to be Flemish, Dutch, German or French. They would be useful to scholars because they would be in touch with the developed centres of scholarly printing.[13]

Printing also led to a new kind of work structure, with closer contacts amongst diversely skilled workers -

> The preparation of copy and illustrative material for printed editions led to a rearrangement of all bookmaking arts and routines. Not only did new skills, such as typefounding and presswork, involve veritable occupational mutations; but the production of printed books also gathered together in one place more traditional variegated skills. . .
>
> Thus it was not uncommon to find former priests among the early printers or former abbots serving as editors and correctors. University professors often served in similar capacities and thus came into closer contact with metal workers and mechanics.[14]

In addition to these new workplace relationships there was a momentous acceleration in reproduction of existing works, the reprinting of reorganised editions and commentaries, the proliferation of new works and creation of

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[11] Supra n. 1 at 439-440.

[12] Id, at 439.

[13] See Michael Black, *Cambridge University Press 1584-1984*, (Cambridge: Cambridge University Press, 1984) at 11.

[14] Elizabeth Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe*, (Cambridge: Cambridge University Press, 1984) at 55.

markets for ideas. These new relationships made possible by the press led to an unprecedented vitality in private discourses.

Even though it was felt that "authority" carried with it the responsibility to protect society against error, until the Reformation, individuals were generally granted the freedom to explore books of Christians, pagans and infidels, in order to search for the truth. Though there were instances where civil and papal decrees condemned books, their effect was initially quite limited.[15] It was not until the ensuing social and political disorder brought about by the Reformation that control was systematically exercised over the press.

In Tudor terms, the licensing and censoring of ideas was essential to establish and maintain English social order. An example of Henry VIII's regulation of the press includes a decree of 1523 in which printers were prohibited from employing any foreign apprentices and limiting the number of foreign journeymen. In 1529 he prohibited the setting up of any new press by an alien, and appointed certain tradesmen as "King's Printers". This enabled the Crown to control the sorts of books that were being produced.[16] It also conferred an important economic advantage upon chosen printers. In the same year Nycolson, a licensed Dutch printer working in Cambridge, was charged with unlawful possession of Luther's books. Black suggests that "It was no doubt with this political and religious situation in mind, as well as the practical trade considerations, that the University suggested -

> that for the suppression of error, there should be three booksellers allowed in Cambridge by the King, who should be sworn not to bring in or sell any book which had not first been approved of by the censors of books in the University, that such booksellers should be men of reputation and gravity and foreigners (so it should be

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[15] Paul Grendler, "Printing and Censorship", *The Cambridge History of Renaissance Philosophy*, edited by Charles Schmitt, (Cambridge: Cambridge University Press, 1988) at 43.

[16] See Alan Downie, "The Growth of Government Tolerance of the Press to 1790", in *Development of The English Book Trade 1700-1899*, edited by Robin Myers & Michael Harris, (Oxford: Oxford Polytechnic Press, 1982) p40.

best for the prizing of books) and that they might have the privilege to buy books of foreign merchants.(Cooper, *Annals* I, 329).[17]

This privilege was granted to the University by Letters Patent in 1534. In the same year Henry restricted the liberty of foreign printers. They could only work their trade if they were fully employed by English printers. Henry later prohibited the import of any foreign bound books.

Regulation was not just limited to restricting the use of the press. Henry VIII also actively encouraged the dissemination of "useful" information by granting patents for a set terms of years for specific titles to guarantee that a publisher had a reasonable chance of a return.[18] This practice was also followed by Elizabeth I, James I[19] and Charles I, although only a minority of books were ever privileged in this fashion.

As well as these formal printing privileges, defacto privileges developed amongst the trade, with stationers recognising amongst the members of their guild a monopoly in the first who printed the text. The Stationer's Company had been founded in 1403 from older societies of scriveners, limners, bookbinders and stationers. In the guild tradition the Company controlled entry into the printing trade. It applied for a company charter and formal recognition of its de facto publication privileges in 1534.

As part of the Catholic Counter-Reformation Mary Tudor agreed to this request in 1557, not for the benefit of the stationers per se, but in order to extend control over what the English could read. Members of the Stationer's

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[17] Black, supra n. 12 at 23.

[18] See John Feather, "From Rights in Copies to Copyright", 10 *Cardozo Arts & Entertainment Law Journal*, (1992) p455.

[19] For a discussion over the "patent" for the King James Bible see Ian Parsons, "Copyright and Society", in *Essays in the History of Publishing*, edited by A. Briggs, (London: Longman Group, 1974) at 35-36.

Company were given a monopoly in the printing of works, the right made effective by entering the work into the Company Register in the name of the publisher (their copy-right). In return for these personal privileges the Company's keepers of the Register were responsible for seeing that the work was appropriately approved by Church and State.[20] No books, pamphlets, newsbooks or broadsides were to be printed without such a licence.[21]

Elizabeth enforced the same policies and further banned the printing of domestic news unless it was unrelated to national affairs. During her time only ninety-seven small hand presses were authorised. But despite these measures control proved difficult. The Crown sought to extend the power of the guild by limiting the number of master printers to twenty-three and whipping and pillorying those found printing without a licence. However as much as demonstrating the desire to censor, these efforts also illustrate the continuing difficulty in controlling the fertility of the press.[22]

It could be argued that these early attempts at trade regulation only generated hostility towards the Stationer's Company and its officers.[23] The Crown itself was partly responsible for this. The Crown undermined the guild's authority which focused on the need to register one's copy in order to have a right to print, by continuing to award lucrative patents, sometimes to parties who were not even members of the guild. There was also the problem that some such privileges were being abused by extension, an example of

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[20] Black, supra n. 12 at 28.

[21] Feather argues that this royal charter had the effect of banning provincial printing outside of Oxford and Cambridge universities because only freemen of London, normally resident there, were able to join the Stationer's Company. However this was not of immediate consequence because none of the provincial enterprises had been very successful, there being little infrastructure to support transportation and distribution of books. See Feather, supra n. 5 at 31.

[22] Friedman, supra n. 9 at 2.

[23] The following discussion is based on the work by Joseph Loewenstein, "For a History of Literary Property: John Wolfe's Reformation", supra n. 10 at 397f.

which was William Bryd's claim to have a monopoly in the printing of ruled paper, by virtue of his patent in music books. Smaller, poorer printers argued that privileged books were shoddy productions and that they were sold at exorbitant prices. Loewenstein suggests that the practice of awarding and protecting monopoly rights polarised the trade. That there was strong dissent lent an air of respectability to those who "pirated" texts.

The fishmonger's piracy (?-1601)

John Wolfe was an exceptionally talented pirate, despite his never having completed the printing apprenticeship he began in 1562 with the English printer Day. He made his reputation abroad pirating many Italian and Spanish works and distributing them with false imprints. He continued to pirate works in England on his return. He also unsuccessfully applied for patents of his own, and he accepted printing commissions for legitimate works even though he was not entitled to do so; as he had not completed his apprenticeship he was not a member of the Stationer's Company. Wolfe's citizenship was conferred by the patrimony of the London Fishmonger's guild.

After a brief prison spell on an unknown charge, Wolfe was released to Thomas Norton who had been appointed to conduct an inquiry into unrest in the printing trade. Wolfe used the opportunity to transform himself into the champion of the aggrieved poor tradesmen. As the report into the trade noted-

> *Wolfe* and some of his confederates affirmed openly in the Stationer's Hall that "it was lawfull for all men to print all lawfull bookes what commandement soever her Majestie gave to the contrary".
>
> *Wolfe* hath oftentimes delivered most disloyall and unreverent speaches of her majesties government, not once giving her highnesse any honorable name or title, as "She is deceaved," "she shall know she is deceaved," also "she is blindly lead, she is deceaved."
>
> [When] Barker sent for the said *Wolfe* and demanded of him why he printyed the Copies belonging to his office: he answered, "Because I will live."
>
> *Wolfe* being admonished that he being but one so meane a man should not presume to contrarie her Highnesse governmente: "Tush," said he, "*Luther* was but one man, and

reformed all the world for religion, and I am that one man, that must and will reforme the government in this trade".[24]

Wolfe was back in prison before the inquiry was finalised, and once he was released he continued pirating works. We know this because records show that the Stationer's Company raided his home and seized works. Part of the settlement included Wolfe agreeing to join the Company of Stationers and presumably to accept their governance. However that he complied should not be interpreted as a sign of submission. When he was again raided by the Company he immediately brought a complaint before the Star Chamber for property damages. Although he lost this action Loewenstein notes that this was "not without gaining an opportunity for impugning the propriety of Day's marketing practices and the quality of his presswork".[25]

Gradually the Stationer's Company consolidated its authority, in particular once its officers were awarded full rights of search, seizure and arrest, to be exercised when they suspected an infringement of state or company trade regulation. Wolfe's fate is most surprising in light of this development. He was appointed the company beadle, having been offered nearly twice the regular wage.[26] He also received other entitlements, such as shares in some of the most lucrative, commonly pirated patents, including that of Day's the *ABC*.[27]

Loewenstein argues that Wolfe "abandoned" the poor for the opportunity to police the company of behalf of the powerful.[28] His co-option suggests that it is wrong to presume lofty ideals to all the participants in the literary

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[24] As cited in Loewenstein, Id, at 401.

[25] Id, at 403. Day was Wolfe's former Master.

[26] Id, at 404.

[27] Feather, supra n. 5 at 37.

[28] Joseph Loewenstein, supra n. 10 at 405. This shows that there is a historical precedent for the computer companies hiring hackers to assist with their security arrangements!

property debates. One could present her/himself as a strong supporter of literary property rights but be motivated by quite instrumental reasons.

The acting companies and their playwrights

The traditional practice was for plays to be sold to the acting company for a flat fee. However performance was not, of course, the only sphere of profitable publication, and by the late fifteenth century companies began to publish plays for a variety of reasons - the plague closed theatres and sales of the text were a welcome source of income; when the play's immediate popularity subsided it provided a further opportunity for profit; and by publishing the play the company forestalled the "pirating" of the text by impoverished members of its own company.[29]

But why did the acting company think itself entitled to claim the reproductive value of this literary property? They had only paid the writer the customary fee for his scribal labour. There was certainly no statute that forwarded them this right, and they had no patent in these literary works.

Loewenstein argues that the acting companies had an exclusive right to disseminate a work in the theatre. However "imperfectly rationalised economic relations and a marketplace made harrowingly unstable by plague and censor generated a new kind of theft and a new kind of ownership".[30] Out of these troubled circumstances there arose an appreciation of "an economic value relatively autonomous from either the author's scribal labour or the stationer's reproductive and disseminative labour."[31] The acting company's exclusive right to perform a work they had paid for was simply

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[29] See Loewenstein, supra n. 8 at 104-5.
[30] Id, at 106.
[31] Ibid.

extended to incorporate the new medium of publication - it founded a claim to an exclusive right to reproduce the work in whatever form.

This power was not necessarily exercised to make money out of publication. Loewenstein argues that it was commonly used as a restraint on such enterprise - acting companies would register themselves as owners of the copy to secure their exclusive right and thereby prevent another publishing it. Registration served to stay possibly unauthorised printings, and thus obstruct the possible competition brought about by the new media.[32]

The acting company's claim to property was based on the assumption that they owned any rights arising from the work of "their" playwright - the playwright being but an adjunct to the proprietary group of performers. However Loewenstein's study of the playwright Ben Jonson suggests a significant level of discontent with this arrangement.

> Jonson was no romantic author -
> his poetic creed stressed such prosy qualities as workmanship, rather than inspiration, judgment rather than lyric excitement.[33]

However this did not mean that he failed to consider the reproductive value of his works. He was very much moved by the mercantilist spirit of his time.[34] But what was the nature of Jonson's literary property, and how did his contemporaries deal with such a claim?

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[32] Id, at 105.

[33] Jonas Barish, "Introduction", in *Ben Jonson. A collection of critical essays,* edited by Jonas Barish, (New Jersey: Prentice-Hall Inc, 1963) at 6.

[34] Harry Levin writes of his work, "The plots of *Eastward Ho, Volpone* and *The Alchemist*. . . have a single theme, which may be underscored as the leading motive of Jonsonian drama, and which is enunciated by its most authoritative spokesman in the mystic words, "Be rich!" "An introduction to Ben Jonson," in Barish id, at 51.

Loewenstein argues that Jonson's literary property was a hybrid breed - it was presented as the property of patrons, perhaps because he sought to attract their support.[35] But it was also sold directly to printers, sidestepping the customary use of a theatrical manager or agent. His connection with the work did not end in one transaction with the printer. He asserted control over the reproductive process - revising, annotating and correcting print runs. For this reason Loewenstein suggest he had a real sense of his own property interest in the text, one that was abstracted from the simpler relations of scribal labour, and closer to the conditions of modern authorship.[36]

His printers accommodated these wishes, although he is presumed to have been paid in presentation copies, rather than in currency. Whilst this may suggest less than a full respect for his property claim, it was a common practice to pay authors this way up until the nineteenth century.[37] Whilst Jonson was certainly an unusual writer his practice suggests that various kinds of property assertions would be tolerated by the printer or publisher if the text was considered valuable enough.

Property and the pulp press (1640-1660)

The civil war made news all the more a desirable commodity. Studies estimate that by 1640 about 30% of males and 11% of females were literate. However these figures don't include the many people unable to write that could read. Further literacy rates were much higher in the cities with their urban merchant economies. The illiterate also benefited from the press because the literate could and did read aloud in public places such as taverns

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35 Loewenstein, supra n. 8 at 109.

36 Id, at 108.

37 This is still a common practice in academic publications, especially in journals where one is paid solely in "offprints".

and alehouses.[38] By the 1640s printing catered to all sorts of markets. Broadsides, ballads, pamphlets and newsheets were quite affordable for an artisan and in regular demand. It was this "political" literature that proved increasingly difficult to regulate.

The monopoly of the Stationer's Company remained in place until Parliament's abolition of the Star Chamber. Restrictive regulation aimed at curtailing anti-government opinion, stifling Royalist propaganda and preventing the publication of blasphemy followed but despite these enactments -

> Every radical constituency found a willing printer if only because many publishers simply and flagrantly flouted licensing laws and other government controls.[39]

Downie says that -

> The Parliament soon realised its mistake, as a flood of Royalist propaganda found its way into the streets. A committee of printing was set up to deal with specific complaints of disorderly publications, and on 14 June 1643 an ordinance for regulating printing restored to the Stationer's Company its powers of search and seizure, the insistence that all books should be entered in the Stationer's Register, and that copy should be submitted prior to publication for official approval - the old system of licensing, in all its glory - was re-introduced under the auspices not of the monarchy, but of Parliament. Government tolerance of the press was far from becoming a reality.[40]

However despite an ongoing official intolerance towards the reading appetites of the population and active attempts to curtail the circulation of newsbooks and pamphlets, the number of publications continued to multiply. Friedman notes that in the George Thomason's collection from 1640-1660,[41] there were 22 informal, one time pamphlets collected in 1640, over 717 collected in 1641, 1,966 in 1642, and for the period ending in 1660, over a

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[38] Friedman, supra n. 9 at 5.

[39] Id, at 3.

[40] Alan Downie, as cited in Edward Earle, "The Effect of Romanticism on the 19th century development of Copyright Law" (1991) 6 I.P.J. 269 at 274.

[41] Thomason was a book collector and bookseller. He was of Presbyterian sympathy and supported the Parliament until 1647, until power began to shift to the New Model Army. Friedman, supra n. 9 at xi.

total of 22,000 pamphlets, newspapers and newsbooks. Permits had only been sought for a few of the listings in Thomason's collection. Many works were anonymous, or the author/s used initials only, or the printer used false imprints or the publishers gave spurious identification. The few authors Friedman identified were commoners. One was a weaver, another kept an alehouse, one was a Thames waterman and later a tavern owner, another was an apprentice bookbinder who also practiced peddling, ballad singing and later on keeping an alehouse.[42]

The existence of licensing regulations has made it difficult to trace what these authors' relationships may have been with printers or publishers. They were not driven to immortalise themself in biographies explaining their attitudes and convictions. How did the author see their part? Did the pamphleteer assert any ownership over the text? What drove them to write? What was their reward?

Because of the inefficacy of the licensing laws we do have access to what "common authors" wrote. From the tenor of these works we can judge the attitudes of the time and speculate about the authors' relationship to the text.

The most obvious thing about the content of the pamphlets and newsbooks discussed by Friedman is the distance they represent from the intellectual concerns of the Renaissance elite. Before the civil war the popular press usually emphasised the importance of mythical heroes, such as Robin Hood, King Arthur, St. George fighting monsters, or the King, like Christ, living and working with peasants. Romantic themes about ardent lovers, passionate suitors, broken promises, false females, betrayal and insanity were

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[42] Id, at 8.

also popular. Rather than engaging with new possibilities and challenges, the literature seeks to explain and reaffirm the existing social hierarchy -

> . . . popular literature . . . attempts to explain to the common and ordinary person how simple truths are still valid in the face of an increasingly complex world. By identifying with the hero of the story, the reader affirms old-fashioned values in a world conceived of as increasingly crass, unscrupulous, irreligious and immoral.[43]

Friedman suggests that after the civil war popular writing changed. Rather than indicating a love of continuity the literature reflected the flipside of continuity, a fear of change -

> Rather than expressing hope and optimism that all was as it should be, new vulgar newsbook journalists paraded before the public horrible images of how everything was bad- and getting worse. Increasing numbers of pamphlets told of the appearance of witches, monsters, and apparitions, whose existence the average English reader took seriously, linked with the revolution, and interpreted as evidence of wrong actions taken by their social betters.[44]

An example that demonstrates the interconnection felt to exist between individual actions and localised events, and between the national and the cosmic scene can be found in the reading of *The Penitent Murderer* (1657). This was but one of many pamphlets that circulated after Nathaniel Butler's homosexual murder of his friend Jonathon West. There was a great deal of news speculation about the motives, deeds, character and history of Butler. The author of *The Penitent Murderer* addressed these too, but in a very broad context -

> explaining that "we hear and fear 'tis true that (Catholic) priests and jesuits (those Romish Locusts) do swarm amongst us in the city and suburbs". And after a long tirade, the pamphlet ended with the prayer to the mayor or London "to put forth your power to the utmost for the discovering and suppressing of them".[45]

West's murder was mysteriously linked with evil, unnatural papist influences. Butler was characterised as relatively innocent compared with the real agents of evil to which all remained vulnerable.[46]

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[43] Id, at 11.
[44] Ibid.
[45] Id, at 14.
[46] Ibid.

The pulp news interpreted events in line with a totemistic view of the world. Rather than engaging with actual political or religious ideology, writers focused on the disorder that flows from human actions and the cosmic repercussions that inevitably follow. Hysterical accounts of witches, monsters, demons, murderous Catholics, devious Jews and thrill seeking libertines were extremely popular. They were also frequently similar suggesting that writers and publishers copied from other's accounts.[47]

So what was it that the writer or publisher owned in these works?

These works do not appear to have been written by "professional" authors. The writer's motivation appears to have been a political, as much as an economic one. It is generally presumed that if the writer was paid at all, s/he was paid for the scribal labour involved in composing a single copy of a text.[48] Thus between writer and publisher there was no accounting for the reproductive value of the work, whereas between publisher and customer there was. Compared to the writer's customary fees, the publisher potentially did considerably better, her/his reward being linked to the market value of the work.

The tales purported to be news and often the writer denied any role in constructing the narrative for the reader.[49] Various versions of the same story would circulate at the same time. Generally the texts circulated as folk tales

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[47] Ibid.

[48] Some historians suggest, in relation to books, that in the early Renaissance authors commonly *paid* printers to print their works, and sought reimbursement from patrons. See Grendler, supra n. 15 at 30-35.

[49] As one writer put it in *The Most Strange and Wonderfull Apparition of Blood in a Pool at a Garreton,* a pamphlet about the pond water at Garreton, Leicestershire, turning to blood for four days, signifying the four years of the civil war - "I will not presume to give you an interpretation of (these events) nor say it is suitable to the present condition of these bleeding times." Friedman, supra n. 9 at 24.

had done. The message was often of the dangers of exercising individual autonomy in the face of God's supreme power and his displeasure at human error. Under these circumstances it is difficult to see any great advantage in asserting an exclusive right to a text, if such a possibility was conceived of. It would have been very dangerous to have been too closely associated with the text.

The property of the poets - Milton (1608-1674)

The standard accounts of Milton's property interest in his works holds him up as an example of the Renaissance scribe to whom copyright was not available. For example Saunder's suggests -

> The positive right - the right to publish copies - was limited to members of the Stationer's Company. As such, the copyright derived from a legal capacity of the Company and was simply not available as a right that the author could hold or contract to accord to another. Milton's 1667 conveyance of Paradise Lost to the stationer Samuel Simmons is usually cited as an instance of the conveyancing procedure:
> "And the said John Milton . . . doth covenant with the said Samll, Symons . . . that hee shall at all tymes hereafter have, hold, and enjoy the same [All that Booke, Copy or Manuscript of a Poem intituled Paradise lost], and all Impressions thereof accordingly, without lett or hinderance of him. . . And that the said John Milton, . . . shall not print or cause to be printed, or sell, dispose, or publish, the said Booke or Manuscript, or any other Booke or Manuscript of the same tenor, or subject, without the consent of the said Samll. Symons."
>
> (in Patterson 1968:74)
>
> The capacity to enter into a negative covenant of this sort is not the stuff of which the Romantic notion of the author is made.[50]

However as another scholar has recently pointed out,[51] this interpretation of the contract is quite misleading. Whilst Milton "lost" his interest in the poem to the stationer by the conveyance, the conveyance was not for scribal labour alone. The terms of the conveyance clearly show that the assignment was of specific *reproductive* rights. Milton is significant as an author because, unlike many of his contemporaries, he assigned interests in *editions*.[52]

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[50] Saunders, supra n. 6 at 49.

[51] See Lindebaum, supra n. 7.

[52] Id, at 441.

Milton received £5 immediately, an additional £5 once the first edition of 1300 copies had been sold, £5 for the second run and a further £5 for the third edition. None of the three editions was to run more than 1500 copies and Milton had a right to demand accounting of sales. If this request was not complied with, Simmons was obliged to pay £5 as if it were due. The assignment of "the full benefitt profitt & advantage thereof or which shall or may arise thereby" for £20 was not consideration for scribal labour. His "property" in the literary work was explicitly linked to the work's reproductive life. In this regard Milton considered himself on the same plane as the publisher. Both shared in market returns.[53]

To suggest that Milton's copyright precedes from a "negative covenant" suggests that only a positive authority can create rights, and in a monarchical fashion. It suggests that law cannot arise from the practices of civil society.[54] However the fact that Milton bothered to formalise his assignment, and the publisher accepted these terms suggests that citizens did feel competent to arrange their own legal affairs, and adapted existing legal procedures to fit new practices. There had been little attempt to systematise English law at this time and it was not conceived of as an orderly body of rules. Different jurisdictions, rules and procedures could utilised to achieve various results, hence the practice of law was in a sense "creative", even though "adapting" procedures to fit the occasion was not necessarily understood as actively shaping the future direction of the law.[55] It should be noted that Milton's

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[53] Victor Bonham-Carter notes that Milton actually received £10, and his widow sold the remaining publication rights for a consideration of £8, which was quite a reasonable sum for its time. See *Authors By Profession,* Volume 1, (London: The Society of Authors, 1978) at 15.

[54] It should be recalled that Milton was a republican!

[55] For a discussion of the order of the law and the attitudes of the profession see Stephen White, *Sir Edward Coke and the Grievances of the Commonwealth,* (Manchester University Press, 1979) at 46-51, 76-85; C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth,* (Cambridge: Cambridge University Press, 1986) at 217-226; Wilfred Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590-1640,* (Essex: Longman Group, 1972) at 137-173.

father was a successful lawyer and money lender and his biographers suggest that he also had an understanding of legal practice and procedure.

It cannot be assumed that the contract would not be enforceable in courts either. There are many records of Chancery issuing injunctions to protect "literary property". It was the practice of Chancery to issue injunctions on application by the plaintiff without waiting for the defendant's reply, as a stop on the printing and circulation of books until the parties were heard. Usually the plaintiff was satisfied with the injunctive relief so that the substantive issue between the parties was never heard.[56] Given this legal culture there is no reason to presume that Milton did not think of his text as a legitimate form of literary property.

So what was it that Milton thought he owned, and that he assigned?

In order to understand that we need to address Milton's understanding of the creation of literature. Although he didn't authorise a biography in order to explain his "creative" power, his writing is renowned for its literary self-consciousness. He was acutely aware that he was the subject of his own work-

> He (was) vastly and precisely interested in himself . . . as a literary artifact (his own) designed to reflect eternity.[57]

Milton's puritanism meant that poetic genius manifested itself differently from Michelangelo's -

> . . . It is true that from his youth he had been lost contemplating for himself "an immortality of fame," last infirmity of noble minds though that might be. But as a

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[56] The formal legal status of these copyright practices was discussed in *Millar v. Taylor* (1769). see Chapter 4 at p95.

[57] Webber argues that John Milton shared this quality with his contemporaries John Donne, John Bunyan, John Lilburne, Richard Baxter, Sit Thomas Browne and Thomas Traherne. See Joan Webber, *The Eloquent "I": Style and Self in Seventeenth-Century Prose,* (Wisconsin: University of Wisconsin Press, 1968) at 4.

> literary figure he is typically Puritan in his inability to separate his destiny from that of the English people. . .[58]

Like Michelangelo Milton also called his works his "progeny".[59] But he intended that it represent his son, not as *his* earthly representative, but as it represents all Englishmen, who were merely instruments of God's will.

Milton was "God's English poet". He signified his part by rarely using "I", instead using the third person, and the passive voice.[60] It is suggested that he tapped into the pleasure of poetry so that moral lessons could get under the reader's skin. His poetry and his prose was to guide his readers through these troubled times.[61] In this way though "inspired" by God to write, the poem did not house a romantic, natural overflowing of feeling -

> The poem is as much an artefact, shaped and polished to do a particular job, as a kettle or a carving knife. It follows that the concept of form as organic will not apply, while on the other hand a concept of form as an appropriate frame for, and signal to the audience about, the total meaning of the poem will be normal- like the total design of a picture. For it was a universally held cliché in the Renaissance that poetry and painting are closely related arts, working in similar ways through the same sort of convention.[62]

Milton was a poet, but he was also a priest and a preacher. As with Michelangelo he believed his reproductive power to be "authorised" by God. His works were a manifestation of God on earth.

Milton's poetic practice creates a paradox -

> . . . the need for human action - expressed in Milton's own performative discourse - struggles with a sense of "its impossibility without divine aid". This leads him to the paradoxical position: deferring to Biblical authority, Milton establishes his own.[63]

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[58] Id, at 189.

[59] See for example, John Milton, *Complete Prose Works of John Milton,* edited by Don Wolfe, (New Haven: Yale University Press, 1953) at Volume II, 492.

[60] Webber, supra n. 57 at 250.

[61] For a discussion of why understanding Milton's poetry is linked with his prose, see David Loewenstein & James Turner, "Introduction: Labouring in the World" in *Politics, Poetics and Hermeneutics in Milton's prose,* edited by David Loewenstein & James Turner, (Cambridge: Cambridge University Press, 1990) at 1-7.

[62] C.W.R.D. Moseley, *The Poetic Birth. Milton's Poems of 1645,* (Aldershot: Scolar Press, 1991) at 7.

[63] Loewenstein & Turner, supra n. 61 at 6.

But Milton does not assume the mantle of God's *only son* on earth. This is clear from his attitude towards the freedom of the press -

> I deny not, but that it is of greatest concernment in the Church and Commonwealth, to have a vigilant eye how books demean themselves, as well as men; and thereafter to confine, imprison, and do sharpest justice on them as malefactors: for books are not absolute dead things, but do contain a potency of life in them to be as active as that soul whose progeny they are; nay they do preserve as in a vial the purest efficacy and extraction of that lively intellect that bred them. I know they are as lively, and as vigorously productive, as those fabulous dragon's teeth; and being sown up and down, may chance to spring up armed men. And yet on the other hand unless wariness be used, as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book destroys reason itself, kills the image of God, as it were in the eye.[64]

Milton concedes the danger of books, but he also considers that books are living men, that embody a divine image. Thus to suppress or destroy them is to fracture that divinity. Therefore -

> Truth lies in the choices made available to the individual in the course of acquiring knowledge, that is, reading. . . . Milton explores a pattern of education which would aid the collective recovery of lost and scattered divine truth.[65]

It is ultimately for the "gathered Church", not Milton, to reconstitute Truth.

So how does this lead to a copyright in the text?

Smith argues that copyright is justified because men need to live from the sale of their books, as much as others need to "feed" on books when they read them.[66] In Milton's puritan republicanism, copyright is a form of private property that sustains the author. But -

> At the same time, the retention of copyright by the author (which Milton says should be assured by the signing of each book) signifies the name, honour and virtue of the author and allows those qualities to be disseminated publicly.[67]

There is a "public" quality that comes with a *creator's* assertion of a copyright. Because of this Milton's property in a work moves closer to that of a patron,

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[64] Milton, "Areopagitica" as quoted in Roger Pooley, *English Prose of the Seventeenth Century 1590-1700,* (Essex: Longman Group, 1992) at 153.

[65] N. Smith, "Areopagitica: Voicing Contexts, 1643-5", in Loewenstein & Turner, supra n. 61 at 105. See also Pooley, Id, at 152-157, for a discussion of the relationship between censorship and a free press in Milton's works.

[66] Id, at 106.

[67] Ibid.

and away from that of the publisher. For the publisher, the work always represents an economic return. For the poet, like the patron, it is ultimately more than this. It commemorates himself. It is a monument to his own virtue. And whilst his virtue is for peers (the gathered Church), to judge, it is also created for subjects to emulate.

But Milton's property is also unlike that of the patron. Where the patron merely contracts another to execute the work, the poet "breeds" the work. He brings forth *his* "lively intellect". Consequently the text does more than *represent* his virtue, it embodies it in a corporeal sense on a number of levels.

Rose notes that in his *Eikonoklastes* (1649) Milton wrote of the "human right, which commands that every author should have the property of his own work reserved to him after death as well as living".[68] Apart from some religious objections, Milton objected to King Charles's appropriation of Pamela's prayer from Sidney's *Arcadia* as his personal meditation on the eve of his execution because of the author's immortal connection with his text -

> It was a trespass also more than usual against human right, which commands that every author should have the property of his own work reserved to him after death, as well as living. Many princes have been rigorous in layng down taxes on their subjects by the head, but of any kings heretofore that made a levy upon their art and seized it as his own legitimate, I have not whom besides to instance.[69]

His comparison of this trespass to literary property with an unfair taxation needs to be understood in relation to the controversy surrounding taxation at that time. In 1638 the *Ship-Money Case* established the right of the King to levy a "tax" upon his subjects, where it was not appropriate to insist upon personal ship building services to meet a threat from abroad.[70] This decision

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[68] Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship", 23 *Representations,* (1988) at 55.

[69] Ibid.

[70] See *R. v. Hampden* (the Ship-Money Case), 1637-38, in M. Evans & R. Ian Jack (eds) *Sources of English Legal and Constitutional History,* (Sydney: Butterworths, 1984) p321-324, and D.L. Keir, "The Case of Ship-Money", (1936) 52 *Law Quarterley Review,* 546.

was a controversial one as in the past taxes were seen as voluntary or as a spontaneous gift of the people who gave their consent through Parliament. Property rights were not normally infringed by Parliament by general laws, and to suggest a legal obligation to pay a tax in lieu of services was seen by many as an attack on the fundamental right to private property.[71] The judges involved in the Ship-Money case were later impeached for subjecting the subjects to arbitrary, tyrannical government, treason against God and the rule of law for allowing one's goods, lands, bodies, and the peace of good conscience to be subject to the mercy of the King. To suggest that Charles's seizing Sidney's literary property is of the same order as the Ship-Money tax suggests that literary property is a comparable fundamental private property right to that of tangible property.

However contrary to what Rose suggests, it is really the antithesis of an alienable property right because with alienable property the assignor loses her/his interest in the property to the assignee.[72] As Milton characterises this unusual human right, even though he assigns his copyright interest, perhaps leaving it to his son on his death, he remains, ever present in that work. The living presence of the author in the text survives beyond his mortal life. Thus although Milton suggests that literary property is as fundamental as other private property, as a form of authorial reproduction it has "immortal" qualities that set it quite apart. The author's property denotes more than a financial interest in the value of the reproducible text.

Milton's use of copyright signifies a multitude of reproductive purposes: the copyright fee sustains him materially; his control over issues suggests his right

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[71] The Ship Money judges tried to avoid the conflict between the right to private property and the right to tax by suggesting the fiction that the taxpayer retained a proportional interest in the ship once it was built.

[72] Rose, supra n. 68 at 55.

of paternity, mimicking God the Father's role; it signifies his immortality; and it signifies his status vis á vis those that are ultimately the subject of the work - the consumers who in feeding on the body of the text, learn how to live a virtuous life. Milton's copyright is a peculiar creation that reflects the political and religious complexity of his time. Perhaps this is why Pope is preferred as the model Renaissance writer in copyright histories. By his time, the respective authority of the poet, of God, and of the law had been simplified, or at least a dominant view about the proper place of each had emerged.

Who owns the property in a work after the Statute of Anne (1709)?

Whilst the events leading up to the Statute of Anne touched upon some of these issues over the creative rights in a work, the Act itself was not designed with these problems. The Statute of Anne arose from much more pragmatic considerations.

The Licensing Act which was the legislative basis to the stationer's printing monopoly lapsed in 1695.[73] Furthermore after the Union with Scotland in 1707 the powerful London booksellers' lucrative markets were liable to be undercut by the provincial booksellers and printers. These sellers were not bound by the rules of the Stationer's Company.[74]

In order to secure their longstanding privileges the London printers and booksellers argued for further statutory protection. In 1709 Parliament was petitioned in support of "A bill for the Encouragement of Learning and for securing the property in copies of books to the rightful owners thereof" -

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[73] See Raymond Astbury, "The Renewal of the Licensing Act in 1693 and its Lapse in 1695", *Library,* (1978) 5th series, Vol 33. p296-322.

[74] Rose, supra n. 68 at 52. see also Peter Prescott, "The Origins of Copyright: A Debunking View", 12 E.I.P.R. 453.

> The poor distressed printers and bookbinders in London and Westminster; setting forth, that having served seven years apprenticeship, hoped to have gotten a comfortable livelihood by their trades, who are in number at least 5000; but by the liberty taken of some few persons *printing books*, to which they have no right to the copies, is such a discouragement to the bookselling trade, that no person can proceed to print any book without considerable loss, and consequently the petitioners cannot be employed; by which means the petitioners are reduced to very great poverty and want: And praying that their deplorable case may be effectively redressed.[75]

A further petition of 12 December 1709 claimed -

> That it has been the constant usage for the writers of books, to sell their copies to booksellers or printers, to the end they might hold these copies *as their property*, and enjoy the profit of making and vending impressions of them...
> (We pray) that leave may be given to bring a bill *for securing to them the property* of books brought and obtained by them.[76]

As can be seen from these demands the printers and booksellers had come to treat the privileges that had been awarded to the Stationer's Company as personal rights, and these right were now treated as if they were property. But what was the nature of this "property right"- a right to financial benefit, released of the duty to censor what was printed?

From the twelfth to the eighteenth century the moral and historical justifications for rights in land were slowly undermined.[77] They were replaced by a more commercial attitude, where land came to be valued for its financial return rather than for its social and political significance. This development undermined the legal concept of property as a real thing securing social relations. Further, the personal rights that attached to the land began to be seen as things of value in their own right. Property and personal rights slowly began to be traded like other commodities. Both came to be seen as merely rights to an income (wealth). As the courts bowed to commercial pressure in protecting these economic values, the legal distinctions between rights in rem

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[75] Reported in "Information for John Robertson..., Defender against J Mackenzie...", in *The Literary Property Debate: Seven Tracts, 1747-1773*, edited by Stephen Parks, (New York: Garland Publishing, 1974) at D35.

[76] Id, at 34.

[77] See Arie Buck, "The Politics of Land Law in Tudor England 1529-1540", 11 *The Journal of Legal History* (1990) p200.

and choses in action, between property right and personal right, lost significance.

The claim of the printers and booksellers that their pre-existing privilege was "property" should be seen in this context. The personal monopoly right, freed of the social obligation to censor what was printed, was treated as akin to a property right, because both are exchangeable as sources of wealth. Wealth is claimed as of "right". "Customary practice" authorises ongoing protection of historical privileges, and as political circumstances change, a re-writing of their legal status in the face of that change.

There has been speculation as to whether the London booksellers, having such an established hold on the market, actually required a monopoly to be profitable. There is little evidence from the previous century that the stationer's had to sue at common law to protect themselves against copyright infringements. This leads some to suggest that the petition had other motivations -

> The real motive behind the first Copyright Act, therefore, seems to have been an attempt to *export* copyright control to a region of Great Britain where the Stationer's Company's writ did not run.[78]

This seems plausible given the above understanding of the stationer's "property" claim. "Literary Property" was seen as an exclusive right to all the wealth unleashed by reproductive technology.

Parliament was initially sympathetic to the bookseller's position and the first draft of the bill maintained copyright as an exclusive, perpetual economic right. However the Scottish printers mobilised support and picking up on an Enlightenment concern - the issue of access to useful books - challenged the utility of this legal development -

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[78] Prescott, as quoted in Saunders, supra n. 6 at 55.

> It is but too evident, that the *London* printers for many Years past, have acted like all who have the Benefit of a Monopoly, and who upon that account are under no Apprehension of Rivals: Witness the great Shoals of Books published in *London* in late Years; with regard to which, it is difficult to say whether the Price or the incorrectness is most to be complained of.[79]

Parliament was left with a dilemma. Debates show that they were sympathetic to the rich booksellers' expectations, they having been so long established. But they were also very reluctant to maintain such lucrative monopolies at the expense of the viability of the smaller and provincial publishers, who were effectively frozen out of all the lucrative markets if the London booksellers, exclusive, perpetual copyrights were to be maintained. Patterson argues that the linking of copyright with an author's right was originally devised by the English Parliament as a way out of this dilemma -

> The monopolies at which the state was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the stationers as a means to their end. Their arguments had been, essentially, that without order in the trade provided by copyright, publishers would not publish books, and therefore would not pay authors for their manuscripts. The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against the monopoly.[80]

Parliament did not recognise the stationers' monopoly as a perpetual property right. But the stationers could purchase a more limited "right" from the author.

This can be seen from the amendments were made to the original bill. "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned" noted the claims of authors, and the rights of printers as the rights of an assignee, but the mention of "property" from the earlier draft was dropped. It limited the monopoly right, still granted by the old practice of entering the copy in the Register of the Stationer's Company before

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[79] As reported in a "Memorial for the Booksellers of Edinburgh and Glasgow, relating to the Process against them by some of the London Booksellers; which depended before the Court of Session, and is now under Appeal" in Parks, supra n. 75 at A3 .

[80] Patterson, as quoted in Rose, supra n. 68 at 57.

publication, to a span of 14 years, with a further 14 if the author had survived. Existing assignments of copyright were to be terminated in 21 years.[81] The Statute added the further requirement that *nine* copies of each book be lodged with the Library of the Stationer's Company. Given the small print runs of some of the books this was a major expense borne by the printer in serving the common interest. These amendments to the Act support Patterson's thesis that respect for the author's property was not the main motivation behind the Act.

In any case the Statute of Anne meant little change in the way that the writer's work was valued by the publisher. Patterson comments -

> That the author was entitled by the statute to hold the copyright of his works did not really disturb the booksellers. They simply insisted on having the copyright before they would consent to publish a work. If the author refused, he ran the risk, if the bookseller accepted at all, of having promotion of his book ignored.[82]

From studies made of the practices of publishers in the eighteenth century it appears that most works were bought on a commission basis. It was usual practice for the publisher to contract a writer to produce a work of a specified length with payment based upon a per page fee. Copyright in the first and future editions was assigned as a matter of course.[83] There was no real accounting for the reproduction value of the copy in the transaction between author and publisher.

Given the history of the Statute of Anne and the practices of publishers and booksellers of the time, what is all the more interesting is the "exceptions" who, after this enactment were still able to bargain for different arrangements with their publishers, establishing a "right" to the reproductive value of their

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[81] As reprinted in "Speeches and Arguments of the Court of the King's Bench in the Cause of Millar v Taylor for printing Thomson's Seasons" in Parks supra n. 75 at Fv.

[82] Patterson, supra n. 2 at 152.

[83] See for example John Feather, "John Nouse and his Authors", 34 *Studies in Bibliography,* (1981) p205 and G.E. Bentley, "Copyright Documents in the George Robinson Archive: William Godwin and Others 1713-1820", 35 *Studies in Bibliography,* (1982) p67.

copy. The "freedom" to negotiate one's own terms, as Milton did, had been significantly impinged upon by the eighteenth century. By this time there had been numerous attempts to systematise and order English law, in line with "scientific principles", and though the law was far from "scientific", the neutrality of science was now widely aspired to.[84] There was not less diversity in opinion as to the nature and merit of literary property, however the shift in legal culture spelt less tolerance of diversity in the organisation of legal relations. Feather suggests that the successful, "professional" poets of the eighteenth century needed the Statute of Anne as a spring-board to assert the legitimacy of their claim.[85]

The property of the poets - Pope (1688-1744)

Pope assigned his copyright to a publisher for specific editions[86] and he enforced the reversionary rights granted to writers after 14 years by the Statute of 1709.[87] He was ever vigilant against piracy.[88] Why was Pope able to assert his claim to literary property?

The first factor to note is that Pope had an excellent knowledge of the printing industry. This no doubt helped him to insist upon his "rights". Feather suggests that Pope directly intervened in the printing trade and he may have even helped a few printers to establish their businesses. His works were extremely popular and of course, this too must have enhanced his bargaining position with printers.[89]

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[84] See Barbara Shapiro, "Law and Science in Seventeenth Century England" 21 *Stanford Law Review*, (1969) p727.

[85] As quoted in Saunders, supra n. 6 at 51.

[86] Feather, supra n. 5 at 169.

[87] Id, at 103.

[88] See David Hunter, "Pope v. Bickham: An infringement of *An Essay on Man* Alleged", Vol. 9 *The Library* Part 3 1987. p269.

[89] See Feather, supra n. 5 at 102.

However Pope did not appear to understand success as bearing upon his special circumstances. Rather he attributed it to his status as a gentleman and a scholar.[90] He ridiculed the unsuccessful writer, the Grub street hack, attributing his lowly social and economic status to the quality of his work, rather than to any deficiency in bargaining power.[91] A preface to a reprint of a volume of 1737, *Memoirs of the Society of Grub Street* captures the hostile attitude toward the lowly writer shared by Pope and his circle -

> And tho' some of those original Grubeans made themselves most remarkably infamous for want of integrity, by wilfully publishing what they knew to be false; yet many of them shewed as great a deficiency in parts and learning, by writing in a very low manner, adapted only to the taste of the vulgar.[92]

The reference here is not just to the fact that Grub street was taken as lodgings by paid political writers during the "seditious times of King Charles I",[93] but to the issue of the appropriate attitude for writers.

Pope's attitude to his craft was similar to Milton's. The author "was primarily a craftsman whose task is to utilise the tools of his craft for their culturally determined ends. In a familiar passage from his *Essay on Criticism* (1711) Pope states that the function of the poet is not to invent novelties but to express afresh truths hallowed by tradition -

> True wit is nature to advantage dressed;
> What oft was thought, but ne'er so well expressed;
> Something, whose truth convinced at sight we find,
> That gives us back the image of our mind. (297-300)[94]

However "True ease in writing comes from art, not chance" -

> Some beauties yet no precepts can declare,
> For there's a happiness as well as care.
> Music, resembles poetry, in each

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[90] See Mark Rose, "The Author in Court: *Pope v. Curll* (1741)", 10 *Cardozo Arts & Entertainment Law Journal,* (1992) p475 at 480.

[91] See also H. Ransom, "The Rewards of Authorship in the Eighteenth Century", (1938) *Studies in English,* No. 3826 at 47.

[92] Pat Rogers, *Grub Street: Studies in Subculture,* (London: Metheun & Co, 1972) at 353.

[93] Feather, supra n. 5 at 104 and Rogers Ibid.

[94] Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'", 17 *Eighteenth Century Studies,* (1984) at 428.

Are nameless graces which no methods teach,
And which a master-hand alone can reach.[95]

Abrams argues that in the eighteenth century "inspiration" took on quite a different character -

> The *je ne sais quoi* in a work of art, recognised only by the intuitions of sensibility, cannot be explained in terms of its causes, nor precisely defined, nor even named except by a phrase which is an expression of our ignorance. There is often the implication that these happy chances have a way of occurring only to poets capable of calculating well; but when they luckily occur, he knows not how; they licence him not only to transcend existing rules, but even to "offend", or break these rules in order to achieve a sublimer poetry than rules can comprehend.[96]

Inspiration is no longer seriously attributed to being a gift from God. And to the extent that the poet is inspired, the poem is more than a tool. The poet creates, "not by Art, but by Nature; yet by a Nature, which gave birth to the perfection of Art".[97] Beyond the shaping skill of mechanical talent lies a poet's innate "instinct". This view is clearly represented in Sir William Temple 1690 analogy of poetic genius and the "art" of bees -

> The Truth is, there is something in the Genius of Poetry too Libertine to be confined to so many Rules; and whoever goes about to subject it to such comparison loses both its Spirit and Grace, which are ever Native, and never learnt, even of the best Masters. . . [Poets] must work up their Cells with Admirable Art, extract their honey with infinite Labour, and sever it from the Wax with such Distinction and Choyce as belongs to none but themselves to perform or to judge.[98]

Pope ascribed to similar sentiments when he wrote about the author's originality in his preface to Shakespeare -

> If ever any author deserved the name of an Original, it was Shakespeare. Homer himself drew not his art so immediately from the fountains of Nature; it . . . came to him not without some tincture of the learning, or some cast of the models of those before him. The poetry of Shakespeare was inspiration indeed: he is not so much an Imitator, as an Instrument of Nature; and 'tis not so just to say he speaks from her, as that she speaks through him.[99]

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[95] Pope as quoted in M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition,* (New York: W.W. Norton & Co, 1953) at 194.

[96] Id., 195.

[97] Harris, as quoted in Abrams, supra n. 95 at 196.

[98] Id, at 197.

[99] Id, at 188.

There is more to this than merely replacing the mystery of God with the mystery of Nature. Even though Pope does not assert ownership over the meaning of the text, this view of inspiration potentially recasts the context of "property" in a work.

As Woodmansee notes above, Pope is primarily a craftsman who brings forth again hallowed truths. But his craft now also engages with the sublime. These sublime parts, where the poet breaks the rules, are attributed to Nature. However as an "unspeakable" quality, our only reference to it is through his name. For example, if one felt so inclined, one could not say what it was in Pope's poetry that is sublime, all that one could say would be, that the poem by Pope is sublime. The work does more than bring forth an eternal truth. The work also embodies an inscrutable dimension, happy accidents, we speak of as if they were "his".

This is not meant to imply that Pope thought his work was "his", bringing forth an identity separable from that of his time, far from it.[100] Pope and the other members of the Scriblerus club ridiculed the new empiricist philosophies that suggested that identity was based on consciousness, such as Locke's. Nevertheless, these eighteenth century ponderings on the working of the poetic mind recast the interpretative context of the work, and even as Pope criticised the modern philosophies, he and his circle absorbed these ideas.[101]

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[100] For this reason Coleridge compares him unfavourably with Milton. Milton he argues "is present in every line", whilst Pope *only* has the capacity for understanding and choice. See "Coleridge's Mechanical Fancy and Organic Imagination" in Abrams, Id, at 167-177.

[101] See Christopher Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth Century Britain,* (Berkeley: University of California Press, 1988) at 121-124, and G.B. Jackson, "From Essence to Accident: Locke and the Language of Poetry", in *John Locke: Critical Assessments,* edited by Richard Ashcraft, (London: Routledge, 1991) at 242-277.

Understanding this makes Rose's study of Pope's "image management" all the more interesting. Rose claims that Pope contrived a copyright scandal over the publication of his "private" letters, in order to "erect a monument to himself and the gifted writers he had known", and free himself of an accusation of vanity, by having another "blamed" for the publications.[102] Pope linked copyright with the author's name, not just so that he could be recompensed for the reproductive value of his copy, and not just to facilitate our access to higher truths. Pope also used copyright to make us acknowledge *his* extraordinary truth, without legal discrimination between the experience of his private discourses and of his works engineered for public display. Whilst it is true that the *Statute of Anne* was not for authors, it was used for the production of at least one author. His work purported to mirror the world around him, but his use of copyright placed his own image in the forefront of that reflection.

But Pope was only able to use copyright in this way because he was already known as a gentleman and a scholar whose work served the public good by bringing forth the stability of tradition and the wonder of Nature. Perhaps the inability of other writers to benefit from copyright can equally be attributed to this cause. The "lowly" writer created disposable works, works of the masses and works for the masses. They were a product of the time, and not a reproduction of the gentlemen of the time. Copyright only authorised the latter kind of project.

The significance of the Statute of Anne (1709)

The Statute of Anne opened up new opportunities for those whose practice had been historically privileged. It impacted upon civil society differentially,

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[102] See Mark Rose, supra n. 90. The quote here is from Pope's biographer Maynard Mack.

even though it did not favour a particular conception of literary property. But the diversity of opinion as to the merits and purpose of literary property continued to be debated and this should not be overlooked. However as other publishers and gentleman scholars joined the members of the Stationer's Company in utilising legal forums, the debate increasingly came to be addressed by, or in reaction to, their particular terms.

Chapter Three: Speculative reportings of literary property in the eighteenth and nineteenth centuries

Whilst most histories are happy to note that the Statute of Anne was the first English copyright enactment, one senses a discomfort with too much being made of that summary note. It doesn't seem right to associate copyright's legal heritage with a development that excluded any direct discussion of the interests of authors. For this reason it is the late eighteenth and nineteenth centuries that excite most copyright historians, for it is during this period that the author's legal right to literary property was formally articulated and judged.

This chapter is about the way the legal concept of literary property was reported and recorded in the eighteenth century. It looks at how Locke, as a political theorist and philosopher contributed to the definition of this kind of property, it looks at how the legal theorist and practitioner Blackstone, selectively reinterpreted Locke's definition, it looks at why the court responded positively to Blackstone's position in *Millar v. Taylor* (1769),[1] and the grounds upon which the Law Lords rejected it in *Donaldson v. Beckett* (1774).[2] Contrary to what is commonly assumed by the writers of copyright's history, the nature and status of literary property rights was not clarified by the courts in the eighteenth century. *Donaldson v. Beckett's* rejection of Blackstone's proposition that it was a Lockean right of labour that established the author's right to copyright only left this property negatively defined. There

[1] 4 Burr. 2303, 98 Eng. Rep. 201.
[2] 4 Burr. 2408, 98 Eng. Rep. 257.

was no judicial endorsement of any principles or other criteria that could be used to determine the boundary between that which the author owns in a work and that which nobody owns.

There were three main reasons why the author's literary property was so minimally defined. Firstly, whilst there was a lot of debate about the nature of the author's legal right in the eighteenth and nineteenth centuries and a lot was claimed in the author's name, authors were still largely absent in these debates. The battle for and against common law literary property was not fought out between authors and publishers. All the key litigation was between London and Scottish booksellers which meant that the status of the author's right came to be entangled with a broader economic debate about monopoly power and free trade. The judges could not but be aware of this other hotly contested agenda - if they found for a common law property of the author it would have immediate implications for the Scottish and other provincial printers who would have to respect the exclusive and most lucrative, perpetual copyrights distributed amongst the members of London Stationer's Company. This subtext made it difficult to focus on the purported issue of the case - the status of the author's literary property.

A second problem arose from using Locke's theory to advocate a property right in the copy of the text. On the one hand, there was a lack of legal precedent to support this "right" as part of the common law. And on the other hand, though his labour theory of value supported a claim for a natural right of the author, the empiricist views that he also advocated and popularised led to a reluctance to define the boundaries of the private property that belonged to the author of a work. Empiricist beliefs led to the doubting that one could discern an author's presence in a text with any scientific certainty. Accordingly it was easier to define the right in terms of what it was not, for instance, to

suggest that the work need not be judged as either original or edifying in order to be protected as copyright, than it was to engage in legal discussion about the apparent qualities of the property s/he created.

Thirdly, because of censorship provisions relating to the reporting of the conduct of the Law Lords the reasons for the decision in *Donaldson v. Beckett* were not made clear at the time of the decision. This fostered a climate that allowed the rejected argument - the claim of a right to literary property founded in an author's labour - to continue to circulate with perhaps more legitimacy than it was entitled to. The reason for its illegitimacy as a matter of law was not easy to grasp from the respected sources reporting the case. These reports popularised views of the Kings Bench in favour of a common law literary property, views that were rejected by the Law Lords.

In the eighteenth century the author became an important legal figure not because of any fundamental concerns about the nature of her/his right to the copy in the text, but for more pragmatic reasons, as an essential component in the production process. The argument could be made in the author's name, in the author's absence, because Renaissance artists and poets had already fostered the idea of a cultural producer's "special" relationship with their progeny, as discussed in the previous two chapters.

Renaissance sculptors, painters and poets had successfully advocated for an enhancement of their standing in society. A consequence of their efforts was the lodging of in the collective psyche, pride in, and respect for, a class of workers who hitherto had been considered as craftsmen. This new conception had proven useful in enhancing their economic relations, their social position and in enabling more autonomy over their practices. However there remained an indistinct connection between the universal celebration of "artists" and

"poets" and a particular producer's claim to belong amongst that esteemed group.

The booksellers could draw upon the general respect awarded to artists and gentleman scholars, enabling them to bolster the property claims of a hypothetical author, when in reality most authors had a relatively low level of social and economic recognition. It was an abstract appeal to the special nature of artistic production that bore little association with the social reality of the production of "art". Literary property was minimally defined because it was not for the author's own benefit but for the benefit of those whose profits were built by capitalising upon this kind of interest.

In the writing of copyright's history there has been a tendency to focus on this period in order to discuss the universal claims of authorial reward,[3] or the universal rejection of this position by the court.[4] However neither of these approaches do justice to the complexity of the literary property perspectives of the time. The arguments for and against an author's literary property comprised an amalgam of perspectives about art, literature, philosophy, law, politics and economics. But the reporting of the time has tended to stress literary property as a subject defined by one or other of the above discourses.

Locke's contribution to the literary property debate

A study of the origins of English literary property would be incomplete without a consideration of the contribution made by the private property

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[3] e.g. Put crudely Patterson's analysis is geared toward exposing how little the interests of authors still intruded on the debate, see Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vandebilt University Press, 1968).

[4] As noted in the introduction this is Rose's position. See Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship", 23 *Representations*, (1988), p51.

theorist John Locke. His views on private property rights were widely disseminated and influenced legal argument in the cases for a common law copyright in the late eighteenth century. His theories are still commonly referred to in discussions about the justification for intellectual property rights.[5] This makes it all the more surprising that neither Patterson,[6] Kaplan,[7] Parsons,[8] Bonham-Carter[9] nor Feather[10] discuss Locke.

Rose[11] and Saunders[12] do discuss Locke, but only briefly. The discussion is exclusively in relation to his work *Two Treatises on Government*. Both quote the same passage -

> Though the Earth, and all inferior Creatures be Common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.[13]

It is claimed that by virtue of Locke's argument all labouring authors (and their assignees) can now claim a natural private property right to the text.

But there is a problem in only focusing on Locke's views in this one text. Locke had published *Two Treatises on Government,* and his *Essay Concerning*

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5 See for example, Justin Hughes, "The Philosophy of Intellectual Property", 77 *The Georgetown Law Journal,* (1988) p287.

6 Supra n.3.

7 Benjamin Kaplan, *An Unhurried View of Copyright,* (New York: Columbia University Press, 1967).

8 Ian Parsons, "Copyright and Society", in *Essays in the history of publishing,* (ed) A. Briggs, (London: Longman, 1974) p29.

9 Victor Bonham-Carter, *Authors By Profession,* Volume One, (London: The Society of Authors, 1978).

10 John Feather, "The Publishers and the Pirates. British Copyright Law in Theory and Practice, 1710-1775", *Publishing History* 22 (1987) p5.

11 Supra n.4.

12 David Saunders, *Authorship and Copyright,* (London: Routledge & Kegan Paul, 1992), at 30f.

13 Ibid.

Human Understanding at almost the same time.[14] Whilst the first generated some interest, though initially little critical consideration,[15] Pope tells us in a note to *The Dunciad* that in 1703 "there was a meeting of the heads of Oxford to censure Mr Locke's *Essay on Human Understanding,* and to forbid the reading of it".[16] It is clear that contrary to what has often been claimed[17] not everything Locke said was immediately accepted.

Locke's attack on the "substantial self"

The radical concept in the *Essay* -

> is a plea for the intellectual freedom of the individual mind from whatever is found by experience to obstruct the light of truth; and it constantly recognises the fact that one chief obstruction is, man's habitual oversight that, as finite or individual, he is in a state of intellectual mediocrity. . . This oversight often leads men to proceed upon assumptions for which there is no reasonable warrant, and then to draw conclusions from them; and it leads them, too, to suppose that they have got ideas of things when they are only employing idealess or empty words.[18]

In the *Essay*, one assumption under constant scrutiny was that of the existence of a "substantial self", the central Christian belief that the person is a unified centre of choice and action, a unit of legal and theological responsibility.[19]

The "substantial self" reflected the idea that -

> the individual is made up of both mind and body, material and immaterial substance. The immaterial substance or soul is by no means the whole person in this construct, but it *is* that indivisible and immortal part of him which assures his personal continuity and ontological permanence.[20]

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[14] *Two Treatises on Government* was first published in 1689. *An Essay Concerning Human Understanding* was first published in 1690.

[15] Thompson notes that the first critical reply was not until 1703 and it was not until 1705 that any extended attempt was made to refute his arguments, see M. Thompson "The Reception of Locke's Two Treatises of Government, 1690-1705" in *John Locke: Critical Assessments,* edited by R. Ashcraft, (London: Routledge, 1991) at 100-109.

[16] C. Fox, *Locke and the Scriblerians: Identity and Consciousness in Early Eighteenth Century Britain,* (Berkeley: University of California Press, 1988) at 138.

[17] Fox notes several authorities that quite erroneously suggest that Locke "reigned virtually unchallenged in the early eighteenth century", see Fox, Id, at 8.

[18] A.C. Fraser, *Locke,* (1890; reprint ed., Port Washington, N.Y.: Kennikat Press, 1970) at 105.

[19] Amélie Rorty, as quoted in Fox, supra n.16 at 14.

[20] Fox, Id, at 15.

It is the immortal soul that invests the Christian individual with the dignity of a permanent, indestructible being, distinguishes one from every other and allows one to be held morally accountable for his or her actions.

Whereas Descarte had assumed that the self was "something" with ontological permanence, Locke fractured the notion of the substantial self by his claim -

> that *self* is not determined by Identity . . . of Substance . . but only by Identity of consciousness.[21]

Locke viewed our knowledge of substance as essentially limited -

> That there is "something" underlying qualities he does not doubt. But he does doubt our ability to perceive that "something" clearly and distinctly.[22]

Our knowledge is really limited to our self-interested capacity -

> *Self* is that conscious thinking thing (whatever Substance, made up of . . . it matters not) which is sensible, or conscious of Pleasure and Pain, capable of Happiness or Misery, and is concern'd for it *self,* as far as that consciousness extends.[23]

To Locke it was one's same self-consciousness that served as a unifying, identifying force. It bonded together diverse thoughts and actions concerning past, present and future.

So why was Locke's perspective of personal identity "almost unanimously condemned in pulpit and pamphlet"?[24] Because personal identity was considered a theological issue, Locke's theory threatened the traditional doctrine of the Trinity and the Resurrection. But beyond this, locating the sameness of self in consciousness presented a puzzle over the nature of one's soul. According to Joseph Butler's analysis of 1736, Locke's -

> hasty observations. . . when traced and examined to the bottom, amounts, I think, to this: *"That personality is not a permanent, but a transitory thing":* that it lives and dies, begins and ends continually: that no one can any more remain one and the same person for two moments together, than two successive moments can be one and the same moment: that our substance is continually changing; but whether this be so or not, is, it seems, nothing to the purpose; *since it is not substance, but consciousness*

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[21] Locke, *An Essay on Human Understanding,* as quoted in Fox, Id, at 12.

[22] Fox, Id, at 29.

[23] Locke, *An Essay on Human Understanding,* as quoted in Fox, Id, at 33.

[24] Maclean, as quoted in Fox, Id, at 8.

> *alone, which constitutes personality;* which consciousness, being successive, cannot be the same in any two moments, nor consequently the personality constituted by it.[25]

This kind of concern led many to inquire whether this meant that one's soul was divisible, or whether two men could then share the one soul, whether the one man could be different persons, or how the "same consciousness" survived when a man forgot or fell asleep. Locke's *Essay* was the source of great confusion and was the subject of much amusement, even though he had tried to account for some of these kinds of inquiries in the work.[26]

What has not been much discussed is where his emphasis on the experience of consciousness leaves the case for an author's property in the text. Whilst Locke was a strong supporter of an author's literary property, his justification is ultimately more an instrumental, than a fundamental one. He was not concerned with defining what it is that the author "owns" and justifying that as a "right".

The property of the text

Locke's theory of property as expounded in his *Two Treatises on Government* cannot be easily transposed to the case for literary property. One does not labour on ideas that exist in a literary common - Locke suggested that language does not attest to a common social heritage at all.

Locke argued that language began when Man, with a great variety of thoughts, "all within his own breast, invisible and hidden from others" tried to communicate his ideas to others -

> it was necessary that man should find out some external signs whereby those invisible ideas, which his thoughts were made up of, might be made known to others. For this

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[25] As quoted in Fox, Id, at 10.

[26] For instance he argued that two men could not have the same soul, because they only had consciousness of their own actions, and ultimately he argued that we would be judged by God on the state of our consciousness, and not on the state of our soul. For further examples see Fox, Id, at 29-37.

> purpose nothing was so fit, either for plenty or quickness, as those articulate sounds which with so much ease and variety he found himself able to make. Thus we may conceive how words, which were by nature so well adapted to that purpose, came to be made use of by men as the signs of their ideas . . . The use, then, of words is to be sensible marks of ideas, and the ideas they stand for are their proper and immediate signification.[27]

But as words are signs for invisible ideas that are already formed in the privacy of the mind, this raises the question as to how our nominal descriptions can be comprehended with any accuracy by other members of the linguistic community, all of whom have different consciousnesses based upon different experiences[28] -

> The names of Substances would be much more useful, and Propositions made in them much more certain, were the real Essences of Substances the *Ideas* of our Minds, which those words signified. [But the real Essences are beyond our perception.] And 'tis for want of those real Essences, that our Words convey so little Knowledge or Certainty in our Discourses about them.[29]

As Jackson explains -

> Under these circumstances, it would seem more accurate to describe a playing child as chasing "the rolling circle's speed" (choosing two primary qualities: shape and motion), as Gray does in his "Ode on a Distant Prospect at Eton College," than to name the inscrutable "hoop"- and more useful to specify "the rapid Greek", like Samuel Johnson in "The Vanity of Human Wishes," than to identify Alexander the Great.[30]

Locke did not reject poetry outright, as engaging in deception and illusion. However Abrams suggests that in his *Thoughts Concerning Education* he "does not disguise his contempt for the unprofitableness of a poetic career, either to the poet himself or (by implication) to others."[31] Locke thought that it was not productive to seek pleasure and delight (ornaments), when

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[27] Locke, *An Essay on Human Understanding*, as quoted in A. Rosen, "Reconsidering the Idea/Expression Dichotomy" 26 *U.B.C. Law Review*, (1992) p263 at 271.

[28] As Rosen puts it "In Locke's theory, each person creates his or her own language, with no way of knowing whether or to what extent it coincides with the language spoken by anyone else. This is a Babel of ideolects, not a community of persons speaking the same language." Id, at 272.

[29] Locke, *An Essay on Human Understanding*, as quoted in G. Jackson, "From Essence to Accident: Locke and the Language of Poetry in the Eighteenth Century" in Ashcraft, supra n.15 at 254.

[30] Ibid.

[31] M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition*, (New York: W.W. Norton & Co, 1953) at 300.

information and improvement could be pursued. As to the instructional value of poetry, Locke's theory of consciousness -

> deprives human knowledge of a stable rapport with any pre-established ontological pattern, as Shaftsbury understood when he wrote that Locke "threw all *Order* . . . out of the World" and made the very Idea of it "*unnatural*". In terms of poetic structure, such a view works against the authority of the symbolic category by denying its pretensions to reveal underlying connections. Stress is shifted to the mind's opportunism in choosing what it strikes under varying circumstances; accident is privileged over essence.[32]

Locke did not discriminate between kinds of works and kinds of knowledge - all works merely bring forth signs of phenomenal data -

> The mind in Locke's *Essay* is said to resemble a mirror which fixes the objects it reflects. Or (suggesting the *ut pictura poesis* of the aesthetics of that period) it is a *tabula rasa* on which sensations write or paint themselves. Or (employing the analogy of the *camera obscura,* in which the light, entering through a small aperture, throws an image of the external scene of the wall) external and internal sense are said to be "the windows by which light is let into this *dàrk room.*" . . . Alternatively, the mind is a "waxed tablet" into which sensations, like seals, impress themselves.[33]

Locke frequently uses sight as a favoured example and as a metaphor, but he does not mean for poetry to become a visual art, in the sense that his emphasis is not on pictures of whole objects, but on component ideas.[34] The mind is inertly receptive, and to the extent that it orders the sensations it receives it relies upon common sense. The author does not "clothe" the idea and deliver its essence into another's mind. The author cannot "clothe" it and so found an individual right to an expression, in his episteme. For this reason, attempts to use Locke's theory to justify an author's right with reference to an idea/expression dichotomy in a work, differentiating what it is that is held in common (the idea) and what it is that is private (the author's expression) mistakes his project.[35] The author is incapable of bringing forth any essential

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[32] Jackson, supra n.29 at 255.

[33] Abrams, supra n.31 at 57. Abrams goes on to note the similarities between Locke's expression and that of Plato and Aristotle. Plato compared sense-perception to reflecting images in a mirror, as well as to paintings, the writing of characters in the pages of a book, and the stamping of impressions into a wax plate. Aristotle suggested that the receptions of sense "must be conceived of as taking place in a way in which a piece of wax takes on the impress of a signet ring without the iron or gold".

[34] Jackson, supra n.29 at 255.

[35] This is discussed in Rosen, supra n.27 at 270-273.

meaning, s/he can only suggest to us a nominal essence. We, the reader, are incapable of discerning where her/his expression starts and ends.

Locke makes it incredibly difficult to specify what it is that the creator of a text "owns". For example, we can name "Locke" as the author, but we cannot clearly see how the man called Locke, as rational activity, is reproduced in the text. We know little of him. What we know is of the primary qualities he describes, such as bulk, shape and motion, that we too can perceive.

So what does the author have a right to?

In the debates concerning the renewal of the licensing laws in the 1690's Locke advocated for the inclusion of a clause which stipulated that anyone who printed an author's name on a publication without his permission should be liable to forfeit to the author all copies he had printed.[36] His interest in the question of attribution of authorship was not motivated by a concern that the author be acknowledged - that her/his name be made public. Rather he was interested in attribution as a question of privacy - one should have a right to control the exposure of what may be understood as her/his consciousness.[37]

Locke did not support a perpetual right of authors in a work. For example, he argued that when works were delivered to libraries, the King's Librarian and the Vice-Chancellors of the universities should issue certificates that gave the authors the sole right to reprint these books *for a set number of years* after the first publication.[38] The reason for limiting one's rights, and relating them

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[36] See Raymond Astbury," The Renewal of the Licensing Act of 1693 and its Lapse in 1695" in *Library,* (1978) 5th series, Vol 33 at 313.

[37] For his alarm at being attributed as the author of an anonymous work, see Letters No. 1268 & 1288 in *The Correspondence of John Locke,* Vol Four, edited by E.S. De Beer, (Oxford: Clarendon Press, 1979) at 38 & 65.

[38] Astbury, supra n.36 at 313.

to specific editions is clear from his own musings on the appropriateness of a second edition of the *Essay*. He wrote to his friend William Molyneux -

> But now that my notions are got into the world, and have in some measure bustled through the opposition and difficulty they were like to meet with from the receiv'd opinion, and that prepossession which might hinder them from being understood upon a short proposal; I ask you whether it would not be better now to pare off, in a second edition, a great part of that which cannot but appear superfluous to an intelligent and attentive reader. If you are of that mind, I shall beg you to mark to me those passages which you would think fittest to be left out. If there be any thing wherein you think me mistaken, I beg you to deal freely with me, that either I may clear it up for you, or reform it in the next edition. For I flatter myself that I am so sincere a lover of truth, that it is very indifferent to me, so I am possess'd of it, whether it be by my own, or any other's discovery.[39]

Publication was valued as an agent in the pursuit of truth.

For similar reasons he argued against the existence of copyright in the classical works because -

> This liberty to any one of printing them is certainly the way to have cheaper and better and tis this which in Holland has produced soe many fair and excellent editions of them. Whilst the printers all strive to out doe an other which has also brought great sums to the trade in Holland. Whilst our Company of Stationers haveing the monopoly here by this act and their patents slubber them over as they can cheapest, soe that there is not a book of them vended beyond seas both for their badness and dearnesse nor will Schollers beyond seas look upon a book of them now printed in London soe ill and false are they . . .[40]

He suggested that the protection of contemporary works should be limited to fifty or seventy years after the first printing of the book or the death of the author.[41]

It is always the pursuit of universal truth that Locke celebrates, and not the sanctity of private literary property. For this reason, Locke's property right for authors ends up as not too different to that of Milton's as expounded in the *Areopagatica,* a work with which he was familiar.[42] The writer had a right to the profit that accrued from the mass circulation of her/his work, but this

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[39] Supra n.37 at 523.

[40] "Documents relating to the termination of the Licensing Act, 1695" in *The Correspondence of John Locke,* edited by E.S. De Beer, (Oxford: Clarendon Press, 1979) Vol Five, at 786.

[41] Id, at 791.

[42] Astbury, supra n.36 at 307.

private interest is justified as serving the common interest - by facilitating the pursuit of truth. Or as Locke put it -

> For I count any parcel of this gold not the less to be valued, nor not the less enriching, because I wrought it not out of mine self. I think every one ought to contribute to the common stock.[43]

The author's property right is instrumental to the cause of enlightenment. And whatever fundamental claim s/he has to the expression of her/his consciousness, this is a matter we cannot identify with any exactness. Because of this shadowiness, the value of the work to the individual author has to be put to one side. The work comes to be valued by another measure that we can gauge - the value of the work in the marketplace.

Locke's challenge to the poets

By the eighteenth century copyright was a familiar notion, but it was a limited kind of right. It could only be meaningfully asserted by a certain kind of author, working in a specific social context. It was fundamentally the property of poets like Milton and Pope - for the virtuous few chosen to guide others in understanding eternal truths concerning the human condition. And it was also made available to printers and booksellers for the instrumental reason of guaranteeing the circulation of these socially edifying works.

Locke's attack on the substantial self undermined the property claims of the poets. His empiricist philosophy destabilised the claim to any essential representation of an identity in a work. Locke doubted that we could discern such a presence with any scientific certainty. Thus whilst Locke affirmed a natural right to the property that issued from one's labour, it was granted at the expense of the Renaissance author's immortality. Literary property was issued on the understanding that the work was not a testament to God or man

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[43] De Beer, supra n.37 at 523.

through whom eternal truths were made known. Whilst copyright was for all "works" of labouring authors it was not for works of "art".

The battle between the London and Scottish booksellers in the eighteenth century

Enlightenment concerns featured strongly in the Statute of Anne. This is clearly evident from its full title *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*[44] However rather than accepting a fifty or seventy year copyright term as Locke had suggested, Queen Anne limited copyright to a term of fourteen or twenty-eight years.

The statutory limitation on copyright directly undermined the London booksellers' established practice of assigning perpetual copyrights in texts, and recognising shares in texts. Accordingly the London booksellers soon attempted to read down the impact of the legislation by establishing an alternate prior right to literary property in the courts. They claimed that their guild practice of purchasing and assigning a perpetual right in texts was evidence of an immemorial custom and accordingly there was a copyright that was enforceable as part of the English common law, existing independently of the limited statutory rights created by the Crown and Parliament.

The booksellers championed themselves as the time honoured guardians of the author, whom, it was claimed, had always "owned" the text -

> Authors have ever had a property in their Works, *founded upon the same fundamental maxims by which Property was originally settled,* and hath since been maintained. The Invention of Printing did not destroy this Property of Authors, nor alter it in any Respect, but by rendering it more easy to be invaded.[45]

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[44] 8 Anne c 19, 1710.

[45] *The Case of Authors and Proprietors of Books*, as quoted in Rose, supra n.4 at 57. (my italics).

The Stationers adapted the Lockean discourse for real property to the literary property issue -

> Every man was entitled to the fruits of his labor, they argued, and therefore it was self-evident that authors had an absolute property in their own works. This property was transferred to the bookseller when the copyright was purchased and thereafter it continued perpetually just like any other property right.[46]

They funded test cases in an attempt to get judicial recognition of the author's "customary" private property.

Millar v. Kincaid was one such case brought in 1747. Millar, a London bookseller, sued Kincaid, a Scottish bookseller, for damages over the printing of a book in which Millar claimed to have purchased an exclusive right to the copy. The copy had never been registered with the Stationer's Company, thus it clearly dealt with the status of copyright independent of the guild regulation of the Company and the statutory recognition of those practices in previous printing laws. Did Millar have an exclusive right to print the text derived through the author's natural property right?

The Scottish printers contended that an author's right was ever a statutory creation, fashioned because -

> . . . a Book once published became every Man's Right or Property; which disabled Undertakers from giving any thing considerable for an original Performance, however valuable. This Commerce deserved to be put upon a better Footing for the Encouragement of Authors.[47]

The Court of Session accepted this argument. They -

> "F(ound) no Action lies upon the Statute, except for such books as have been entered in Stationers Hall, in Terms of the Statute : And find that no Action of Damages lies upon the Statute".[48]

The case was brought to the House of Lords. On appeal however, the action was dismissed because it was "improperly and inconsistently brought".[49] A

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[46] Rose, Ibid.

[47] "Speeches or Arguments of the Judges of the Court of the King's Bench. . . in the Cause Millar against Taylor", in *The Literary Property Debate: Seven Tracts, 1747-1773*, edited by Stephen Parks, (New York: Garland Publishing, 1974) at A1.

[48] Id, at A14.

[49] See "Preface" in Parks, supra n.47.

similar problem affected a further test case, *Tonson v Collins* (1760).[50] When it came before the Court of the King's Bench under Lord Mansfield he refused to proceed with it because the two parties were acting in collusion in order to test the law.[51] The artificial construction of concern for the rights of the author obstructed early attempts to test the legal status of her/his "customary" right.

Blackstone's role in the literary property cases

It was the English common law theorist William Blackstone who developed a plausible legal argument in favour of the author's common law right to literary property. Blackstone, who was familiar with Locke's justification for real property, saw that this argument might be accepted in relation to literary property if it could be demonstrated to have some "authentic" legal heritage. He argued that such a right could be shown to be supported by the principles of Roman law. Roman law had recognised a property right flowing from the first occupation of real property -

> There is still another species of property, which, being grounded on labor and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself, (a) is supposed by Mr Locke, and many others, (b) to be founded on the personal labor of the occupant . . . When a man, by the exertion of his rational powers, has produced an original work, he has clearly a right to dispose of that identical work, as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his property. Now the identity of a literary composition consists entirely in the sentiment and the language, the same conceptions, clothed in the same words, must necessarily be the same composition and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is conveyed; and no other man can have a right to convey, or transfer it, without his consent . . . [52]

Blackstone also referred to the records of Chancery as evidence of a British legal tradition of protection for the author's literary property.[53]

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50 98 ER. 201.

51 Rose, supra n.4 at 53.

52 William Blackstone, *Commentaries on the Laws of England,* Book 2, c26 Sect 8, (Oxford: Clarendon Press).

53 In *Donaldson v. Beckett* Lord Chief Justice De Grey said that Chancery injunctions "may be granted on a reasonable pretence, and a doubtful right, before the hearing of the cause; nor is it objection that the party for it has a remedy at law". See Howard Abrams, "The Historical

William Blackstone had appeared for the London bookseller Tonson, in the case dismissed by Lord Mansfield, *Tonson v Collins* (1760). He presented the argument for another London bookseller, Millar in *Millar v. Taylor* (1769).

The subject of dispute in this case was an extremely popular work, Thomson's *The Seasons*. Rose notes that it was a particularly apt piece to become the centre of such a dispute because -

> *The Seasons* is a descriptive and reflective poem in which a changing landscape of mountains, meadows, forests, rivers, plains, and valleys is portrayed and made the occasion for Thomson's moral and philosophical meditations. As Jacob More wrote in a critical study of the poem published three years after the Donaldson decision, Thomson's general purpose in the poem was to lead his readers to "a filial confidence in the Author of Nature".
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> . . . the process of Thomson's poetic creation, as More describes it, is strikingly similar to the process of the original creation of private property as Locke had described it: the individual removed materials out of the state of nature and mixed his labor with them, thereby joining them to something that was his own and producing an item of property. Likewise, according to More, Thomson's method was to go directly to nature for his materials and them to impose upon them his ideas, sentiments, and poetic forms, and the result was that familiar objects were cast in a new light.[54]

In *Tonson v. Collins* Blackstone had argued that -

> Style and sentiment are the essentials of a literary composition. These alone constitute its identity. The paper and print are merely accidents, which serve as vehicles to convey that style and sentiment to a distance. Every duplicate therefore of a work, whether ten or ten thousand, if it conveys the same style and sentiment, is the same identical work, which was produced by the author's invention and labour.[55]

He made a similar appeal in *Millar v. Taylor.*

Problems with Blackstone's analysis of Locke's theory of property

The problem with Blackstone's interpretation of Locke's theory of property was his insistence that the author "occupies" the text. He may have been led to suggest that the author "occupies" the text by his familiarity with the

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Foundation of American Copyright Law: Exploding the Myth of a Common Law Copyright" 29 *Wayne Law Review,* (1983) p1119 at 1143, and David Saunders, "Purposes or Principle? Early Copyright and the Court of Chancery", [1993] 12 E.I.P.R. p452.

[54] Rose, supra n.4 at 71.

[55] As quoted in Rose, Id, at 63.

Roman natural right to property flowing from occupation however, as noted above, Locke was not convinced that anything like an authorial essence embodying a work could be meaningfully conveyed. Further suggesting a virtue in the author's communication of "style and sentiment" conflicted with Locke's views about the unprofitableness of poetry. Style and sentiment obstructed the pursuit of empirical truths. To Locke it was hardly to be trusted as the basis of a right to private property, let alone as the foundation for an absolute right. Locke was convinced that an absolute right to literary property hindered enlightenment. He argued that it inflated the price of books and discouraged the production of revised editions, hence he supported statutory limitations to copyright.

Rather than levelling the poet to every other writer as Locke had intended, Blackstone's formulation reinstated her/his special status by an appeal to the unique creative forces at work in "art". Copyright was theoretically a right available to all labouring authors regardless of what kind of work they produce, but it was justified and defined in the name of a very specific style of writing - poetry, that as organically inspired creation does not necessarily involve mechanical labour at all. Rose argues that the utility of arguing for the author's organic labour was to suggest a fundamental difference between the common law right of literary property and the more limited "patents" in works granted by the state fashioned to reward mechanical labour.[56] But the consequence of adopting this "strategy" was to depart from the more radical cultural agenda Locke had formulated. Blackstone only appropriated those aspects of Locke's writings that were useful to the London bookseller's legal case. Alienating one's traditional social peers by doubting the ability to communicate a "substantial self" was not part of Blackstone's cause.

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[56] Rose, supra n.4 at 62f.

Millar v. Taylor (1769)

Millar v. Taylor came before the court of the King's Bench before Justices Willes and Aston, Lord Chief Justice Mansfield and Sir Joseph Yates.[57] The Scottish printer claimed that under the *Statute of Anne* copyright had expired and therefore the text was in the public domain.

Justice Willes was impressed by Blackstone's argument and found that the records of Chancery proved the existence of a common law right of the author. He claimed that the *Statute of Anne* assumed this as fact, the bookseller's petitions and first drafts of the bill evidencing this. He argued that the time limitations on copyright were not general provisions affecting pre-existing common law rights. Rather the Act was drafted to protect the position of the Universities who, because they were set up by Letters Patent, were never bound by the Stationer's Company, and they printed copies of old works for which they had not purchased the rights.[58] He claimed that the Act was an attempt to legitimate this practice by expiring the existing copyrights in twenty-one years from the date of the Act. Its ambit was limited to protecting the University's role in disseminating useful works. Therefore the Act did not apply in Taylor's case.

He suggested that Taylor was a stranger attempting to reap the benefit of another man's labour. A perpetual monopoly was essential to encourage the "painful researches of learned men".[59] It seemed to escape his attention that

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[57] This account of the judgement is based upon the recording of it in Parks, supra n.47 at F & G.

[58] For a discussion of conflict between the Stationer's Company and the two Universities see Michael Black, *Cambridge University Press 1584-1984,* (Cambridge: Cambridge University Press, 1984) at 82-83.

[59] As recorded by Burrows in "The Question concerning Literary Property. . . in the cause between Andrew Millar and Robert Taylor", in Parks, supra n.47 at G39.

all the actions for the author's rights were made by printers and Booksellers, not by the struggling author.[60]

Justice Aston's judgement was along the same lines as Willes'. His one distinguishing contribution was a revision of the idea of property. In response to the defendant's claim that in law property needed to be a tangible thing he said -

> The RULES attending Property must *keep Pace* with its Increase and Improvement, and must be *adapted to every case.*
> A DISTINGUISHABLE Existence in the Thing claimed as Property; an ACTUAL VALUE in that Thing *to the true owner;* are its *Essentials*; and not less evident in the present case, than in the immediate Object of those Definitions.
> And there is a material *Difference* in Favour of *this* Sort of Property, from that gained by *Occupancy*; which before was common, and *not* Yours; but this was to be rendered so by some Act of your Own. For, THIS is *originally the Author's*: And, therefore, *unless* clearly rendered common by his own Act and full Consent, It ought to *still to remain His.*[61]

Lord Mansfield agreed, but he took a more pragmatic view of the state of the law. He was not persuaded by Blackstone's claim that there was a customary author's right, arguing that there was no evidence of it existing before the introduction of printing in the reign of Edward 4th. However he then went on to find an alternate justification for the creation of a common law author's right on the ground that -

> it is *just* that an Author should reap the pecuniary Profits of his own Ingenuity and Labour. . .
> It is agreeable to the Principles of Right and Wrong, the Fitness of Things, Convenience and Policy, and therefore to the common law, to protect the copy *before* Publication.[62]

He then went on to find that the Statute of Anne did not expressly take away this "natural right" of the author, and used the records of Chancery as evidence of an additional security for an aggrieved proprietor.[63]

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[60] Kaplan, Patterson, Feather, Rose and Saunders all make this point.

[61] Supra n.59 at G45-46.

[62] Id, at G115.

[63] He said "The judicial opinions of those eminent lawyers and great men who granted or continued injunctions, in cases after publication, not within 8 Queen Anne; uncontradicted by any book, judgment or saying; must weigh in any question of law; much more, in a

The dissent of Sir Joseph Yates is worth noting here because it proved influential in the later case *Donaldson v. Beckett*. He argued that to succeed, Millar needed to prove that compositions of authors were property. He defined property with reference to established general principles of real property and found that -

> the dominion of a Proprietor can not extend beyond the *Duration* of the Property: No Man can have that Right beyond the just Bounds of his Property.[64]

That is, one can have property in a book, but s/he cannot have property rights beyond the actual pages between the covers, extending to rights to reproduce that book. The only reason for such an extension of the right would be to protect "mere value" but -

> The *Air*, the *Light*, the *Sun* are of Value inestimable: But *Who* can claim a *Property* in them?[65]

He rejected the possibility of acquiring property by labour alone because this claim presumes that the object is capable of sustaining a private right, simply by labouring upon it. He argued that real property could only be acquired by labour because in law *occupation* founded the claim to the land. However -

> The occupancy of a *Thought* would be a new kind of occupancy indeed. By *what outward Mark* must the Property *denote* Appropriation? . . . At what *Time*, and by what *Act* does the Author's *common law* property *attach*?[66]

He pointed out the absurdity of reckoning this at the time of publication because the effect of this would mean that if another person had the same ideas as an author, s/he could not presume to publish them - the ideas already being pre-occupied and private property. He rejected the presumption of justice in Blackstone's Lockean justification - preventing another reaping where they haven't sown - because it begs the very question in dispute. It

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question of mere theory and speculation as to what is agreeable or repugnant to natural principles. I look upon these injunctions, as equal to any final decree." Id, at G117.

[64] Id, at G64.

[65] Id, at G65.

[66] Id, at G66.

presumes that ideas are capable of being privately and exclusively owned. Any determination of injustice depended upon a determination of the extent and duration of the author's property. Thus Yates argued that this issue must logically precede any determination of the need for protection. If the author did have a natural right in the text, how is it that the author is reproduced in the text? The difficulty in explaining this satisfactorily pointed to there being no such "perpetual right" at all.[67]

The defendant initiated an Appeal to the House of Lords however "the booksellers prevented this appeal from going forwards by coming to term with him".[68] Rose argues that the booksellers were keen to prevent an appeal because the Lords, including peers, lawyers and laymen alike, were judged to be unsympathetic to their cause. Parliament was judged as against anything that looked like a monopoly in the book trade.[69]

Donaldson v. Beckett (1774)

Donaldson v. Beckett also concerned the publication rights in Thomson's *The Seasons.* Saunders notes that there was extensive press interest in the case in London and in Scotland. He suggests that "such interest is perhaps a sign that no one knew which argument would prevail".[70]

Because of the importance of the issue the King's Bench and the House of Lords sat together to hear arguments by counsel. This has led to some confusion in accounts of the case because of misunderstandings of the

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[67] Because of Yates' appreciation of these Enlightenment concerns it could be argued that his minority opinion was the one that more accurately reflected Locke's views than that of the majority, as is commonly assumed.

[68] Rose, supra n.4 at 87.

[69] Id, at 67.

[70] Supra n.12 at 66.

procedural significance of this joint sitting and because of the reporting of the judgements in the case. Abrams notes the significance of sitting together was that the opinions of the judges of the King's Bench, Common Pleas and Exchequer were *advisory only,* and were sought before the House of Lords proceeded to debate the case and to vote on the issue. However at this time it was a contempt punishable by imprisonment to publish any statements made by a member of Parliament in the course of parliamentary business, hence reporters of the day limited themselves to reporting the advisory and wholly non-binding opinions of the judges.[71] Unfortunately the opinions of the judges and the Lords were rather different, which made reconciling the judicial reasoning with the Lords' decision quite difficult. The views of the Law Lords were published, but only in anonymous pamphlets.[72] However from these we can identify why the author's common law right, as expounded in *Millar v. Taylor* and supported by a majority of the justices in *Donaldson v. Beckett,* was rejected by the Law Lords.

The majority of the judges had been very much influenced by Lord Mansfield's view that a finding of property was warranted by the principles of "natural justice and solid reason". As Justice Ashhurst claimed -

> Making an Author's intellectual Ideas common, means only to give the purchaser an Opportunity of using those Ideas, and profiting by them, while they instruct and entertain him; but I cannot conceive that the Vendor, for the Price of Five Shillings, sells the Purchaser a Right to multiply Copies, and so get Five Hundred Pounds.[73]

However the principle speaker for the Lords, Lord Camden rejected such a view because -

> I find nothing in the whole that favours of Law, except the term itself, Literary *Property*. They have borrowed one single word from the Common Law. . . Most certainly every Man who thinks, has a right to his thoughts, while they continue to be HIS; but here the question again returns; when does he part with them? When do they become

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71 See Abrams, supra n. 53 at 1156-1159.

72 See "The Cases of the Appellants and Respondents in the Cause of Literary Property. . ." and "The Pleadings of the Counsel before the House of Lords in the Great Cause concerning Literary Property. . .", in *The Literary Property Debate: Six Tracts 1764-1774.* Edited by Stephen Parks, (New York: Garland Publishing, 1975) at E & F.

73 Id, at E35.

> *public juris?* While they are in his brain no one indeed can purloin them; but what if he speaks, and lets them fly out in private or public discourse? Will he claim the breath, the air, the words in which his thoughts are cloathed? Where does this fanciful property begin, or end, or continue?[74]

He rejected the claim that the common law had ever recognised such a right, and then proceeded to discuss if it *should* recognize such a right, concluding that -

> Knowledge has no value or use for the solitary owner; to be enjoyed it must be communicated. . . . Glory is the reward of science, and those who deserve it, scorn all meaner views. . . It was not for gain, that Bacon, Newton, Milton, Locke instructed and delighted the world. . . .
> Some authors are as careless for profit as others are rapacious of it; and what a situation would the public be in with regard to literature if there were no means of compelling a second impression of a useful work. . . All our learning will be locked up in the hands of the Tonsons and Lintons of the age, who will set what price upon it their avarice chuses to demand, till the public becomes as much their slaves, as their own hackney compilers are.[75]

As with Locke, Camden rejected the case for a perpetual literary property, the needs of the public for access to knowledge superseding any private interest arising from the work. Similarly Lord Effington rose to "urge the liberty of the press, as the strongest argument against this kind of property."[76] The House of Lords voted twenty two to eleven to reverse the injunction against Donaldson.[77]

Confusion following the debate over common law literary property

Though the Law Lords discredited the case for a common law literary property the significance of this was not so clear. There was confusion surrounding the reasons for the decision and though -

> The London booksellers failed to secure perpetual copyright . . the arguments did develop the representation of the author as a proprietor, and this representation was very widely disseminated.[78]

Rose goes on to note that -

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[74] Id, at F32.
[75] Id, at F34.
[76] Id, at F39.
[77] Abrams, supra n.53 at 1164.
[78] Rose, supra n.4 at 69.

> . . . the Lords' decision did not touch the basic contention that the author had a property in the product of his (sic) labour. Neither the representation of the author as a proprietor, nor the representation of the literary work as an object of property was discredited.[79]

However this interpretation fails to recognise how enlightenment concerns cross over into the realm of property. The Lords accepted that the author may be entitled to be paid for the value of her/his labour, but not necessarily that the literary work was capable of being a defined object of private property.

Donaldson v. Beckett arrived at a negative definition of literary property. If property did not attach to his "style and sentiment" in the way Blackstone had suggested because as Lord Camden claimed, he "let (the words) fly out in private or public discourse", what did it relate to? There was no progress in distinguishing what it was in the text that the author owned or assigned to another, as separate from the paper and print. There was no endorsement of criteria by which the limits to reproductive property could be discerned.

Feather notes, in regard to the vagueness of the property defined by the Statute of Anne, that "such an omission was a direct consequence of the Act's origins in the inner circles of the London book trade, where men like Tonson and Baldwin knew exactly what rights and copies were, and had no need of a law to define them".[80] Perhaps a similar reason lies behind the definition of the author's property in eighteenth century case law. Philosophically it was a complex issue and in the context of what was really a power struggle between London and Scotland, there was little interest in speculating about the more personal details of the author's "right".

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[79] Ibid.

[80] As quoted in Saunders, supra n.12 at 54.

Where did this leave the author?

This would prove an obstacle to the "struggling" author. It placed her/him at a real disadvantage in the early nineteenth century when there was a rapid expansion of the trade and accordingly a jump in the real market value of the author's copy. There was no clear, legally endorsed moral position from which authors could stake a greater claim.

In a period of major economic expansion, particularly in the third and fourth decades, the nature of the book industry underwent fundamental change. As the distribution system for literature became more efficient, a growing and prosperous commercial leisure market was established. The novel, magazine and part books became increasingly important, providing regular income for publishers, booksellers and writers. The writer's audience became middle-class.[81] Small printing establishments were displaced by firms that though still family owned, were operated with large workforces of paid employees -

> Although the typical "publishing" firm was much smaller than the large printing businesses, the number of publishing booksellers increased, and the total output of the London trade rose quite dramatically during the century. Edition sizes, which had been restricted to 1,250 by the Stationer's Company in the early 17th century, and had rarely reached that level, now increased substantially. Although many eighteenth century editions were probably of 1,000 or 1,500 copies, editions of up to 10,000 were not unknown, and some popular books, especially schoolbooks, chapbooks and almanacs, were regularly reprinted in such numbers.[82]

Whilst one might expect this increase in the value of reproductive rights to be reflected in a stronger bargaining position for authors with their publishers, it appears that most authors were unable to achieve any greater share in the press's financial rewards. Throughout the late eighteenth and early nineteenth century it was still commonplace to sell one's copy to the publisher outright.

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[81] See John Feather, *A History of British Publishing* (London: Croom Helm, 1988) at Chapter 8 "The Expanding Trade" and Chapter 9 "Periodicals and Part Books".

[82] Feather, Id, at 94.

The value of the copy remained a scribal fee for the ordinary writer and even for those writers well established, the value was invariably based upon the reputation of the writer and the success of previous works, not this book's merit or potential sales.[83] The author's treatment in the marketplace was out of step with her/his purported social and economic status.

Though the bulk of publishing still comprised books that were "bread and butter works of proven vendibility, compendium of household or professional usefulness which are of comparatively little interest to posterity"[84] both Bentley and Feather's studies suggest that "original works", involving more than a representation of existing information, fared little different in treatment. Bentley provides the comparative prices paid by the publisher George Robinson 1713-1820 for commissioned translations (paid by the page), plays and novels. He notes that translations were bought for an average of £54.1.7, although this covered a range from £210 to £5.5; rights to plays were bought an average of £58.82, this figure drawn from within a much narrower range of dealings; whilst the outright purchase of rights to a novel paid a paltry average of £27.19, with earnings falling within an even narrower range.[85] Further it appears that Robinson paid novelists extremely well compared to other publishers -

> In her *Minerva Press* 1790-1820 (1939), 72-73, Dorothy Blakey assembles a good deal of evidence about what was paid for novels at this time. In April 1757 *The Critical Review* asserted that the Noble brothers "never paid to any author for his labour a sum equal to the wages of a journeyman tailor", and Lackington in his *Memoirs* (1791) said he had been told of booksellers "who frequently offer as low as half a guinea per volume for novels in manuscript; it is a shocking price to be sure, but it should be remembered that . . . many novels have been offered to booksellers, indeed, many have actually been published, that were not worth the expence of paper and printing, so that the copyright was dear at any price . . ."[86]

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[83] Robert Patten, *Charles Dickens and his Publishers,* (Oxford: Clarendon Press, 1978) at 22.

[84] G.E. Bentley, "Copyright Documents in the George Robinson Archive: William Godwin and Others 1713-1820" 35 *Studies in Bibliography,* (1982) p67 at 69.

[85] Id, at 74-75.

[86] Id, at 75

Bentley concludes that the real average price for a novel was only £5-20, and based upon this, Robinson was extremely generous. Feather's study only uncovered two unsolicited manuscripts purchased by Nouse. In both these cases the writer's terms were far less favourable than with commissioned works.[87] He further notes that "it was not unknown for poets to be paid by the line".[88]

The legal status of the author in the early nineteenth century

Given this context the question then arises - how could the legal acceptance that the author had some kind of property right be reconciled with such a low social and economic status? Surely if the "author" was so significant a social subject that it was presumed that s/he had some kind of literary property, s/he should have been able to capitalise upon that in dealings with publishers in the early nineteenth century. Why wasn't the invisibility of the author, the artificiality of the case made on "her/his" behalf by the booksellers a problem?

If, as is clearly the case, the legal status of the author did not mirror actual social relations, the authority of the legal position must rest elsewhere. Blackstone had argued that literary property belonged to an inspired creator - the poet - an idealised "worker" who since the Middle Ages had been acclaimed as "different" to other men. His difference was measured by his immortality. Whether Blackstone's drawing upon this earlier cultural heritage reflected the attitudes of his time, or by virtue of the publicity surrounding the case he helped popularise this notion, it seems that the representation of the

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[87] John Feather, "John Nouse and his Authors" 34 *Studies in Bibliography,* (1981) at 211.
[88] Id, at 217.

author as proprietor ended up encapsulating both this and the "Lockean" view of reproductive property. Blackstone merged the two strands of thought.

The consequence of this was a change in circumstance for the few who had been recognised as "true poets". Even in Milton's time eminent writers could bargain for better than the average reward for their copies with publishers. With the upturn in the volume of trade they could now expect more for particular popular editions. However for works that lacked immediate public rapport, it was now clear that the time for capitalising on such works was strictly, statutorily limited. Though their work may suggest an authorial immortality, though the copyright may be justified because of this paternal connection, as a matter of law their reproductive property was necessarily circumscribed. After a set term of years the progeny would cease to refer to him.

Chapter Four: The case for romantic authorship

> Though freedom from the relations of patronage had meant -
> There was an advance, for the fortunate ones, in independence and social status - the writer became a fully fledged "professional man". . . the change also meant the institution of the market as the type of a writer's actual relations with society. Under patronage, the writer had at least a direct relationship with an immediate circle of readers, from whom, whether prudentially or willingly, as mark or as matter of respect, he was accustomed to accept and at times to act on criticism. It is possible to argue that this system gave the writer a more relevant freedom to that which he succeeded.
> . . . against the independence and the raised social status which success on the market commanded had to be set similar liabilities to caprice and similar obligations to please, but now, not liabilities to individuals personally known, but to the workings of an institution which seemed largely impersonal.[1]

By the early nineteenth century it was accepted that authors had a property right in their texts, but the only firm measure suggested by the courts for the value of this property had been its value in the marketplace. However few authors seemed able to bargain for a market return for their copy, and even those who did expressed dismay at such a seemingly "arbitrary" valuation of their work.

This chapter considers the case for romantic authorship, beginning with a comparison of the romantic notion of property with the property of the Renaissance artist. It is argued that whilst there are some distinct similarities, there are also key differences that flow from the romantic right being forged in reaction to capitalist relations of production. The stress on organic, imaginative creation can be seen as a form of opposition to the mechanical, commodity-oriented production in the marketplace. As a consequence of this emphasis the significance and essence of a work comes to be exclusively determined with reference to its genesis within the author, and without

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[1] Raymond Williams, *Culture and Society 1780-1950,* (Middlesex: Penguin Books, 1971) at 51.

reference to its location, function or circulation in the social world. Although the romantics shared the Renaissance concern to elevate "art" above everyday life, romanticism leads to a much more privatised, exclusive assertion of ownership in the work than had been posited previously.

It is argued that if patriarchy is understood as the rule of the father, a centralised authority that defines all others with reference to himself, the relationship between the modern artist and the artwork is an exemplary patriarchal creation. The modern artist purports to (re)produce by himself, the legitimate artistic birth being segregated from and elevated above illegitimate creations, which includes both father-less commodities and the products of women's labour. Romanticism appeals to a rigid separation between the "public" space of art and the "private" realms of industry and the home.[2]

The romantic position deflects questions about how the property right serves commodity production, by redefining the property issue as an exclusive concern for the sanctity of authorial creation. Copyright is justified in the name of protecting an unique, original work. Copyright distinguishes these special, cultural works from ordinary commodities and "domestic" works lacking an assertion of ingenious activity by a male progenitor. But nevertheless copyright can be exploited so that unique, original works can be mass reproduced and circulate as commercial products. That the author's work can be multiplied and sold without endangering its claim to be an original work of art is one of the paradoxes of this romantic right. It is a feature that would later prove important, but not necessarily to the benefit of the romantic author. The argument that copyright was the legal means to protect the author's "private" right was drawn upon by the courts throughout

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[2] For a more detailed feminist analysis of copyright see Shelley Wright, "A Feminist Exploration of the Legal Protection of Art", (1994) 7 *Canadian Journal of Women and the Law*, forthcoming.

the nineteenth and twentieth century to limit inquiries into the social consequences of the protection of a copyright monopoly.[3]

The property of the Renaissance artist and the property of the romantic author

In the Renaissance, works of genius were visionary works. A vision was produced by a solitary human creator (even though God or Nature may have so inspired him). Technical mastery of the craft was also essential so that the genius could execute his work in a way that it inspired others. But technical proficiency alone would not give rise to any lasting ownership in a work, deserving an attribution of it as his progeny. By point of comparison, all the artisan had was a technical competency, a practical rather than intellectual skill and for this reason the artisan had no enduring relationship with what s/he produced.

Works of genius were created for the instruction and delight of the masses, and even though the poet himself might be wary of claiming the high moral ground, he would still purport to diagnose the moral and social condition of the times. In this sense Renaissance genius represented a unifying cultural force, engendering a common identity or sense of purpose in the community.

The romantic poets were attracted to the Renaissance poets, claiming Milton in particular, as a worthy forebear. Milton was especially well known, his triple function as politician, scholar and poet having led to innumerable works about him, both commentaries and biographies. Further his writing style, so full of personal utterances, lent itself to biographical interpretation.[4]

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[3] This is discussed in Chapter Six.

[4] M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition,* (New York: W.W. Norton & Co, 1953) at 250.

Wordsworth had no doubts about Milton's authority and public importance, as one of his sonnets indicated -

> Milton! thou shouldst be living at this hour:
> England hath need of thee: she is a fen
> Of stagnant waters: altar, sword and pen,
> Fireside, the heroic wealth of hall and bower,
> Have forfeited their ancient English dower
> Of inward happiness. We are selfish men;
> Oh! raise us up, return to us again;
> And give us manners, virtue, freedom, power.
> Thy soul was like a Star, and dwelt apart;
> Thou hadst a voice whose sound was like the sea:
> Pure as the naked heavens, majestic, free,
> So didst thou travel on life's common way,
> In cheerful godliness; and yet thy heart
> The lowliest duties on herself did lay.[5]

But what qualities was it that the Romantics recognised in the Renaissance writers?

It is clear that the romantics admired the "moral leadership" of the Renaissance poets, however the romantics transformed the significance of this role. Coleridge admired Milton, "himself is in every line of *Paradise Lost*".[6] But whilst Milton might have agreed that he was present in the work, he would have distanced himself from any excessive identification of the work with his personal life, for example, Coleridge's explanation of his description of the Garden of Eden with reference to Milton's personal sympathies and wants aroused by an "apparently unhappy choice in marriage".[7] The romantics transformed the nature and function of poetry into something intensely more private and personal than before. Whilst works were still seen to address the general condition of humanity they were more often discussed as reflections of the individual and his concerns and nature. In the nineteenth century it was

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[5] As quoted in C.W.R.D. Moseley, *The Poetic Birth. Milton's Poems of 1645,* (Aldershot: Scolar Press, 1991) at 5.

[6] Abrams, supra n.4. Abrams goes on to note the dearth of romantic literature devoted to explaining Milton's identification with the Devil in *Paradise Lost.*

[7] Abrams notes that Coleridge felt burdened with a similar marital problem. Id, at 253.

the novel rather than the poem that served a diagnostic, public, moral function.[8]

The romantics returned to the organic as the model of artistic production, a model that had been abandoned for the machine view of progress in the early Renaissance[9] -

> By the end of the eighteenth century, under the influence of, most notably Rousseau, the metaphor of organic growth had replaced more mechanical, rational images of the processes governing art: ignorant of, or indifferent to, rules and reasons, the artist creates by blind necessity, like Nature itself. Such a view was given added intellectual authority by Kant; against the then prevailing Enlightenment view (derived from Locke) that true knowledge is only gained empirically, via the senses, Kant asserted that knowledge is essentially innate - arising from within the individual, rather than derived from without; for Kant, *Genius* is the name given to the "innate, productive capacity", a gift of nature, which produces art "from within". In a well known statement of 1800, Wordsworth writes : "all good poetry is the spontaneous overflow of powerful feelings".[10]

The romantics adopted a distinction between organic and mechanical production -

> An Original may be said to be of a *vegetable* nature; it rises spontaneously from the vital root of genius; it *grows*, it is not *made*; Imitations are often a sort of *manufacture*, wrought up by those *mechanics, art* and *labour*, out of pre-existent materials not their own . . .
>
> . . . Modern writers have a *choice* to make . . . they may soar in the regions of *liberty*, or move in the soft fetters of easy *imitation*.[11]

Even though Pope himself had also ascribed to the idea of Nature as the inspirational force that guided his work,[12] the romantics distanced themselves from his example. Pope's preoccupation with bringing forth well worn themes marked him as an imitator, rather than as a truly inspired genius. However romantic poetry was not *just* the spontaneous outpouring of feeling. Rather

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[8] Moseley, supra n.5 at 6.

[9] c.f. Chapter One at footnote 32.

[10] Victor Burgin, *The End of Art Theory*, (London: Macmillan, 1986) at 150.

[11] Edward Young, *Conjectures on Original Composition*, (1759) as cited in Williams, supra n.1 at 54. Abrams notes the similarity between this and Coleridge's formulation, supra n.4 at 199.

[12] See Chapter 2 at 73.

feeling was to be re-created imaginatively, reflected upon and qualified by the constraints and pleasure of poetic form -[13]

> While the poet's feelings animate the poetic utterance, "the music of harmonious metrical language" helps create a distinctively poetic feeling of delight that tempers the powerful emotions associated with expressions of the deeper passions. Wordsworth thus says that the end of poetry is "to produce excitement in co-existence with an overbalance of pleasure"[14].

The poem was not designed to meet with conventional tastes, but was to be judged by its sincerity in reflecting "the actual state of mind of the poet while composing".[15]

This placed the poet in conflict with the traditional expectations that marked literary production under a system of patronage. By the nineteenth century patronage as a source of income was on the decline. However it was still significant enough for the poet William Blake to complain -

> The Enquiry in England is not whether a Man has Talents & Genius, But whether he is Passive & Polite & a Virtuous Ass & obedient to Noblemen's Opinions in Art & Science. If he is, he is a Good Man. If not, he must be Starved.[16]

The marketplace was not seen as much of an "alternative". To the extent that the romantic poet created a truly original work, the work would have limited prospect for immediate market success. This is reflected in Coleridge's lament that -

> the most prudent mode is to sell the copy-right, at least of one or more editions, for the most that the trade will offer. By few only can a large remuneration be expected; but fifty pounds and ease of mind are of more real advantage to a literary man than the chance of five hundred with the certainty of insult and degrading anxieties.[17]

A similar sentiment is captured in Wordsworth's complaint -

> Away then with the senseless iteration of the word *popular* applied to new works in poetry, as if there were no test of excellence in this first of the fine arts but that all men should run after its productions, as if urged by an appetite, or constrained by a spell.[18]

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[13] Dugald Williamson, *Authorship and Criticism,* (Sydney: Local Consumption Publications, University of Sydney, 1989) at 5.

[14] Ibid.

[15] Abrams as quoted in Williamson, Id, at 7.

[16] W. Blake, Annotations to Reynold's *Discourses*, as cited in M. Foss, *The Age of Patronage,* (London: Hamilton, 1971) at 110.

[17] As cited in Richard Patten, *Charles Dickens and his Publishers,* (Oxford: Clarenden Press, 1978) at 22.

[18] As quoted in Williams, supra n.1, at 51.

Another writer of the time complained -

> It has of late become so much the fashion . . . to view every thing through commercial medium, and calculate the claims of utility by the scale of *The Wealth of Nations,* that it is to be feared, the Muses and Graces will shortly be put down as unproductive labourers, and the price current of the day considered as the only criterion of merit.[19]

The romantic author shared the Renaissance ideal of an "Art" that united by transcending daily mundanity, whimsy and antagonisms. However s/he was also moved by fear of the social fragmentation and alienation inherent in the adoption of a rational, atomistic perspective of the world. Accordingly artistic vision was explained as a form of "natural" opposition to the "mechanical" world. And unlike the Renaissance genius who created alone but was trained and inspired by city life, s/he identified with country, and produced "innately". The appeal of the romantic position was that in locating the work in the natural self, meaning could be kept safe from "worldly" contamination.

By the late eighteenth century the classical association of art with history and tradition had lost its appeal. In the first place "authentic art" had come to include "traditions" and "virtues" that in previous times would have been considered irrelevant to public life and the ethical ideals of the aristocracy. The soft and hitherto private virtues of amiability, kindness and compassion were elevated to the dignity of public virtues.[20] In 1786 one writer observed that "by far the greater share of glory attends upon what are called great actions"- which are in fact "glorious to the individual alone". . .[21] Secondly, and particularly in association with historical painting, images of the present had come to be presented *in terms of* the classical past -

> This relationship was expressed not only superficially, in details of costume and physiognomy, but also structurally, through a radical condensation of narrative into a single, emblematic instant - significantly, Barthes calls it a hieroglyph - in which the

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[19] Martin Archer Shee as cited in John Barrell, *The Political Theory of Painting from Reynolds to Hazlitt,* (New Haven: Yale University Press, 1986) at 50.

[20] For a discussion of this see Barrell, Id, at 54f.

[21] *The Microcosm,* No 4 (27 November 1786) as quoted in Barrell, Id, at 55.

past, present, and future, that is, the *historical* meaning, of the depicted action might be read.[22]

Events were being lifted out of time and place -

> Thus to Robespierre ancient Rome was a past charged with the time of the now which he blasted out of the continuum of history. The French Revolution viewed itself as Rome reincarnate. It evoked ancient Rome the way fashion evokes costumes of the past. Fashion has a flair for the topical, no matter where it stirs in the thickets of long ago; it is a tiger's leap into the past.[23]

The romantics broke with the notion of a cultural unity represented by an appeal to tradition and popular iconography.

As a "public" reading of the work was to be distrusted, the virtue of art came to rest in its ideological purity, or as Coleridge put it, in its symbolic rather than its allegorical meaning. Coleridge suggested that -

> The Symbolical cannot, perhaps be better defined in distinction from the Allegorical, than that it is always itself a part of that, of the whole of which it is the representative.[24]
>
> . . . the latter (allegory) cannot be other than spoken consciously; whereas in the former (symbolism) it is very possible that the general truth represented may be working unconsciously in the writer's own mind during the construction of the symbol.[25]

The shift to symbolic meaning entailed the interpretation of the work in isolation from society and the fragmentation of meaning therein. The art work no longer had to be decoded.[26] The art work embodied a pure essence. It embodied -

> the ideal of a formally unified, centred, *concentrated* composition whose meaning could be communicated at a glance.[27]

In Coleridge's terms a "public" reading of a work was actually redundant. If "the symbol is precisely that part of the whole to which it may be reduced . .

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[22] Craig Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism" in Craig Owens *Beyond Recognition. Representation, Power and Culture,* edited by S. Bryson, B. Kruger, L. Tillman and J. Weinstock (Berkeley: University of California Press, 1992) at 58.

[23] Walter Benjamin, as quoted in Owens, Id, at 59.

[24] Coleridge as quoted in Owens, Id, at 62.

[25] Id, at 63.

[26] Burgin notes that such was the complexity and obscurity of allegorism by the Rococo period that it was often felt necessary to produce extensive explanatory pamphlets along with the paintings. Burgin, supra n.10 at 115.

[27] Ibid.

(t)he symbol does not represent essence, it *is* essence".[28] A "public" reading that seeks to find instances of a universal truth in a particular work is not required. The judgement would be nonsensical. In grasping the particular, the universal is implicitly understood along with it.[29] Further if the symbolic is constructed intuitively such "rational" deliberation would simply risk the truth of the work. As Frederic Jameson notes -

> Modernism's formulation of the problem of representation . . . [was] borrowed from a religious terminology which defines representation as "figuration", a dialectic of letter and the spirit, a "picture language" (Vorstellung) that embodies, expresses and transmits otherwise inexpressible truths.[30]

The rejection of allegory involved the advocacy of a mode of representation derived from within its own pure space, and a mode of understanding radically distinct from verbalisation.[31] The attraction of the "self as origin" of the meaning of art made sense because it housed the potential for continual acts of regeneration -

> The self as origin is safe from contamination by tradition because it possesses a kind of original naiveté.[32]

However although romanticism suggested a creative personality in isolation from society, the reality was that it proposed a hierarchy within society, one group, that Modernism later branded as the "avant garde", of artists and their critics, and the other, the mass of producers and consumers. The avant garde continued the tradition of constituting a public space for "art". They presented a "superior consciousness" that "ke(pt) culture *moving* in the midst of ideological confusion and violence" through the pursuit of original, authentic

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[28] Owens, supra n.19, at 62.

[29] Id, at 68, n. 30.

[30] As quoted in Craig Owens, "Representation, Appropriation, and Power", in Owens, supra n.19 at 110.

[31] Victor Burgin, "The Absence of Presence", in C. Harrison & P. Wood, *Art in Theory 1900-1990,* (Oxford: Blackwell, 1992) at 1098. It is interesting to consider how such a view can be accommodated in a legal domain, historically a space for verbalisation. This point is considered further in Chapter Six.

[32] Rosalind Krauss, *The Originality of the Avant Garde and Other Modernist Myths,* (Massachusetts: MIT Press, 1986) at 157.

or non-derivative works.[33] And this community existed in contradistinction to the mass who spent their leisure time in consumption. Mass market products were seen to have a parasitic relationship with "genuine culture" - feeding off and appropriating it, transforming the "original work" into "kitsch".[34]

This rationale is reflected in Wordsworth's need to create "tastes" -

> . . . "if there be one conclusion" that is "forcibly pressed upon us" by their disappointing reception, it is "that every Author, as far as he is great and at the same time *original,* has had the task of *creating* the taste by which he is to be enjoyed."[35]

It is also apparent in his appeal to a distinction between the "public" and the "people" -

> Towards the Public, the Writer hopes that he feels as much deference as it is entitled to; but to the People, philosophically characterized, and to the embodied spirit of their knowledge . . . his devout respect, his reverence is due.[36]

The distinction here relates to a distinction between society as a collective of disparate individuals, and society as a collective in the true sense, as people sharing a common humanity. To the romantics, genius incorporated not only authorial self-validation, but a wider affirmation of shared human values -

> a conclusion about personal feeling became a conclusion about society and an observation of natural beauty carried a necessary moral reference to the whole and unified life of man.[37]

Though poetry generally focused on the subjective experience of the individual, this did not mean that the individual was naturally isolated from others. The romantic poet appealed to an essential harmony between the man and nature, individual and society, a harmony that had been sabotaged by industrialisation.

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[33] Clement Greenberg, "Avant-Garde and Kitsch", in Harrison & Wood, supra n.28 at 531.
[34] Id, at 534.
[35] Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'", 17 *Eighteenth Century Studies,* 1984 at 429.
[36] Ibid.
[37] Williams, supra n.1 at 48.

Paternity of the art work and (re) production

Parker and Pollock argue that at the same time that women in the nineteenth century were increasingly locked into a place in the family, with femininity to be realised exclusively in child-bearing and child-raising, the title of "artist" became increasingly associated with everything that was anti-domestic: outsiderness, anti-social behaviour, isolation from other men, disorder and the sublime forces of untamed nature -

> As femininity was to be lived out in the fulfilment of socially ordained domestic and reproductive roles, a profound contradiction was established between the identities of artist and of woman.[38]

The key to understanding this sex-based dichotomy rests with a distinction between familial reproduction in the home and the unnatural reproduction process undertaken by the "solitary" artist.

Although he established alternate traditions for art and a new kind of public able to access it, the artist purported to be a solitary man. The work was reputed to posit a self-evident truth, even if a secure understanding relied upon "the monograph - a study of the artist's life and work, and the catalogue - the collection of the complete oeuvre of the artist whose coherence as an individual creator is produced by assembly of all his work in an expressive totality."[39] -

> Art (was) therefore neither public, social nor a product of work. Art and artist become reflexive, mystically bound into an unbreakable circuit which produces the artist as the subject of the art work and the art work as the means of contemplative access to that subject's "transcendent" and "creative subjectivity".[40]

In this sense the artist purported to reproduce by himself, his offspring, the artwork, deriving meaning only in relation to him, for what it signified of him.

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[38] Rosalind Parker & Griselda Pollock, "God's Little Artist", from their book *Old Mistresses. Women, Art and Ideology,* (London: Routledge & Kegan Paul, 1981) at 99.

[39] Griselda Pollock, "Artists, Mythologies, and Media - Genius, Madness, and Art History", (1980) 21 *Screen,* No 3 at 59.

[40] Id, at 58.

His "raw" material, the world in which he lived, denoted lack, incompleteness, indifference.[41]

This characterisation was of a different order to that in the Renaissance where paternalistic alliances of responsibilities and dependencies at least in some practical ways protected women. As the social order based upon patronage gave way women were increasingly called upon to preserve the remnants of the old society within the private sphere of the home -

> In doing this, however, early nineteenth century women epitomized within their own "virtues" one of the fundamental contradictions of bourgeois ideology. For both their idealized helplessness and the domestic life they kept separate from the marketplace were increasingly at odds with the competitive spirit that was rapidly transforming every other sector of English society.[42]

The female was excluded for the creation of industry and of culture.[43]

This "natural" exclusion drew upon established patriarchal traditions -

> Our culture is steeped in such myths of male primacy in theological, artistic and scientific creativity. Christianity, as feminist theologians have shown us, is based on the power of God the Father, who creates the natural world of generation out of nothing. Literary men, like Coleridge, Shelley, Keats and Ruskin describe the author as priest, prophet, warrior, legislator or emperor, reinforcing the idea most lucidly articulated by Gerard Manley Hopkins that "the male quality is the creative gift".[44]

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[41] *Indifferent:*

a) Within the masculine order, the woman is indifferent in the sense of non-different or undifferentiated because she has no right to her own sexual difference but must accept masculine definitions and appropriations of it.

b) As a consequence, she is indifferent in the sense of detached and remote because of the imposture of her position.

c) From a feminine perspective, however, she might experience difference differently, in relation to her resemblance to another woman rather than to a masculine standard.

"Publisher's Note on Selected Terms" in Luce Irigaray *This Sex Which Is Not One,* translated by C. Porter, (Ithaca, N. Y.: Cornell University Press, 1985) at 220.

[42] Mary Poovey, *The Proper Lady and the Women Writer,* (Chicago: University of Chicago Press, 1984) at xv.

[43] For a study of how women artists negotiated the obstacles this involved see Deborah Cherry, *Painting Women: Victorian Women Artists,* (London: Routledge, 1993).

[44] Susan Gubar, "*The Blank Page* and the Issues of Female Creativity", in *Writing and Sexual Difference,* (ed) Elizabeth Abel, (Chicago: University of Chicago Press, 1982) at 74.

However the romantic emphasis on the innate quality of artistic expression led to a shift in the significance of the work. Rather than the creation bringing forth a ready-made world of established truths and traditions -

> . . . the creator is male, the creation itself is the female.[45]

This idea is clearly evident in Henry James's *Portrait of a Lady* where the "ideal jeune fille is described as 'a sheet of blank paper'. So 'fair and smooth a page would be covered with an edifying text', we are told, whereas the experienced women who is 'written over in a variety of hands' has a 'number of unmistakable blots' upon her surface".[46] Romanticism constructed artistic creation in the image of a virgin birth.

Huet argues that such a creative force owes more to the tradition of unnatural births than it connects with the notion of natural reproduction. She explains this with reference to the Romantic fascination with portraiture. She argues that through this form -

> the work of art breaks the laws of nature . . . . The genesis of art excludes the maternal in favour of a male fecundity, whose progeny, the portrait, discloses both art and the hidden monstrosity behind art: its unnatural birth.[47]

Familial procreation is superseded by the father's quasi-physiological interiorisation -

> . . . inasmuch as the painter both mirrors his models and internalises them, he never paints anything but himself, that which is already inside him, his specular soul. The art of painting . . . is a process of pregnancy and delivery . . . (and) though it can be described in terms of progeny, (it) nevertheless remains entirely separated from any form of natural conception.[48]
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> . . . between the model and the painter on the one hand, and between the painter and his canvas on the other, art (techné) imposes a form of opacity that makes it impossible to know or experience nature (physis).[49]

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[45] Ibid.

[46] Id, at 75.

[47] Marie Helene Huet, "The Artist's Studio", from her book *Monstrous Imagination,* (London: Harvard University Press, 1993) at 163.

[48] Id, at 165.

[49] Ibid.

His "progeny" remain marked by their unnatural origins. They can never escape parental authority and exist independently. The works are sentenced to an eternal childhood because without his guidance, their existence is confused and uncertain. He speaks for them. But it is because of this that his works can be endlessly, mechanically multiplied and circulated, without detracting from the claim that the works are unique. Such processing fails to count as reproduction, a process that gives rise to a new life, and is more a form of (re)production - duplication, and presentation for public consumption. The need to always pay tribute to the genesis of the work provides a unity that denies its actual multiplicity and guarantees its ongoing originality. (Re)production also ensures that the work can never be fully consumed so that its mass proliferation remains of a different order to that of the commodity. It is in this sense that -

> . . . the fetishism of . . . (art) proceeds by subordinating the social and abstract aspects of artistic labor to its private and concrete aspects.[50]

The romantic author's presence in the work was reminiscent of Milton's paternal relationship with the work. However in the romantic formulation the author claims a new kind of moral authority. Romantic copyright entailed a kind of reservation of cultural meaning. It was to protect that which existed *prior to* and *separate from* everyday social and domestic relations.[51] It was to protect a cultural life that was made vulnerable by those social and domestic relations. And as a presence not naturally embodied in language, it made no sense to force the author to articulate precisely what it was that he owned in a

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[50] Craig Owens, "From Work to Frame" in Owens, supra n.19 at 139, note 28.

[51] Williamson notes that "In the 1802 Appendix to the "Preface" (to the Lyrical Ballads) Wordsworth imagines a creative dawn in which the earliest poets composed work which was original in the sense not only that it came first historically but that its daring, figurative language naturally expressed powerful thoughts and feelings. However, others who followed would apply the same kind of language to feelings or thoughts with which it had 'no natural connection'. Poets thus came to content themselves with making a 'mechanical adoption' or imitation of modes of expression which 'at first had been dictated by real passion'." supra n.13 at 7.

work in order to protect it as copyright. Such a project was bound to fail. Accordingly a romantic copyright took for granted his essential relationship with the work, and only defined the limits to his copyright with reference to those features of his work that were allegedly violated by another's copying.[52] Romantic copyright was to be enforced without a definition of the original subject matter. Concern for the sanctity of the origins of the work superseded concern for the social reception of the work.

Where does this leave copyright?

Romanticism, as a political movement, tried to influence the social reception of romantic works. Writers and authors embarked upon direct political interventions, lobbying members of Parliament for an extension to the term of copyright.[53] On the cultural front there was a rewriting of the significance of Grub Street -

> Grub Street was now called on to serve a wholly different function. It was a vague expression, growing ever more remote from its original root in topography. Its principal associations were those of fecklessness, eccentricity and poverty. The idea of literary incompetence disappeared to a considerable extent, and crime was linked only to the degree that the lurid career of Richard Savage lay at the heart of the myth. (For the Scriblereans, "crime" had portended not murder, private assault, but sedition, public disorder, obscenity.) The myth also had recourse to Grub Street for conjuring up a sympathetic, if not a sentimental, mood. It frequently enlisted the term in the office of deploring something else - miserly booksellers, cruel satirists, and absent patrons.[54]

The issue of extending the term of copyright was considered by Parliament in 1814. Discussion of it was clouded by its linking up with a debate about compulsory deposit of copies of books in libraries. In an early form of the bill Parliament suggested amending the term of copyright unconditionally to 28 years, however for reasons that are uncertain the Lords extended this to 28

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[52] This will be elaborated on, with reference to case law, in Chapter Six.

[53] see John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part I: Legal Deposit and the Battle of the Library Tax", 24 *Publishing History,* (1988) at 59.

[54] Pat Rogers, *Grub Street: Studies in Subculture,* (London: Metheun & Co, 1972) at 351.

years or for the term to the life of the author.[55] This extension of the term of copyright, whilst obviously welcome from an economic point of view, made no sense philosophically. As Robert Southey argued in 1817 -

> The question is simply this: upon which principle, with what justice, or under what pretext of public good, are men of letters deprived of a perpetual property in the produce of their own labours, when all other persons enjoy it as their indefeasible right - a right beyond the power of any earthly authority to take away? Is it because their labour is so light, - the endowments which it requires so common, - the attainments so cheaply and easily acquired, and the present remuneration so adequate, so ample and so certain?[56]

Immediately after the 1814 Act authors and writers began to agitate for further reform. From 1830 onwards Wordsworth was particularly active in political lobbying. Feather provides an account of his activity.[57] He argues that Wordsworth was motivated out of concern for the impending poverty of his heirs. However the complexity of his grievance with the system is more suitably demonstrated in the following passage written by Wordsworth to the M.P. Talfourd in 1840 -

> [T]hese large profits furnish, in some cases, the strongest reason why the term *should* be extended. The practice of reading, the number of readers, and the ability to purchase books have all so greatly increased of late years that the existing public is able to hold out temptations which few authors have virtue enough to resist. Therefore, whether a Man be fond of praise or money, he is more likely than ever to write below himself, if he be man of ability, in order to suit the transient and the corrupt taste of the day - therefore let the term be extended to counterbalance as far as it may this mischief. So that if an Author of small means endeavours to rise above his age, and aims at giving lasting pleasure, or producing lasting good, he may in conscience be reconciled to the foregoing of present advantage in money, for the benefit of Successors.[58]

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[55] See Feather, supra n.53.

[56] As cited in Ian Parsons, "Copyright and Society", in *Essays in the History of Publishing,* (ed) A. Briggs, (London: Longman, 1974) at 42. Perhaps it is the irresolution of this philosophical issue that has led to an ongoing debate about the status and value of moral rights in the Anglo-American tradition. For further discussion see David Vaver, "Author's Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?", (1988) 14 *Monash University Law Review,* p284, and Michael Weir, "The Story of Moral Rights or the Moral to the Story?", (1992) 3 A.I.P.J., p232.

[57] See John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part II: The Rights of Authors", 25 *Publishing History,* (1989) p45.

[58] Wordsworth, Letter to Edward Moxon (18 February 1840) as cited in Edward Earle, "The Effect of Romanticism on the 19th century Development in Copyright Law", 6 I.P.J. (1991) at 286.

Wordsworth's complaint was not merely an economic argument about the issue of fair remuneration for the patriarchal author. It also encompassed concern for the economics of writing in the very widest context - the construction of literature as if it were merely a trade. This was not an uncommon concern -

> For example, Sir Egerton Brydges wrote in the 1820s: "It is vile evil that literature is become so much a trade all over Europe. Nothing has gone so far as to nurture a corrupt taste, and to give the unintellectual power over the intellectual. Merit is now universally esteemed by the multitude of readers that an author can attract . . . will the uncultivated mind admire what delights the cultivated?" Similarly in 1834 Tom Moore spoke of the "Lowering of standard that must necessarily arise from the extending of the circle of judges; from letting the mob in to vote, particularly at a period when the market is such an object to authors."[59]

The case for romantic authorship was fashioned in opposition to the book trade, drawing upon the fears of living in an alienating, individualistic society. This strategy worked by appealing to a contrast between the spontaneous, inspired "production" of the genius with the faceless, mechanical labouring of the factory. However the case for romantic copyright was also fashioned to accommodate that reality, to increase the author's potential to profit in such a society.

That the romantics could play it both ways owes a lot to the social dichotomies within that society. Superficially the romantics suggested themselves as playing a parallel role to that of Woman, providing a kind of natural sanctuary from competitive, antagonistic forces. However the flimsiness of that dichotomy is obvious from the perspective of their case for romantic copyright. The romantic author requires an enlarged copyright not only to protect his cultured domain, but also to provide for Woman's natural one - where she selflessly provides as his Mother, daughter and wife. The romantic appeal to an opposition between the organic and the mechanical rested upon a more fundamental gendered distinction. It not only constructed

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[59] Williams, supra n.1 at 52.

him as father and guardian of his culture, but it further generated his needs as patriarch and provider, and expanded her role as a selfless provider servicing those needs. His role in a hostile world altered her domestic role, for she now not only oversaw the running of the household but was expected to insulate the home from the harsh reality of the social world.[60] The case for romantic authorship thus not only excluded Woman from culture and from industry, but it created her as an object of culture in the home. She becomes part of the home furnishings.

Though a "right of personality did not emerge as an object of protection in late nineteenth century English law of copyright"[61] these broader social concerns about the "progress" of society did affect the expansion of copyright throughout the nineteenth century. That it is not commonly recognised shows how easily we are drawn into evaluating copyright from the narrow perspective of the "integrity" awarded to an author's right, and without regard for the broader concern - how it structures social, political and economic relations in that society.

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[60] For a discussion of nineteenth century domestic life see Dolores Hayden, *The Grand Domestic Revolution,* (Massachusetts: MIT Press, 1981) and Ruth Schwartz Cohen, *More Work for Mothers,* (New York: Basic Books, 1983).

[61] David Saunders, *Authorship and Copyright,* (London: Routledge, 1992) at 144.

Chapter Five: Parliamentary appropriation of the romantic cause

In the 1830s and 40s romantic authors lobbied for recognition of a post mortem term for copyright. Debate on the subject took the form of eight different bills, before two English Parliaments.[1] Political agitation finally led to an Act granting limited post mortem rights in 1842.[2] It is clear that respect for "art" and "poetry" influenced the expansion of copyright in the nineteenth century.

However in the nineteenth century copyright was considered in relation to an ever increasing range of works, and copyright was expanded not only in response to the needs of "art", but also in response to the needs of industry.[3] Romantic considerations can also be identified in discussions concerning the state of British industry. Accordingly, in order to examine how Parliament responded to romanticism it is necessary to consider more than the Parliamentary response to the author's direct political agitation. In the period that Parliament considered the extension of post mortem rights for authors, Parliament also consolidated and amended design copyright. A fuller picture

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[1] For a full discussion of the passage of these bills see John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775-1842 Part II: The Rights of Authors", 25 *Publishing History*, (1989) p45.

[2] The Act is 5 & 6 Victoria c. 45.

[3] There were numerous Select Committees, Royal Commissions, Accounts and Papers, and Bills concerning the clarification, consolidation, repeal and expansion of copyright laws, the subject matter included books, dramatic works, lecture notes, plays, engravings, maps, literature, art, fine art, trade marks, photographs, musical compositions, designs for articles of manufacture, woven fabrics, paper-hangings, ornamental articles and inventions. See Peter Cockton, *Subject Catalogue of the House of Commons Parliamentary Papers 1801-1900,* Volume 3, (Cambridge: Chadwyck-Healey, 1988) at 963f.

of the impact of romanticism can be gained from a comparison of the parliamentary treatment of these two cases.

This chapter argues that although romanticism had purported to distinguish "art" from "industry", as it was played out in legislative developments in nineteenth century Britain copyright was available for both the creative, solitary poet and for the employer of an artisan's labour working in a factory. The domain of copyright was expanded not only out of respect for romantic art, but also in the interest of developing the consumer tastes of the masses, in order to stabilise markets, and so that the domestic sphere would provide a suitable haven in an increasingly alienating world.

The romantic artist's agenda was appropriated by the legislature and utilised to facilitate the ongoing commodification of culture. This was not necessarily anathema to romanticism, except that the engineers of "taste" resided in Parliament, the courts and in industry.

Post mortem rights for romantic authors

The initial proposal for an extension to the term of copyright to 60 years after the death of the author was introduced into Parliament in 1838 by a friend of Wordsworth's, Talfourd. He argued that -

> the main and direct object of the bill is to insure to authors of the highest and most enduring merit a larger share in the fruits of their own industry and genius than our law now accords them . . .
>
> . . . the present term of copyright is too short, for the attainment of that justice which society owes to authors, especially to those (few though they be) whose reputation is of slow growth and of enduring character.[4]

He then went on to note the opinions of the judges in *Donaldson v. Beckett* concerning the author's perpetual property and the demands of natural justice-

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[4] *Parliamentary Debates,* (Hansard), Third Series, Vol XLII, col 556.

> In maintaining the claim of authors to this extension, I will not intrude on the time of the House with any discussion on the question of law; whether perpetual copyright had existence by our common law; or of the philosophical question whether the claim to this extent is founded in natural justice. On the first point, it is sufficient for me to repeat what cannot be contradicted, that the existence of the legal right was recognised by a large majority of the judges, with Lord Mansfield at their head, after solemn and repeated argument; and that six to five of the judges only determined the stringent words "and no longer", in the Statute of Anne took that right away. . .
> On the second point I will say nothing; unable indeed, to understand why that which springs wholly from within, and contracts no other right by its usurpation, is to be regarded as baseless because, by the condition of its very enjoyment, it not only enlarges the source of happiness to readers, but becomes the means of mechanical employment to printers, and of speculation to publishers. . .[5]

That he did not feel obliged to place these comments in the context of the *actual decision* by the Law Lords shows how little *Donaldson v. Beckett* achieved in settling the dispute as to the author's original entitlement.

> His romantic sympathies were clearly expressed -
> I perfectly agree with the publishers in the evidence given in 1818, and the statements which have been repeated more recently - that the extension of time will be a benefit only in one case in five hundred of works now issuing from the press; and I agree with them that we are legislating for that five hundredth case. . . It is the benefit that can only be achieved by that which has stood the test of time - of that which is essentially true and pure - of that which has survived spleen, criticism, envy, and the changing fashions of the world. Granted that only one author in five hundred attain this end; does it not invite many to attempt it, and impress on literature itself a visible mark of permanence and of dignity? The writers who attain it will necessarily belong to two classes - one class consisting of authors who have laboured to create the taste which should appreciate and reward them, and only attain that reputation which brings with it a pecuniary recompense just as the term for which that reward is held out to them wanes. Is it unjust in this case, which is that of Wordsworth now in the evening of life, and in the dawn of his fame, to allow the author to share in the remuneration society tardily awards him? The other class are those who, like Sir Walter Scott, have combined the art of ministering to immediate delight, with that of outlasting successive races of imitators and apparent rivals; who do receive a large amount of recompense, but whose accumulating compensation is stopped when it should increase.[6]

In both cases copyright was justified by a distinction between the immortal genius and the merely fashionable imitator. Talfourd expanded this theme when he explained the difference between copyright and patent law, based upon the "essential and obvious distinction" between organic and mechanical production -

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[5] Id, at col. 557.
[6] Id, at cols 558-559.

> In cases of patent, the merits of the invention are palpable, the demand is usually immediate, and the recompense of the inventor in proportion to the utility of his work, speedy and certain. In cases of patent, the subject is generally one to which many minds are as one applied; the invention is often no more than a step in a series of processes, the first of which being given, the consequence will almost certainly present itself sooner or later to some of these inquirers, and if it were not hit on this year by one, would probably be discovered by another; but who will suggest that had Shakespeare not written "Lear," or Richardson "Clarissa," other poets or novelists would have invented them? In practical science every discovery is a step to something more perfect; and to give the inventor of each a protracted monopoly would be to shut out all improvements by others. But who can improve the masterpieces of genius? They stand perfect; apart from all things else; self-sustained; the models for imitation; the sources whence rules of art take their origin.[7]

It is clear that Talfourd believed copyright was for the solitary father, the one in five hundred who created perfection from within himself - bringing forth a self referential work that feeds the others that follow him.

However his passionate case on the romantic author's behalf was met with quite vociferous opposition. It was argued that post mortem rights were unwarranted, that to extend the term of copyright would amount to an interference with the existing property rights of those who had invested in the book trade, it would hinder free trade and expropriate expectations of profits for the benefit of only a small group of authors. Foremost was the argument that such an extension of copyright would unduly disadvantage the public.

The parliamentary debates note that Hume -

> objected to the limitation of the intellectual enjoyment of the public at large, which the extension of the present privilege of copyright was calculated to produce. He held in his hand a statement by which it appeared that during the last year of the existence of copyright of Sir Walter Scott's "Lay of the Last Minstrel," that work was sold at two guineas; but that in the year after the expiration of copyright it was published at five shillings; and in the subsequent year at eighteen pence! . . . Was not that diminution of price a great advantage to the public - an advantage which ought not to be relinquished unless on very good grounds?[8]

Similarly the Sergeant General argued -

> It might be a pleasing thing to contemplate the extension to the benefit to the posterity of an author. But it was impossible so to extend it without doing a great and manifest injustice to the public. . . But if they already got enough to secure the devotion of their powers to the public, why adopt a measure by which the public must be so materially injured? All unnecessary taxation was to be deprecated; and what tax could possibly be

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[7] Id, at cols 565-566.

[8] Id, at col 569.

> more injurious than a tax on that knowledge which they were all so desirous to diffuse?[9]

Petitions from printers, publishers and booksellers had convinced many that the effect of an extension of copyright would necessarily be "that benefit (to the authors) would be obtained at the expense of the reading public". Grose went on to suggest that -

> the Bill was replete with mischief to the public, doubtful in its pecuniary results as to the authors themselves, and calculated to rob those authors of that which he was persuaded they set a greater value upon than any pecuniary gain - a wide and enduring circle of literary and intrinsic admiration.[10]

The opinion of the Parliament was so divided that the second reading of the bill in 1838 was only passed by a majority of five. In the ensuing years the most optimistic of claims for post mortem rights for a term of 60 years, was whittled down to 25 years, then finally settled on in the 1842 Act as the life of the author plus seven years after her/his death, or 42 years from first publication, or 42 years for copyrights assigned to members of an author's family.[11]

Notwithstanding the "compromise" involved in valuing the author's property, it would be wrong to suggest that the reproductive claims of the genius were found to be illegitimate. It was taken for granted that the author deserved a fair recompense and that recompense should be measured by both the profit and fame generated. Where the claim for an extension of the author's copyright was vulnerable was through the recognition that the author's private interest, her/his profit and fame, was dependent upon the co-operation of other players - the publishers, booksellers and consumers. Accordingly the author was recognised as only one, dependent party in the copyright debate. The right of publishers and more importantly, the right of

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[9] Id, at col 570.

[10] Id, at cols 585-586.

[11] Feather, supra n. 1.

consumers to cheap books and particularly for cheap versions of the more edifying works, had to be given due consideration. Parliament responded to romantic demands, but felt compelled to "balance" this property claim against the interests of the other parties involved in the profitability of the trade.

The expansion of copyright in designs

What is most striking about the expansion of copyright as it related to design in the 1830s and 40s is the similarity in the treatment of the issue to that considered above. In order to appreciate this it is necessary to briefly look at the history of copyright protection for designs, to place in context purported dissatisfaction with it in the nineteenth century.

As with the first protection awarded to printers to help establish an English printing industry, the earliest forms of design protection were by patent, to reward the importing of East Indian and Chinese skills utilised in the "decorative arts". Similar to the printing case, local industry was assisted by prohibitions on the importation of competitive goods manufactured abroad,[12] and by control over the development of domestic competition.[13] This would later lead to a division between the "establishment" and the "newcomers", with the eventual freeing up of markets resented by the establishment as an expropriation of their right to profit. These sentiments are reflected in the petitions asking for a copyright in designs in linen and calicoes in 1787. It was objected that the Northern printers were appropriating the patterns of the higher class goods, and printing them on inferior cloth that attracted a lesser

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[12] For a discussion concerning the effect of imports on the English silk manufacturers and weavers see *Journals of the House of Commons*, 29 January 1699 & of 8 December 1699.

[13] For example, the silk and woollen industry was supported by prohibitions on the wearing of printed cotton. See *An Act to preserve and encourage the Woollen and Silk Manufacture of this Kingdom; and for more effectual imploying the Poor by prohibiting the Use and Wear of all printed, painted, stained or dyed calicoes, in Apparel, Houshold-Stuff, Furniture or Otherwise* 1721 (7 Geo. I c.7).

duty and could be afforded by the lower classes. The practice ruined the middle class trade by making the patterns "unfashionable". Copyright protection for designs on linens and calicoes was granted, however protection was only for two months from first publication, and later extended to three months.[14]

"Design copyright", as it was then called, compared extremely unfavourably with copyright protection awarded in other industries at this time. For example, at this time books had protection for 14 years, and a further 14 years if the author still lived. Under the *Engravers' Act* 1735 protection was for 14 years from the date of the print. If the designer deserved copyright protection, why was the protection in so limited a form?

Lahore suggests that the Act gave the right to prevent others copying the work and was not conferring an exclusive right in the design itself. He suggests that references to novelty and inventiveness reveals uncertainty as to how to deal with artistic works of an industrial character, and that the limited term may also be a reflection of northern discontent with the granting of monopoly rights in connection with textile inventions.[15] The *Journal of the House of Commons* also provides some clues in its discussion of the "originality" of these valuable designs -

> Mr. Kilburne being again called, was asked, What is meant by an original Pattern? he replied, That it is an Assemblage of Flowers of Fruits placed in a Variety of Colours, so that they shall strike the Trade as something new, and not seen before.[16]

Originality was not seen as something originating from the author's genius, but was a status awarded by the marketplace. Montgomery suggests that at this time responsibility for designs lay with the London drapers and that

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[14] (27. Geo. III. c38; 34 Geo. III. c23).

[15] J. C. Lahore, "Art and Function in the Law of Copyright and Designs", (1971-72) 4 *Adelaide Law Review* 182 at 185.

[16] *Journals of the House of Commons,* 27 March 1787.

patterns were made to their precise specifications. Changes in taste from year to year and season to season were governed by their demands.[17] Given that the "designer" was not generally responsible for the conception of the design but rather executed it as directed, as often as the draper judged that the market required something "new", it is not surprising that only a limited term of protection was perceived as necessary.

This situation changed with the development of roller printing in the late eighteenth and early nineteenth century. Roller printing drastically reduced the cost of printing and it radically increased the value of popular designs. Roller printing meant that once a design had been engraved it could be produced in a continuous length -

> Where it had been possible to print only six pieces a day on a single table, a steam-powered roller printing machine could print up to five hundred pieces a day. Between 1796 and 1840, as a result of the introduction of these machines, the annual production of printed textiles in the United Kingdom increased from one million pieces to sixteen million pieces.[18]

Increasing the volume printed of a particular design no longer required an additional capital outlay. Whilst the width of the pattern handled by the rollers was initially only a foot wide, the fabric could be overprinted in numerous colours. Advances in chemistry also improved the quality of dyes. The industry was also boosted by a repeal of the excise on printed fabrics in 1831 which further reduced the cost of fabrics by about 30-40%.

This change led to a reorganisation of labour in the factory. Designers were perceived as "salaried servants" employed on a weekly wage. The practice of the "print masters" was to have a large number of designs prepared but to engrave and print only a few. The preparation of a design was undertaken by

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[17] Florence Montgomery, *Printed Textiles: English and American Cottons and Linens 1700-1850,* (London: Thames and Hudson, 1970) at 34.

[18] Adrian Forty, *Objects of Desire. Desire and Society since 1750,* (London: Thames & Hudson, 1986) at 47.

a pattern-drawer, who would re-arrange the designer's pattern so that the repeats were equidistant and fit the width of the fabric. The drawer would then prepare a sketch so that it fitted the roller[19] -

> One large Manchester manufacturer said that in 1838 his pattern drawers had prepared between two to three thousand designs of which only five hundred had been engraved and printed.[20]

The sketch was not generally engraved "in-house" but was sent out to a specialist.[21] The application of electro-magnetism to engraving reduced the process from one that could involve months to a process that could be completed in a few hours.

This led to a reconceptualisation of the function of design in the manufacturing process. Whilst there was an increase in the demand and value of designs, divisions of labour were also strengthened. The crafting of the object was radically separated into aesthetic and technical components.[22] The designer came to be seen as skilled in the putting on of style, with a knowledge and expertise distinct from the giving of form.

One may have thought that the increased value of a good design and the change in practice so that "the pattern is drawn by the designer from his own ideas, and not with reference to whether it is workable or not",[23] would have enhanced the position of the designer. However this was not to be the case. Rather than being respected as modern artists designers were widely criticised as inferior to the traditional artisans. It was claimed that -

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19 Mr Stirling, *Select Committee on the Copyright of Designs, Minutes of Evidence*, Parliamentary Papers, 1840 vol VI, at paras 3430;3431.

20 Taken from the *Select Committee on the Copyright of Designs, Minutes of Evidence*, Parliamentary Papers, 1840 vol VI, para 105 as quoted by Forty, supra n. 18, at 48.

21 *English Printed Textiles 1720-1836*, (ed) Peter Floud, (London: Victoria and Albert Museum, 1960) at 6.

22 For a discussion of this distinction see Penny Sparke, *An Introduction of Design and Culture in the Twentieth Century*, (London: Unwin Hyman, 1986) at 38.

23 Mr Stirling, supra n. 19 at para 3422.

> Wherever ornament is wholly effected by machinery, it is certainly the most degraded in style and execution; and the best workmanship and the best taste are to be found in those manufactures and fabrics wherein handicraft is entirely or partially the means of producing the ornament.[24]

Nostalgic generalisations about the superiority of the hand-crafted pattern and print were common. At least one industry observer directed attention to the question of workplace organisation -

> the talents of our artisans (are) being employed in a more profitable direction . . . The great object with every English manufacturer is quantity; with him, that is always the best article to manufacture of which the largest supply is required; he prefers much a large supply at a low rate to a small supply at a higher.[25]

Nevertheless despite concern for a perceived deterioration in the quality of designs, in general there was a failure to look for any causal connection between this and adoption of a capitalist system of manufacture.[26] Instead interest focused upon whether or not British artisans were up to the mark compared with the skill of the French designers. Out of concern for this issue three Parliamentary Select Committees addressed the subject in 1835-36, 1840 and 1849.[27]

The French were widely credited as masters of design and one factor in which they differed to the British was in their attitude to copyright. The 1840 *Select Committee on the Copyright of Designs* noted -

> It was likewise a strong and striking fact that in the only country which was confessedly superior to England in all the departments of industrial art, in France, the copyright of designs was the most complete and effectual, giving the inventor a property in them for any term of years, from one to a perpetuity, for which he might feel disposed to claim it. Under the influence of this law the productions of French

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[24] Richard Redgrave, *Great Exhibition of 1851, Jury Reports,* Vol. IV, "Supplementary Report on Design to Class XXX" as quoted in Forty, supra n. 18 at 49.

[25] J.C. Robertson, *Parliamentary Committee on Arts and Manufacture* 1835, as quoted in Forty, id, at 60.

[26] This matter was taken up in the latter half of the nineteenth century by the English designer William Morris (1834-96), leading to the development of the British Arts and Crafts Movement. This movement sought to reform design standards by returning to the old techniques, such as block printing of fabrics using vegetable dyes.

[27] For a general discussion see Forty, supra n. 18 at 49-60.

> taste had attained a reputation for beauty which ensured for them a price infinitely beyond the more homely and less elegant manufactures of England . . .[28]

Revolutionary France had enacted a general law of copyright that encompassed all pictures and design, *dessins de fabrique* and *dessins artistiques*. Commercial designs could also be protected by registration from 1806, without having to demonstrate artistic quality which was necessary under the broader copyright law. Protection could be secured for a number of years or in perpetuity. Design protection was enforced by commercial tribunals, rather than through the courts.[29]

The idea of consolidating and extending design copyright, and of providing for registration of designs along French lines, met with strong opposition from some quarters. It was argued -

> that there was no such thing as originality in design - that old patterns were perpetually recombined and reproduced. The measure would be productive of nothing but endless litigation and constant disputes. . . The fact was, that originality of invention may be said to have been exhausted, and the production of original new designs could hardly be expected. . . . The whole system of patternmaking was not the forming of patterns on original ideas, but the combining of them from existing designs.[30]

Many in Parliament argued that design protection was contrary to laissez faire principles and was an attempt to discriminate against the successful Northern printers.

Evidence given at the various inquiries overwhelmingly named large Northern manufacturers as the instigators of "piracy". For example, Mr Stirling complained to the Committee in the course of one month an entire 83 patterns were copied by a Manchester firm and offered for sale in competition with his own at a reduction of 20% on cheaper cloth, and were then

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[28] Mr Emerson Tennant, *House of Commons Debates,* 9 Feb 1841, (Hansard) Vol. LVI at 483.

[29] Lahore, supra n. 15 at 222.

[30] Mr W. Williams, *House of Commons Debates* 16 Mar 1841, (Hansard) Vol. LXI at 684-85.

considered too common to be reordered by his suppliers.[31] However he then went on to explain his own practice of copying -

> We are in the habit of getting patterns from every place we can . . . our object in getting these patterns is to enable us to keep pace with the trade to know what is suitable and what is worth copying.[32]

There was an apparent double-standard whereby appropriation by "quality" manufacturers was approved of and called copying the "style", but a similar practice undertaken by different printers for the broader mass market was frowned upon and called "piracy". Whilst there is no doubt that often the latter were involved in piracy,[33] even when Northern printers only adapted the style it was still resented and disapproved, as if it too was piracy. The latter still affected the sale of the "original" design.

An explanation for this can be drawn from the curious remark by a fabric merchant that -

> I consider that copying is detrimental in this way, that except the higher class of printers, who give a tone to the print trade generally, derive a remunerative price for their goods, the general taste of the country will be deteriorated; and in that way, I think, they are entitled to their protection; nothing more than that.[34]

The concern for "taste" entailed more than aesthetic considerations -

> many entrepreneurs and professional men found the world in which they worked increasingly brutal and deceitful. While participating in it, they felt it necessary to find some way of experiencing and expressing the moral virtues and honest emotions that they saw being submerged in the commercial world. The home, therefore came to be regarded as a repository of the virtues that were lost or denied in the world outside. . . It was to turn the home into a place of unreality, a place where illusions flourished.[35]

The comment that "the general taste of the country will be deteriorated" harboured real social and political fears. Design law took on board those concerns in its model for protection. It was a law to regulate access to design sources to ensure the economic viability of those undertaking "quality" design.

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[31] Supra n. 19 at paras 3320; 3337.

[32] Id, at para 3390.

[33] Harris writes of an example where to save time and money a pattern was not even adapted to fit the new width of the cloth, but rather was simply cut away, destroying the repeat. Jennifer Harris, "Printed Textiles" in *5000 years of Textiles*, (ed) Jennifer Harris, (London: British Museum Press, 1993) at 230.

[34] Mr R Barbour, supra n. 19, at para 8488.

[35] Forty, supra n. 18 at 101.

The Designs Act 1842[36] repealed all existing design laws and protected "any new and original design whether such design be so applicable to the ornamenting of any article of manufacture, or of any substance, artificial or natural . . . ". It was the first generalised law to protect the appearance of the object. Designs had to be registered and protection was for a term of nine months to three years, depending upon the class of goods. The Act required that the design be novel or original, however unlike patent law's expectation that novelty mean that the idea had not been previously published -

> a design may well be novel although all the parts are old, and were common general knowledge or were trade variants at the date of registration, for the combination of two or more old and well known designs of parts of designs will certainly constitute novelty, if the effect, ie. the appearance of the combination as a whole, is new.[37]

This somewhat contradictory definition whereby "everything old is new again", was a means of discriminating between printers and regulating access to design styles. Mr Stirling and his friends could, if they so chose, protect "quality" designs from Northern reproductions of them. Further they were better placed to compete with French goods, as reflected in the following discussion -

> Do you consider the state of the law of copyright in this country, regarding prints, to be favourable or adverse to French goods . . . ?
> If further protection were granted, I should certainly say it would act against French goods; it would lessen the consumption of French goods, and would increase the consumption of British goods. . . . The consumers, who are at present driven to purchase French goods from fear of purchasing spurious productions in English goods, when they find that they can place dependence upon the British productions, will naturally purchase them, because they are cheaper; . . . an equal quality will be produced cheaper in this country in printed goods than it can be produced in France.[38]

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[36] 5 & 6 Vict. c100.

[37] *Walker & Co v. A.G. Scott & Co* (1892) as interpreted by Russell-Clarke on *Copyright in Industrial Design,* (5th edit) 1930, quoted in Michael Blakeney & Jill McKeough, *Intellectual Property Cases and Materials,* (Sydney: Law Book Company, 1992) at 262.

[38] Mr Schuster, supra n. 19, at paras 1119-1120.

From this brief account it should be clear that design protection was fashioned in response to concerns over appropriate cultural values and symbols, to support the development of certain markets and to retard others -

> Copyright of design gave manufacturers a form of protection which interfered with free market competition, while the government subsidy of schools of design represented a form of state assistance to industry - another kind of interference with the "natural laws" of the economy. Design was therefore a sufficiently important issue to cause people to advocate remedies contrary to laissez-faire principles which dominated politics at the time.[39]

Interestingly enough, the assistance given to industry by government support for regional schools of design was not so that manufacturers would have access to artistically skilled employees, but was offered with a view to raising the standard of public taste.[40]

Middle class married women were the primary targets of such strategies. Whilst domestic furnishings had been the domain of men before the 1860s, domestic manuals of the last quarter of the nineteenth century were for "the lady of the house". She was advised "to strive to make a home something like a bright, serene, restful, joyful nook of heaven in an unheavenly world".[41] It should be noted that fulfilling this domestic responsibility precluded the possibility of undertaking other forms of work -

> The enforced idleness of married women was a reflection of the wealth and success of their husbands: rather than consuming leisure themselves, the men consumed it through their wives and daughters.[42]

The virtue of "idleness" was reinforced by the tastes women were encouraged to imitate. The primary source of imagery for a place free from work was the past styles of the aristocracy.

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[39] Forty, supra n. 18 at 59.

[40] Sparke, supra n. 22 at 158.

[41] Baldwin Browne, "Young Men and Maidens, A Pastoral for the Times" as quoted in Forty, supra n. 18 at 103.

[42] Forty, Id at 104.

Beyond making the home as un-worklike as possible, she was told that the home should express "her" personality -

> The unhomeliness of the homes . . . of women in whom the feminine element is lacking is pitiable . . . The more womanly a woman is, the more she is sure to throw her personality over a home, and transform it, from a mere eating and sleeping place, or an upholsterer's showroom, into a sort of outermost garment of her soul; harmonised with all her nature as her robe and flower in her hair are harmonised with her bodily beauty . . .[43]

Forty notes that such an attitude contains a curious paradox "for while most of the authorities on domestic decoration have insisted that every home must distinctively express the character of its occupants, the same authorities have also laid down the rules to be followed in the design of the decor. The pursuit of individualism cannot be compatible with the observance of preordained rules of design."[44]

Nineteenth century consumer education was more about constructing the values of femininity *in terms of* her natural domesticity, than it was about individual expression. However "beauty" was not just a matter of making appropriate aesthetic decisions. Beauty was also an indicator of moral virtue, where virtue was to be judged in terms of Woman's conformity with a preordained social rôle.

A case study of design copyright shows that the first general, modern design law involved much more than the protection of design "rights". It was a component of a modernisation strategy aimed at shaping and stabilising the direction of manufacturing and at constructing consumer demand. The consumer was perceived in line with nineteenth century representations of respectable, middle class married Woman.

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[43] Frances Power Cobbe, "The Final Cause of Woman", as quoted in Forty, Id at 106.
[44] Ibid.

Parliamentary appropriation of the romantic cause

Copyright law expanded throughout the nineteenth century as industries that had originally been favoured by Crown patents and were accustomed to monopoly protection, petitioned Parliament for "copyright" to protect their markets from both domestic and foreign competition. Their claim for protection was justified in line with the terms that had been established by the literary model. Production was presented as a *serial process* - the "artist" was the initiator of the process. S/he had brought forth an "original" work and sought the opportunity to reproduce it, by assigning reproductive rights to the printer. It was argued that if an obliging printer were to be found and the work was successfully marketed, it was probable that the work would be soon "pirated". The printer's expectation for profits would be undermined. There would be less incentive to invest in new works. Therefore a monopoly was required to secure the incentive to invest in new works.

The scenario suggested was of course, fictional. Parliament was aware that the copyright case presented the interests of particular historically privileged creators and industrialists as everyone's best interest. They knew that the works that protection was sought for, were not often terribly "original". They also knew from the many and various commissions of inquiries that the printer and investors generally controlled the creation of the works by contracts of employment. It was capital and contract that initiated the reproductive process, not the creative individual. An individual may produce an original work, but there was no necessary connection between this act and the decision to mass reproduce the work. The creator had little control over that decision or over the value of the recompense.

Nevertheless it seems that Parliament was willing to go along with these copyright fictions. Parliament was not overwhelmed by concern for the needs

of the creator. Many Parliamentarians were sceptical of need for a monopoly in order to secure profit. However a majority of Parliamentarians supported copyright reform in an attempt to restore "taste" and "tradition" to mid-nineteenth century British society.

Parliament enabled copyright reform precisely because it favoured "the one in five hundredth poet" and "the higher class of printers". Taste was important political consideration. Taste conferred the social and political stability that comes with deference to the authority of one's peers. And taste conferred economic stability because so long as works of taste were enduring, they served as an original source for (merely) "fashionable" imitation. It was anticipated that "taste" would inform the consumer choices of the masses, steadying burgeoning markets by reinforcing traditional socio-economic stratifications.

Parliament responded to the cultural critique reflected in romantic art. However Parliament appropriated that cause to suit contemporary political agendas. They made it clear that concern for the "original" artist had to be considered in light of actual social, political and economic relations. This meant respect for the "genius" who was identified as such by his peers but not necessarily known by the masses; respect for the industrialist who manufactured this good taste for the masses; and respect for the "good" wife who purchased in good taste and displayed it in the home. What occurred in the nineteenth century was a further idealisation and abstraction of the role of the "genius". His significance came to rest firmly with his functional rather than his fundamental value.

Why this history matters

It is true that there was not any one, uncontested principle shining through the nineteenth century copyright debates. It is also true that the patchwork of copyright legislation developed in response to localised demands. However this does not mean that the development of the law was "ad hoc" or without foresight.

In nineteenth century Britain, the copyright debate touched on broader questions about the nature and direction of the social order. That this is not apparent from the legislative enactments, flows from the way that social order was administered. Rather than be seen to *engineer* respect for "tradition" and ensure tradition's "progress", Parliament adopted a subtle, more conservative strategy. They reformed society when the opportunity arose case by case, in response to petitions and inquiries. The ensuing legislation may be different in details, but those differences did not impede the fulfilment of the social objective - a society harmonised by the appeal of quality consumer goods.

The nineteenth century was a period in which copyright was "opened up" to the producers and investors in various cultural products, however copyright did not abandon its historical association with the protection of "exclusive" values. Copyright remained a tool in support of cultural "leaders". It was awarded by the patronage of Parliament which approved the properties represented by the artefacts that legislation protected.

Whilst legislation delineated prescribed categories of work, Parliament maintained a flexible attitude to these practical distinctions. Protection was extended by broad analogies made between all kinds of productions. The more fundamental divides that were sponsored and maintained were of gender and of class. A gender distinction identified Woman as a natural

consumer of culture, excluded from active participation in its creation. A class distinction separated her from the working woman, whose "lack" of idleness imperilled her femininity. The corollary of this can be found in the construction of Man. The terms of his "public" participation in cultural production was also circumscribed by class position and an interest in domestic affairs jeopardized his Masculinity.

In order to discern the social relations of copyright we need to look beyond the cause and effect of a particular copyright enactment. If one focuses too narrowly, for example, only on the push to extend post mortem rights, one is led to believe that Parliament was minimally affected by romanticism. It appears that they mediated a "compromise" between the interests of romantic authors and the demands of influential publishers and supporters of consumers' interests. The institutional power of Parliament does not appear to be committed to any particular cause.

However by looking further afield it is clear that Parliament was not "above" or "outside" of the social movement of the time and although it housed fractious political opponents, a clear and consistent policy was formulated and put into action. This copyright policy lacked *an author* - it was not a solitary effort and it had to incorporate many different visions. But as an ongoing collective effort it still left a mark upon the landscape and cast a shadow upon the souls within.

Chapter Six: The judicial construction of the author as an "owner"

Notwithstanding the British government's social policy of sponsoring British industry and romanticising domestic life, what remains to be accounted is how the courts dealt with this agenda. Given that the courts are a social filter you would expect that, like Parliament, they too would have addressed romantic concerns. This chapter considers how the courts met that challenge. How have the courts constructed the author? What kind of creator is s/he? How far does her/his right of ownership extend? Does copyright enable certain forms of production and disable others?

Who qualifies as an author?

As mentioned in the previous chapter, copyright legislation does not protect "authors" per se. Legislation specifies protection for categories of works - generally literary, dramatic, artistic and musical works. It is up to the courts to determine whether the work qualifies as belonging to that category. This means that how the courts define "author" has to be drawn from how they define the works that deserve protection.

The courts could have pursued a specific cultural agenda in determining whether or not a work was of sufficient merit to qualify as, for example, a literary work. How "literary" does the work have to be? In the nineteenth century the courts addressed this line of inquiry by determining that a work need be "original" in order to attract protection. So what does an "original" work look like?

Walter v. Lane[1] is an interesting case that shows the difficulties the courts have had in identifying originality. At issue was whether or not a journalist could have copyright in his written version of a public speech. The lower court found that the reporter had a copyright in his version of the speech because the speech maker had placed his words in the public domain in a non copyrightable form. Words in the public domain were available for private appropriation of them, with the labour involved in reducing the oral to a written form founding the reporter's copyright. Every reporter would independently hold copyright in her/his personal record of the one speech. The court's analysis echoed the "Lockean" position put forward in the nineteenth century literary property cases. Copyright was to be for all *labouring* authors.

The Court of Appeal rejected this analysis. It was argued -

> The more closely the Act is studied the more clearly it appears that in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript or in some other way . . . To hold that every reporter of a speech has copyright in his report would be to stretch the Copyright Act to an extent which its language will not bear, and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters.[2]

So what did it mean to be an "author"? The legislation had not defined "author".

It was argued that -

> The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances . . .[3]
> . . . The word "compose" here cannot mean copy or write from dictation; it obviously means compose in the sense of being author of the matter published.[4]

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[1] *Walter v. Lane* [1899] 2 Ch 749; [1900] A.C. 539.

[2] *Walter v. Lane* [1899] Id, at 771.

[3] Id, at 770.

[4] Id, at 771.

The "obviousness" here - that an author is an author - did little to clarify the legal criteria for identifying a copyrightable work. Presumably the legal criteria accords with romantic conventions - securing a place for the first poets, and distinguishing them from the mere scribe.

This decision was successfully appealed to the House of Lords who adopted a similar view to that of the lower court. However the Lords added to this formulation suggesting that -

> a reporter's art represents more than mere transcribing or writing a dictation. To follow so as to take down the words of an ordinary speaker, is an art, requiring considerable training, and does not come within the knowledge of ordinary persons.[5]

Why was it felt necessary to present the author as *more than* a mere scribe? Why must an author possess a specific kind of skill and understanding? We can only presume that the romantic case was put strongly and the court felt compelled to respond to it. Such was the power of contemporary literary expectations that the court did not wish to discount the relevance of such views outright. Rather the court sought to meet that challenge on its own ground - reclassifying the journalist's craft. The journalist's skill was characterised as closer to that of the producer of extraordinary work, than it was of the "ordinary" labourer.

Walter v. Lane is an unusual case because the courts felt the need to discount the defendant's arguments about the qualities of the labourer and her/his work. More usually the courts specify that there is *no role* for aesthetic judgements about the quality of the work. The often quoted formulation is that -

> The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing . . . the Act does not require

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[5] *Walter v. Lane* [1900] supra n. 1 at 554.

that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author.[6]

In arguing that an original work is one that "originates" with the author attention focuses on the conditions of the production of the work rather than on the quality of the work produced.

There are numerous formulations of this principle. For example in *Jarrold v. Houlston* (1857)[7] it was argued that -

> If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomenon of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of this former general reading or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work, of which the copyright will be protected.[8]
>
> . . . If knowing that a person whose work is protected by copyright has, with considerable labour compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the paine of searching into all the common sources, and obtaining your subject matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colourable variation, and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use.[9]

In a similar vein *Kelly v. Morris* (1866)[10] argued that -

> The Defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide-book or directory when there are certain common objects of information, which most, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done . . . generally he is not entitled to take one word of information previously published without independently working out the matter for himself . . .[11]

Likewise in *Lewis v. Fullarton* (1839)[12] Lord Langdale said -

> Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labours of all former writers whose works are not subject to copyright, and all public sources of information; but whilst all are entitled to resort to common

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[6] *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch. 601 at 608.

[7] *Jarrold v. Houlston* (1857) 3 K & J 708, 69 ER 1294.

[8] Id, at 1297.

[9] Id, at 1298.

[10] *Kelly v. Morris* (1866) 1 LR Eq 697.

[11] Id, at 701-702.

[12] *Lewis v. Fullarton* (1839) 48 Eng Rep 1080.

> sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection.[13]

In all these cases what drives the need for copyright protection is respect for "independent" effort. This means that although copyright is couched in terms of protecting specific kinds of "work", the work that is really under the spotlight is the work (labour) entailed in product development, not the quality of the end product.

That this formulation still has contemporary relevance can be seen from the more recent case *Kalamazoo (Aust) Pty Ltd v. Compact Business Systems Pty Ltd* (1985).[14] In this case *Kalamazoo (Aust) Pty Ltd* argued for copyright in their receipt system -

> Kalamazoo claims that certain of its servants have spent considerable skill and care in the devising and drawing of the forms that comprise the systems, that they were original works of such servants, and that as the employer of such persons it is entitled to such copyright as exists in such works.[15]

This suggested that what deserved protection was the work process, involving investment in product development. The defendant objected by an appeal to a judgement of the end product. It was suggested -

> that the forms are insignificant variants of traditional accounting and bookkeeping forms, and that neither individually nor collectively are they original literary works under the *Copyright Act* 1968.[16]
>
> . . . a "literary work" requires, as a minimum, that information, instruction or pleasure in the form of literary enjoyment be conveyed.[17]

Thomas J found for Kalamazoo in line with the nineteenth century authorities-

> whilst I refuse to find that the authors showed great skill, I did find that their preparation required a degree of concentration, care, analysis, comparison, and a certain facility in using and adapting the altered forms to a composite "one-write" system. In each case, some awareness of contemporary developments and the marketability of such forms played a part in their creation. Looking at each system as expressed, there is sufficient originality of expression, shape and content to comprise an original literary work.[18]

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[13] Id, at 1081.

[14] *Kalamazoo (Aust) Pty Ltd v. Compact Business Systems Pty Ltd* (1985) 5 I.P.R. 213.

[15] Id, at 217.

[16] Ibid.

[17] Id, at 232.

[18] Id, at 237.

The protection awarded was primarily protection of the master's investment in his servant's labour, including his investment in market research. It was "work" *leading up to* the manufacture and sale of the work that gave rise to the copyright.

However what is interesting in this case is that the court was reluctant to say that this is the only matter that counts. Thomas J did not reject the defendant's argument and say that lack of originality in the end product was *no bar* to copyright protection. Rather Thomas J tried to "dress up" the quality of the end product suggesting that -

> The documents have their own character, their own form of expression, and in a sense tell their own story to the user.[19]

He felt compelled to make the peculiar proposal that a receipt system compiled by numerous employees entailed a personal narrative, akin to a romantic work of art.

Because of the way the courts formulate an "original work" a maker of a commodity qualifies as an author. However when confronted with the argument that the end product lacks originality, the courts suggest that beyond protecting mere financial investment in labour, they are also protecting the independent judgement behind the labour, an expression that founds an independent, self-referential story. Aesthetic judgements are not the most important consideration before the court however this does not mean that there is no place for a judgement of the work in terms of the "personal" contribution that gives form and substance to the ideas in a work. It is a judgement of both kinds of "work", investment in labour and the quality of the end product, that copyright protects under the guise of protecting "authors".

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[19] Id, at 238.

How far does the author's right of ownership extend?

In *Sayres v. Moore* (1785)[20] Lord Mansfield argued that -

> . . . we must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for services of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.[21]

But how is this balance to be struck? The solution was well formulated by the American case *Baker v. Selden* (1879)[22] -

> The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent.[23]

However this explanation of the idea/expression dichotomy does not necessarily extend the definition of the right of ownership very far. How does one demarcate the ideas in the public domain from the author's private expression?

Cases such as *Kelly v. Morris*[24] and *Lewis v. Fullerton*[25] seem to suggest that one needs to retrace all the same steps that the "original" author has done in order not to infringe the copyright in her/his expression. But does this mean that if I follow more or less the same path as a previous author, but independently trace all the same steps, that I have no copyright problems to worry about? Such a minimal standard would be open to abuse. Further to require every author to reinvent the wheel could seriously retard the progress of particular fields of endeavour.[26] However if the extent of the author's

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[20] 102 Eng. Rep. 139n (K.B. 1785).

[21] Ibid.

[22] 101 U.S. 99 (1879).

[23] Id, at 105.

[24] (1866) 1 LR Eq 697.

[25] (1839) 48 Eng Rep 1080.

[26] It is interesting to note that *Sayres v. Moore, Kelly v. Morris* and *Lewis v. Fullerton* all involved disputes about maps where public access to accurate navigational information was a primary consideration.

ownership is determined with reference to more than "labour", the court will surely get bogged down in aesthetic debates authoritatively determining the essence of the author's work - the irresolvable problem that Locke mused upon and that the romantics too, were concerned about.

Avoiding a definition of the essence of a work

The court has been able to avoid the issue altogether because of the way that the author's right of ownership is constructed in the judicial forum. Because this is a complex matter it is best explained with reference to a case. *Hanfstaengl v. Baines* [1895][27] shows the standard construction of the parties' interests at law, but it also shows how the courts sometimes choose to manipulate that construction, out of respect for other social interests.

In *Hanfstaengl v. Baines & Co* Hanfstaengl claimed to own the copyright in a set of German paintings. Empire Palace Limited had staged an exhibition of "Living Pictures", where the spirit of Hanfstaengl's pictures was evoked by the staging of live models in scenes representing the various titles. Baines & Co's alleged infringement involved the publication of a set of sketches accompanying a newspaper article about the exhibition. Hanfstaengl has called upon the court in order to protect his rights as owner.

> The court noted that -
> . . . the object of the Act of 1862 . . . is to protect the reputation of the artist and to preserve intact the commercial value of the artist's work.[28]

However neither an inquiry into the reputation of the artist, nor into the work's commercial value was the starting point of the case. There was no

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[27] *Hanfstaengl v. Baines* [1895] A.C. 20.
[28] Id, at 29.

attempt to define what Hanfstaengl owned, before considering the question of an alleged infringement. Why did this occur?

The reason that this occurred stems from the way the issue of ownership was introduced. The case was presented as if the court merely responded to the issue of copyright as constructed by the plaintiff. Hanfstaengl has assumed the guise of wronged "owner". In these circumstances it was the court's responsibility to act upon the complaint before them - determine if there had there been a copyright infringement, and if so, act against the defendant. Because the court's primary responsibility was to settle that dispute, the more metaphysical question - what does his right of ownership mean? - seemed less important.

But why does the broader question seem less important? How can the court proceed to determine if an infringement has occurred, if they don't actually know what Hanfstaengl owned in the first place? To answer this we need to look more closely at the way our knowledge of Hanfstaengl has been constructed in the court.

All that we know of Hanfstaengl comes from what can be discerned from the legal argument in the case. However the legal argument only represents his interest in the works in terms of his "right" of ownership. All other dimensions to the case - concerns about the personal, cultural or political significance of the "original" or the "infringing" work - have been filtered out as essentially non-legal considerations. They have been placed outside the domain of copyright law.

In this sense the legal representation of Hanfstaengl's interest involves a kind of substitution in focus from a consideration of the "thing" to a

consideration of the rights of personhood - personhood exclusively constructed in terms of owning private property. Rather than focus on the expression (the paintings), we focus on Hanfstaengl's rights as owner of the expression. Hanfstaengl's interest in the case is revealed to us as -

> . . . a desire for *property*, which conveys man's sense of his "power over things"; a desire for *propriety*, a standard of decorum based upon respect for property relations; a desire for the *proper name*, which designates the specific person who is invariably identified as the subject of the work of art; and finally a desire for *appropriation* . . . a contest over the proprietorship of the image.[29]

Hanfstaengl is represented in the court as a particular citizen with a gripe about the misuse of his personal property. However Hanfstaengl represents more than this. He represents the universal owner, his representativeness resting upon an assumed universal aspiration for private property. What this means is that in responding to Hanfstaengl's complaint the courts are doing more than responding to his private cause. In being seen to deal with his complaint justly, they are assuring all of us, as property owners, that our property interests can be made safe.

Whilst the courts have merely responded to the particular case, *Hanfstaengl* as "owner", at the same time they have responded to the guise of the universal copyright owner. However to the extent that Hanfstaengl represents us all, there is no need to further define what his right of ownership entails. There is no need to further scrutinise what is already familiar. In this way Hanfstaengl's particularity and his universality are mutually supportive. His particularity evokes the power of the court, his universality constructs the way the court responds to the issue -

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[29] Craig Owens, "Representation, Appropriation, and Power", in *Beyond Recognition: Representation, Power and Culture,* (eds) S. Bryson et al (California: University of California Press, 1992) at 95.

> All we know of (this right) is that it gives the person the power to be an owner or an employer. It is this concept of law that, for the law, determines the domain of law. It is the subject that determines the subject . . . It is a mystifying tautology.[30]

Because scrutiny of the nature of Hanfstaengl's interest in the work can be glossed over, it doesn't matter if his ownership is based upon a Lockean justification, a romantic justification or a blend of the two. From whichever perspective one adopts Hanfstaengl has a legitimate claim as owner. The central legal issue thus becomes that of the possible encroachment by Baines & Co's work. Had Baines & Co infringed Hanfstaengl's right by taking a "substantial part" of this property?

> With reference to this test the Lord Chancellor said -
> It must always be a question of fact whether what is complained of as an infringement is a copy of a design.[31]

This emphasis on an "empirical" comparison of the work further distances the judiciary from responsibility for their decision about the nature and extent of the owner's right. It implies that a work can be broken down into key components without venturing into subjective judgements about the essence of the work. These details can then be empirically measured against another, again without subjective judgement bearing on the comparison. This implies that the judges engage in neutral observation, and in that sense it is *the works* that suggests the answer. The judge's only task is to uncover it in the particular circumstances.

> The Lord Chancellor's conclusion was -
> There can only be a copy of such a design if the treatment of the subject be the same. Now, comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the woman's hair is arranged is different; the dress, especially in the case of the woman, is different;

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[30] Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law,* translated by Elizabeth Kingdom, (London: Routledge and Kegan Paul, 1979) at 30.
[31] Id, at 24.

> the pose is different; the attitudes are different; the background is different, and in the case of the sketch the foreground is wanting . . .
> My Lords, it is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now before your Lordships. I have tried to indicate some of those which have led me to my conclusion; but it depends really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it, or at least of its design.[32]

But if the decision was grounded in an objective, empirical comparison of two works why couldn't the full reasons for that judgement be articulated?

There are some peculiar aspects to the judgement in this case. Why, for instance, did the Lords focus on the dissimilarity between the two works, rather than on their similarity? Why did they not look to the more obvious consideration- the encroachment of the original work by the derivative work? Baines & Co's sketches must be considered derivative of the paintings if the Living Pictures' exhibition achieved its aim and the sketches were reasonably accurate. Surely the point should have been that there was no infringement because neither the reputation of the artist nor his purse would be damaged by this reproduction. Why wasn't this the basis of the judgement? The vagueness in the decision means that ultimately we have to take it on trust, rather than in reason.

The answer to the question *How far does the author's right of ownership extend?* is - as far as the courts determine in any one case. There are no substantive criteria that are utilised in order to define the limits to the author's expression. In their place there lies a standard way of proceeding, designed to avoid responsibility for making such a inquiry :

- focusing on a comparison of the works, rather than considering their properties independently;
- suggesting that the points of comparison arise from the works themselves;

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[32] Ibid.

- assuming that the way a work is broken down into key details is self-evident, as if the points of focus were not chosen by the viewer;
- suggesting that the answer lies in the domain of fact, rather than in interpretation; and
- appealing to the uniqueness of every case, which tends to make an explanation of the system overall, elusive.

This way of proceeding creates the space for a consideration of issues about the social context of the work, without the courts having to justify their stance. The courts suggest their abstraction from social relations by confining discussion to a comparison of the two works alone. But competing rights of private ownership cannot be resolved by consideration of the right of "ownership" alone. The deadlock is broken by considering "outside" factors. However to articulate what these are would endanger the courts' claim to neutrality and expose how their decisions involve the construction of social relations in line with the perceived "needs" of the social body.

Because they are not clearly articulated, it is difficult to retrospectively interpret the bearing of various social factors on the court. For instance, did Hanfstaengl's German nationality have any bearing on the court's receptivity to his case? Without knowing more about the attitudes of particular judges of the case it is difficult to speculate on this. We can however attempt a reading of the case in line with a context with which we are familiar - the influence of romantic considerations on the decision in the case.

> In *Hanfstaengl v. Baines & Co* [1895] Lord Watson said -
> . . . in cases where copyright is claimed for pictures or drawings which treat an old and common subject, such as love-making behind a stile, the privilege of the author must, in my opinion, be strictly confined to the particular design which he has chosen.[33]

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[33] Id, at 28.

Similarly Lord Ashbourne says -

> The subjects dealt with in the pictures are not special or exceptional: they deal with ideas as old as the world, and it would be impossible, as pointed out by the Lord Chancellor, to hold that the plaintiff could claim anything like a monopoly in every treatment of such common subjects.[34]

The suggestion seems to be that because the works were based upon "universal" themes - "Courtship", "Charity", "First Love", "Love me, Love me not," and "Pets", the sphere of private property was curtailed. But why should works representing "universal themes" be excluded from the sphere of private property?

These works represented private and domestic virtues. To allow the "privatisation" of these matters would take from the shared cultural agenda precisely those ideals that justify contemporary social relations. Or to put it more positively, in advocating these themes as part of a shared cultural heritage the courts assist in maintaining them as universal virtues. Failing to protect Hanfstaengl's "property" may have been considered necessary in order fulfil a public commitment to the ideals of subjectivity and domesticity. The copyright holder's right was given short shrift because protection of such a monopoly was seen to be socially unacceptable. However to concede these reasons as the basis for the decision would undermine the "neutrality" and "objectivity" of the courts. The court would not be simply an arbiter responding to a dispute between two private citizens. It would have been seen as having constructed the values of citizenship itself.

The court and romanticism

The court can be seen to have been affected by romantic pressures on a number of levels. The court drew upon romantic respect for the author and his original production in assuming the "right" to protect the author's

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[34] Id, at 29.

expression. The court could rely upon romantic distrust of a public reading of the essence of the work. This made their decision not to define the boundaries around a particular author's expression (except by way of comparison) more credible, particularly for those who were not swayed by the enlightenment argument in this regard. The courts responded to romantic arguments and came to incorporate concepts such as originality and expressive labour into justifications for decisions. At the same time the court could rely upon other romantic virtues - such as subjectivity and domesticity - in order to discredit particular claims to ownership. Romanticism provided a useful sounding-board for judicial decisions even though there was no actual endorsement of romanticism as an official philosophy of copyright.

What remains to be considered is the legacy of this heritage. Such ideals form part of the social fabric of the law, but they were not consciously put there, or at least they are not perceived to be the result of an overarching plan or design for social progress. Do romantic values create problems for certain kinds of authors? Does copyright discriminate between literary and other kind of works?

Does copyright enable certain forms of production and disable others?

One thing that needs to be considered is that the legal terminology and distinctions relied upon by copyright owe their genesis to the world of literature. Copyright begins with the "original author", the one party responsible for the material form of the expression. But what happens where there is no "original author" because the work is produced by various labouring inputs? What happens when technology is the force that leads to the expression appearing? This is the case with photography. The photograph is a product of both physical and chemical procedures. Except in the case of

the polaroid, the negative must first be developed and then processed, before the "expression" takes shape. Because of this there is no "original" moment expressed in material form and it is impossible to distinguish an "original" print from the other authorised copies. There are a myriad of decisions involved in the formulation of the expression - from the general idea of the subject, to the arrangement of the subject, to the positioning of the camera, to the choice of lighting and lens, to the timing of the shot, to the developing of the negative, to choosing the part of the negative from which to print, to developing the print. Frequently the camera operator will be interacting with others along the way, building upon their judgement, their skill, their knowledge. The negative may be developed by an altogether different party. Chance will also always play a significant part. Because of this it is worth considering how the courts dealt with the issue of copyright in photographic works. How do they deal with the absence of an "original expression" and the possibility of multiple authors for a work?

Photography and the original work

Initially the courts had great difficulty in translating authorship to photography as provided under the *Fine Arts Copyright Act* (1862).[35] As Brett M.R. said -

> I confess I have the greatest difficulty in construing this Act of Parliament. Persons who draw Acts of Parliament will sometimes use phrases that nobody else uses. I am speaking for myself only, as to the strangeness of the phraseology. It says, - "The author," and so on - "of every original painting." Who ever, in ordinary life, talks of "the *author*" of a painting? We talk of an artist or a painter. Who ever talks of him as in this Act of Parliament as the author of a painting? Then it says "the author" of a drawing. Yet one can easily make out who is meant by the author of a painting or drawing. The author of a painting is the man who paints it; and the author of a drawing is the man who draws it.[36]
>
> But now we have "the author" of a photograph. I should like to know whether the person who drew this Act of Parliament was clear in his mind as to who can be the *author* of a photograph.

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35 (25 & 26 Vict. c. 68).

36 *Nottage v. Jackson* (1883) 11 Q.B.D. 627 at 630.

> . . . It is difficult to say who is the author of the photograph. Neither of them make the picture because, after all, that is done by the sun.[37]

Paintings, like drawings and literary works are generally produced in a singular form. This allows us to identify the expression by reference to the individual author, *before* the question of reproducing the work arises. The "original work" comes to signify the source for mass reproduction. It can be distinguished from the "copy", the reproductive right contractually assigned for editions to the printer or publisher. This temporal distinction between the original and the copy has been useful to copyright. It has allowed the court to define the "copyright" by reference to the existence of a former singular work. But as noted above, this is not so that a definitive expression can be given boundaries, but rather so that we can identify the ownership rights that have flowed from it. So far as the "author's right" is concerned, the courts merely have to consider the authority of any assignment of the right that originated with the author. The focus on the "original" act engenders a spirit of respect for private property relations, in terms of respect for the author's private autonomy and free will in choosing how to present the work to the public, and in terms of respect for the "orderly" establishment of markets by guaranteeing a limited monopoly for those investing in mass reproduction of "original" works.

What can the courts do when the specifics of production and reproduction preclude such a serial approach to copyright?

In *Nottage v. Jackson* (1883) the court found that "the author" of the photograph was the one who was the "effective cause of the picture", meaning the person who "superintended the arrangement". This meant that the author was the photographer who chose the arrangement for the

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[37] Id, at 632.

snapshot, rather than the employers who came up with the idea of the subject (a photo of an Australian cricketer) and provided a photographer in their employ with appropriate equipment and materials, and the suggested location to take it. Because the registration of the employers as "authors" was invalid, their action against an alleged pirate failed.

Nottage v. Jackson (1883) was distinguished in a latter case *Melville v. Mirror of Life* [1895] 2 Ch. 531. In this case the "author" that was protected had not operated the photographic equipment. Rather his son operated the camera, arranged the subject and framed the overall shot. However the court suggested that because the party claiming authorship was on site and appeared to be in effective control of the shoot, this made the actual operator a mere "agent", the "principal photographer" being the party capable of assuming control of the process. Authorship was vested with reference to the intention of the parties, rather than through a strict interpretation of the significance of events.

These early cases failed to distinguish between the significance of taking the shot and developing a negative from which prints are taken. The 1862 Act had referred to the author of the "photograph or negative" without any explanation as to whether or not this should be read as meaning one and the same person. Nineteenth century cases such as *Melville v. Mirror of Life* [1895] simply assumed that ownership of the negative followed from the decision about authorship of the photograph, unless there was a formal agreement otherwise. Whilst this position appeared easy enough to work from, it wasn't. A great deal of photographic work was done on some kind of commission basis, and most of the copyright disputes involving photography centred on the question who should own the copyright in the absence of any formal agreement about it. It appears that often the industry practice was to seriously

consider copyright only once the negative had been developed when it was decided that the reproductive right might be worth something.[38]

When drafting the Australian copyright laws in 1905 the Commonwealth Parliament debated who should own what when a photograph was taken. The majority argued in line with the *Melville* case that, in the first instance, the photographer should own the negative, the copyright and the prints unless the operator is an employee in which case they belong to the principal (clause 39). However when the photograph was commissioned, for example where "a beauty orders her photograph and pays for it", it was decided that the prints and the copyright should belong to the customer. Accordingly the photographer could be prevented from multiplying copies or even from exposing them to public view in the shop. It was determined that in the absence of an alternate agreement the tangible property in the negative (the glass) still belonged to the photographer.[39] In later debates some members objected to this. Photography, it was argued, should not have a copyright at all -

> The difficulty is that so much of the work of producing a photograph is truly mechanical. For instance, the use of a fine lens will assist a photographer in a way that nothing else will.[40]

This objection was met by the claim that "success in photography can be obtained only through the application of brain power".[41] Whilst this reference was meant in the spirit of "art", so far as the Act accommodated the "rights" of

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[38] The first Kodak camera, factory loaded with a roll of film for 100 shots, was sold for $25 in the United States in 1888. The whole apparatus had to be returned to the factory to be re-loaded. It was superseded in 1900 by the first Brownie camera, which sold for only $1 using film that cost 15c. By 1905 there were an estimated 10,000,000 amateur photographers in the U.S.A and about 4,000,000 in the U.K. However even with the enormous growth in amateur photography brought about by the Brownie camera, it was still common to commission a portrait from a professional photographer throughout the first half of the twentieth century. See G. King, "You Press the Button. . . A short history of the snapshot" from his book, *Say "Cheese"! Looking at snapshots in a new way,* (New York: Dodd, Mead & Co, 1984) at 1-15.

[39] Parliamentary Debates, Session 1905, (Hansard) Volume XXVI at 2999-3000.

[40] Mr Conroy, Parliamentary Debates, Session 1905, (Hansard) Volume XXX at 7248.

[41] Mr Fisher, Ibid.

employers, "brain power" also involved the business sense in choosing a valuable photographic subject and the suitable employees and equipment to be engaged in taking the shot and developing the copies.

The wording with regard to the owner of photographic copyright was changed as copyright law was reformed throughout the twentieth century. For example, the 1911 Imperial Copyright Act, which allowed for reciprocal protection as independent legislation by a Dominion, enacted in Australia in 1912 out of respect for international copyright harmonisation,[42] provided for a copyright for "fifty years from the making of the original negative from which the photograph was directly or indirectly derived."[43] In case law, confusion tended to arise from this definition. When a commissioning party intends to purchase a specified number of prints a negative must be made. Must the customer pay for the material from which the negative is made? If they do so, do they automatically get the copyright along with it? Or does the photographer simply provide the negative as part of the service of reproducing a print? Does the customer or the photographer hold the copyright in the prints?

> MacKinnon J claimed in *Sasha Limited v. Stonesco* (1929)[44] -
> It was the sort of region in which though the words of the Act were quite plain it was extremely difficult to ascertain the application of the law to the facts. The case was an illustration of the fact that the terms of the simplest contracts which everyone entered into every day were the most difficult to ascertain, because they were made with the minimum of expression and the maximum of implication.[45]

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[42] See Parliamentary Debates, Session 1912, (Hansard) Volume LXIV at 1333-1339; Volume LXVII at 4509-4519.

[43] s21 *Copyright Act* 1911, (United Kingdom). One of the virtues of this provision was that it clarified the term of copyright for photographs "owned" by a corporation, silencing an objection raised in *Nottage v. Jackson* (1883) that employers could not own copyright, as they have no natural life against which the term for copyright could be measured.

[44] *Sasha Ltd v. Stonesco* (1929) 45 T.L.R. 350 (K.B.D.)

[45] Id, at 352.

In this case the courts distinguished two kinds of situations which led to the production of a negative. The first one was where "There might still be some persons so undistinguished that they resorted to a photographer without being invited. The contract in that almost hypothetical case was a request by the customer to do work by making a negative."[46] The intention would be that the customer pay for the negative even if they decided not to have any prints made. The judge concluded that because of this the customer would also be entitled to the copyright, although it was clear that he thought that the copyright in such photographs would be of little value. In the second situation where the photographer invited a party to sit and pose it was felt that although s/he might provide some "publicity" copies to the photographic subject, there was no way that the subject could be forced to pay for the negatives to be made. The photographer thus would retain both the negatives and the copyright.

In both situations the courts treated owning the tangible property in the negatives as necessarily leading to owning the copyright as well. This approach collapsed the distinction between owning the ordinary, tangible property in the negative and owning the intangible property of copyright. It appeared that copyright was almost decided by default, its significance camouflaged by discussion about the intent behind ill-defined labour and service contracts. Further it was not contemplated what would happen if a party other than the photographer developed the negatives or the prints.

This situation was readdressed when the Australian copyright laws were revised in 1968. For works prior to 1968 the emphasis on the significance of "making the negative" was altered to emphasise owning the material on

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[46] Ibid.

which the photograph was made.[47] This clarified the language of the statute in line with its reading in decided case law. However for works after 1968 the author of a photograph was defined as the person who "took" the photograph.[48]

This suggests a reversion to the position under the 1862 Act, with copyright again arising from the "original" moment of pushing the button, despite there being no expression in a form capable of being reproduced existing at that time. However the position is only superficially similar. There had been significant changes in our understanding of the technology that had developed in the intervening century.

At first the photographer was seen as a technician, a scribe rather than a poet.[49] This view was reflected in legal discussion that suggested that the picture was really made by the sun rather than the "author", and the suggestion that photography was so mechanical that copyright should not apply at all. However once the experience of photography had become commonplace it was understood that making the picture was not so mechanical -

> as people quickly discovered that nobody takes the same picture of the same thing, the supposition that cameras furnish an impersonal, objective image yielded to the fact that photographs are not only of what's there but of what an individual sees, not just a record but an evaluation of the world.[50]

It was also understood that this "evaluation" involved both "superintending the arrangement" and manipulating the device in order to give rise to the photographer's unique view. This understanding was reinforced by the advertising of the technology -

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[47] s208 Copyright Act 1968 (Cth).
[48] s10(1) Id.
[49] Susan Sontag, *On Photography,* (Harmondsworth: Penguin Books, reprinted 1984) at 88.
[50] Ibid.

It's hard to tell where you leave off

and the camera begins

Minolta 35mm SLR makes it almost effortless to capture the world around you. Or express the world within you. It feels comfortable in your hands. Your fingers fall into place naturally. Everything works so smoothly that the camera becomes a part of you. You never have to take your eye from the viewfinder to make adjustments. So you can concentrate on creating the picture . . . And you're free to probe the limits of your imagination with a Minolta. More than 40 lenses in the superbly crafted Rokkor-X and Minolta/Celtic systems let you bridge the distances or capture a spectacular "fisheye" panorama . . .

MINOLTA

When you are the camera and the camera is you.

-advertisement (1976)[51]

To award copyright to the "taker" of the photograph was to recognise that the skill involves both an aesthetic and a mechanical understanding and that it makes no sense to judge one as more important than the other.

The legislature's departure from consideration of the production of the negative does however create another problem. It treats the production of the negative and the printing of the photograph as less significant creative processes than the framing of the shot. It may make sense to overlook the production of the negative and the prints in the case of the amateur photographer who gets her/his photographs "mass" processed, however such works are not really the stuff of infringement actions. When it comes to professional photography -

> The vintage print is specified as one made "close to the aesthetic moment" - and thus an object made not only by the photographer himself, but produced, as well, contemporaneously with the taking of the image. This is of course a mechanical view of authorship - one that does not acknowledge that some photographers are less good printers than the printers they hire; or that years after the fact photographers re-edit and recrop older images, sometimes vastly improving them; or that it is possible to re-create old papers and old chemical compounds and thus to resurrect the look of the nineteenth century vintage print so that authenticity need not be a function of the history of technology.[52]

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[51] Id, at 186.

[52] Rosalind Krauss, *The Originality of the Avant Garde and Other Modernist Myths,* (Massachusetts: MIT Press, 1986) at 156.

Why does copyright overlook this reality? Why return to the emphasis on the "taking" of the shot? Beyond a failure to consider the differences that might arise between the case of the professional and the novice photographer, I think the appeal of the emphasis on the "taker" lies within copyright's desire to translate the work into a discourse that separates the "original" and the "copy".

Whilst the negative, as a singular and unique object capable of being reproduced can play the role of "the original expression", its place as an interim process frustrates such an association. Where did the image on the negative come from? That it comes from somewhere else detracts from its identification as "original". This leads one back to the "taker" of the image. But the taker of the image has not produced an expression that is in reproducible form. How can copyright overlook this reality?

Copyright can overlook the question of what it is that the photographer actually produces because it is understood that, unlike painting or drawing, the taker of a photograph is more a mediator of an experience that happened "out there" than the "original" source of an expression. The original already exists in the real world as a presence or as an event, the photographer "captures" it -

> A specific photograph, in effect, is never distinguished from its referent (what it represents) . . . By nature, the Photograph . . . has *something tautological about it*: a pipe, here, is always and intractably a pipe. It is as if the Photograph always carries its referent with itself . . .
> Whatever it grants to vision and whatever its manner, a photograph is always invisible: it is not it that we see.[53]

Whether the photograph serves an informative function or conjures affective relations, the assumption is that some central essence has been captured by the image and so recorded in time. This displaces the reality that at the time

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[53] Roland Barthes, *Camera Lucida. Reflections on Photography,* trans. R. Howard, (London: Jonathon Cape, 1981) at 5-6.

of taking, the image is yet to come into being. It also ignores that to make sense of the image one needs to draw upon a matrix of culturally specific suppositions -

> . . . if we accept the fundamental premise that information is the outcome of a culturally determined relationship, then we can no longer ascribe an intrinsic or universal meaning to the photographic image.
> But this particularly obstinate piece of bourgeois folklore - the claim for the intrinsic significance of the photograph - lies at the center of the established myth of photographic truth.[54]

Whilst no one subject really authors the "original", the photographer is constructed as the author of a universal expression, as the observer closest to the moment captured for all time.

By identifying the "taker" of the photograph as the owner of the copyright we allow for the orderly reproduction of that print. Whilst not the source of the original, the taker originates the reproductive process. S/he can "authorise" the reproduction of the "moment", perhaps subject to a service agreement with the producer of the negative or prints. Through this process photography is accommodated within the usual copyright dynamics - respect for the original "creator" and respect for the right to mass reproduce that work, subject to a license from the "creator".

It is worth noting here that photography quickly developed a "natural" association with book publishing -

> For many decades the book has been the most influential way of arranging (and usually miniaturising) photographs, thereby guaranteeing their longevity, if not mortality - photographs are fragile objects, easily torn or mislaid- and a wider public. The photograph in a book is, obviously, the image of an image, but since it is, to begin with, a printed, smooth object, a photograph loses much less of its essential quality when reproduced in a book than a painting does.[55]

This association reinforced the importance of the licence to reproduce works, the authorised copy differentiated from the unauthorised one by reference to

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[54] Allan Sekula, "On the invention of Photographic Meaning", from his book *Photography against the grain,* (Nova Scotia: Novia Scotia College of Art and Design, 1984) at 5.
[55] Sontag, supra n. 49 at 4.

contractual relations. Authenticity of a work can still be determined with reference to private property relations. It does not require a judgement of the nature of the work itself.

What we can conclude from this is that copyright deals with other kinds of works by translating their production techniques into the terms of the literary model. Rather than reappraising the utility of concepts such as the original author and the fixed expression, the courts and the legislature stretch the meaning of these concepts to new situations and production techniques. In this sense copyright doesn't try to discriminate amongst works, but rather strives to accommodate them, in copyright's own terms.[56]

Works of artistic craftsmanship

Given this generous attitude it is surprising that copyright has been unwilling to accommodate "works of artistic craftsmanship" on the same terms. For reasons that are not obvious[57] this sub-category of artistic works developed along a different path to all the other kinds of works. Works of artistic craftsmanship are required to reflect some aesthetic quality in order to be considered as "art". The work also has to present itself as the effort of a skilled artisan in order to be considered "craft". This means that "ownership" cannot be definitively determined simply by establishing that an expression has been created. There must be some independent consideration of both the

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[56] There are of course a few special provisions specific to artistic works. For example, when a portrait is commissioned s35(5) gives a kind of moral right to the taker of the photograph, or maker of the painting, drawing or engraving. This prevents the commissioner from holding copyright for other than the purpose made known at the time of the making of the contract. see Sam Ricketson, *Intellectual Property. Cases and Materials,* (Sydney: Butterworths, 1994) at paras [7.1.5-7.1.6]. There are also provisions relating to the "incidental use" of artistic works under ss65-7, see Ricketson at Figure 6.1 (p302).

[57] For a brief discussion see Sam Ricketson, Id at paras [4.2.36;4.2.38].

quality of the work seeking protection and of the skill in execution of the craft by the labourer.

At first glance it could be suggested that such a requirement was necessary in order to prevent a large number of manufactured products achieving copyright protection as works of "craftsmanship".[58] However the problem with this analysis is that it doesn't make a lot of sense in light of the minimal standard of "originality" necessary for other works. If Kalamazoo can copyright basic accounting forms as literary works, why must a work of artistic craftsmanship possess aesthetic value? Perhaps there is no answer to this, beyond a recognition of the way that copyright law reform has been conducted. The piecemeal approach taken by the various Parliaments increased the probability that the law would develop unevenly. Anomalies only appear when the whole institution is examined.

The question remains however, how do the courts determine aesthetic quality and who is a skilled artisan? Do the courts draw on romantic tenets in order to establish that a work is the "genuine" article? In this particular category of work, does this disable the identification of some artists' works as copyrightable?

The first thing to note is that the emphasis on craftsmanship sits uncomfortably with the romantic desire for "art". The court is looking for "a calling requiring special skill and knowledge especially a manual art".[59] Such a person is an artisan not a creator whose credentials are imagination and symbolic expression. However when it comes to the test of aesthetic quality,

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[58] There are other statutory provisions that also help to limit what commodities can be protected as copyright. See Jill McKeough & Andrew Stewart, *Intellectual Property in Australia,* (Sydney: Butterworths, 1991) at paras [1018-1021].

[59] *Cuisenaire v. Reed* [1963] VR 719 at 729.

the direction of the law changes. For as Walton J. explained in *Merlet v. Mothercare Plc* (1984)[60] - artistic craftsmanship is "a totally different matter" to the manufacture of "a durable, useful hand made object".[61] He noted that "artists (have) vocationally an aim and impact that differs from those of the ordinary run of humankind",[62] and suggested that art was the aesthetic appreciation of the object "in itself" -

> the article in question is to be judged on its own merits without any reference to what might be thought to be their natural place in the order of things.[63]

The appeal to the romantic distinction between art and industry followed the decision in an earlier case, *Burke & Margot Burke Ltd v. Spicers Dress Designs* [1936],[64] where it was suggested that -

> It must, however, be borne in mind that the meaning of the term "artistic" as indicated in the Oxford Dictionary is that which pertains to an artist. An artist is defined in the same dictionary as : "One who cultivates one of the fine arts in which the object is mainly to gratify the aesthetic emotion by perfection of execution whether in creation or representation". Does a designer who herself designs and makes a frock cultivate one of the fine arts in which the object is mainly to gratify the aesthetic emotions by perfection of execution whether in creation or representation? A possible view is that what she does is merely to bring a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding that even a lady who designs and executes a beautiful frock is necessarily the *author* of an original work of artistic craftsmanship.[65]

In arguing that art is durable, timeless and transcends its functional context the courts are clearly adopting some central tenets of romantic thought. The enigma this formulation leaves in its wake is - what is the point of allowing for the right to *mass* reproduce works of artistic craftsmanship, if such objects are not designed to be commodities but are intentionally produced as "objects in themself"?

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[60] *Merlet v Mothercare Plc* (1984) 2 IPR 456.

[61] Citing *George Hensher Ltd v Restawile Upholstery (Lancs)* [1975] AC 64; 2 All ER 420; [1975] RPC 31 in *Merlet v Mothercare*, Id, at 460.

[62] *Hensher*, Id, at 464.

[63] Id, at 463.

[64] *Burke & Margot Burke Ltd v Spicers Dress Designs* [1936] Ch. 400.

[65] Id, at 408-409. (my italics).

The sub-category "works of artistic craftsmanship" seems to possess its own unique version of the literary production formula. What is first required is an "original" object - a unique work that reflects both an artisan's skill and an artist's vision. Once this solitary expression has been identified, a reproductive right can arise. Unlike other categories of works commercial considerations must not have borne on the decision to produce in the first instance, because that motivation would compromise the claim that the work is in fact a work of art. The seriality of motivations matters here, because that is what is seen to protect the courts from having to make their own determination of the qualities of the work.

By deferring to the question of "original motivation" the court can deflect responsibility for judging the expression as a work of art. In *Merlet v Mothercare Plc* Walton J considered that such a determination would be "impermissible" -

> . . . it is not for the court to make a value judgment: the question is primarily the intention of the artist-craftsman. If his intention was to create a work of art and he has not manifestly failed in that intent, that is all that is required.[66]

It is the artist himself who suggests the answer to the inquiry *is this a work of art?* This allows the court to "judge" aesthetic quality without actually forming a judgement about the merit of the work. The "objectivity" of the court remains intact.

Is the sub-category "works of artistic craftsmanship" gendered?

The need to identify an "original" object, one that can be "judged on its own merits without any reference to what might be thought to be their natural place in the order of things"[67] creates problems for some kinds of artistic endeavours.

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[66] Ibid.

[67] Id, at 463.

This is clear from the case *Komesaroff v. Mickle* [1988].[68] Komesaroff was recognised by the court as having produced aesthetically pleasing "moving sand pictures". She intended that the works would be "pleasing to the eye",[69] and selected the substances that would be displayed between the glass panels with this in mind. The problem was that the pictures that resulted from her endeavour "var(ied) from occasion to occasion. They are not produced by any human hand, but are produced by the operation of forces acting in the confines of the product to bring about unpredictable results."[70] Because ". . . her action does not directly bring about the spectacles which result from adjustment of the position of the product . . ." the product is not a work of artistic craftsmanship.[71]

This brings to mind to the objections once levelled at the case for photographic copyright. Science and chance were perceived to have superintended the display, rather than the "artist". The work fails to stand outside of the realm of "natural" forces. Because of this she cannot be an artist, even though she may believe that she is. This determination is again presented as one of fact - it was the failure to produce a fixed expression that lost the case, not judicial pretensions about what constitutes a work of art.

That "it is necessary for copyright not to have 'changing materials' that are 'lacking in certainty' or 'unity'"[72] is, on one level, gender neutral. On this ground copyright has been denied to football games[73] as well as to moving

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68 *Komesaroff v. Mickle* [1988] RPC 204. (Vic SC).
69 Id, at 210.
70 Ibid.
71 Ibid.
72 *FWS Joint Sports Claimants v. Copyright Board* (1991) 36 CPR (3d) 483 at 490. I would like to thank David Vaver for this reference.
73 Ibid.

sand pictures. However this formulation is not gender neutral because of the consequences that flow from its emphasis on "non-natural" production. This criterion seriously disables the identification of women's "craft" as works of *artistic* craftsmanship.

The problem arises because of the way that women's "art" was reclassified in the Renaissance -

> The contemporary practice of distinguishing between the fine arts and the crafts originated in the reclassifying of painting, sculpture and architecture as liberal arts during the Renaissance. The general exclusion of women from highly professionalised forms of art production like painting and sculpture, and the involvement of large numbers of women in craft production since the Renaissance, have solidified a hierarchical ordering of the visual arts.[74]

Whilst both men and women were involved in guild production in the monasteries, particularly from the eighteenth century onwards there was a rewriting of the significance of women's labour. The transformation is well illustrated by the myth that developed in the eighteenth century surrounding the Bayeux Tapestry "which was said to have been stitched by Queen Mathilda, William the Conqueror's wife, and her ladies"[75] -

> The work has sometimes been cited as an example of feminine creation of a work of art within the happy circle of domesticity, albeit at a royal level. It now appears that the work was done by a community of workers both male and female and was commissioned by Bishop Odo, William's half-brother, for the Cathedral at Bayeux from a professional workshop, probably in Canterbury.[76]

In claiming craft as "domestic" production, produced by women in the home and for the home, such works never appear as "self-referential" objects. Their referent is always the "wife" or "mother" whose intention is circumscribed by her domesticity.

The discriminatory implications of this can be seen from the treatment of "Madam" Merlet's work in *Merlet v. Mothercare Plc.* Rather than begin the

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[74] Chadwick, as quoted in Shelley Wright, "A Feminist Exploration of the Legal Protection of Art", (1994) 7 *Canadian Journal of Women and the Law,* forthcoming.

[75] Wright, Ibid.

[76] Ibid.

inquiry with a discussion of her "art" the case began on another foot. It began with a homily about virtuous motherhood -

> One summer, when enjoying the climate in the south of France, she bethought herself that she would shortly be visiting her mother in the Highlands of Scotland, and that it would be very convenient if she was able to shield her son from the rigours of that climatic position by means of a suitable form of cape. So she set to, with materials which she had readily to hand, and produced a suitable garment.[77]

Throughout the judgement Walton J was preoccupied with explaining her work in the context of its "personal" significance -

> . . . She was consciously aiming for something which looked nice, because it was for her own use: at that stage she there was no commercial purposes in her mind.[78]
>
> . . . *it appears to me . . . What she had in mind . . . was the utilitarian consideration of* creating a barrier between the assumed rigours of a Highland summer and her baby in such a manner as to afford him complete protection, safely cocooned next to her warm body, in a stylish and attractive shape.[79]

In copyright Merlet's nurturing of a small child came to conclusively define the significance of the work. The case not only abstracted and elevated "art" to a pure space above the sphere of social production, treating art and commerce as mutually exclusive pursuits. Beyond this it located the sphere of private reproduction as "naturally" prior and subordinate to both these spheres. Merlet failed in her action not only because of the status of art compared to that of "craft" but also because of the status of commerce, when compared with that of "women's work". The ascription of "wife" and "mother" to Merlet spelt her different treatment by the copyright regime. It meant that she was not and could not be an artist and that she was not and could not be a "real" producer. Presumably her economic interests were to be "taken care of" by her husband, the father of the small child.

Copyright tries to accommodate all comers. However when it comes to works of artistic craftsmanship it disadvantages women who choose to maintain artistic traditions that have come to be identified as "craft". Despite

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[77] *Merlet v Mothercare Plc,* supra n. 60 at 457.
[78] Id, at 458.
[79] Id, at 465.

going to great lengths to minimise the scope for value judgements, the courts fail to achieve neutrality because the definition of art they rely upon is gendered. It is derived from a patriarchal perspective popularised in the Renaissance and revised in modernity.

What is the significance of the judicial construction of authorship?

The courts let romantic concerns influence how they conduct their inquiries. That this occurred should be no surprise. We have to expect that contemporary movements would influence the court in some way since judges, lawyers and other court officials could not remain unaffected by such developments occurring in their society. A romantic heritage can be seen in the judicial emphases that emerged, in the judicial denials of such ideals, by the application of romantic terminology and by the adoption of romantic notions as if they were "common sense". Though its influence was uneven, romantic philosophy affected who could address the law and under what conditions.

It is interesting to note that both the judicial and the Parliamentary treatment of authorship involved the accommodatation of romanticism without an explicit acknowledgement of that agenda. However the judicial treatment of the subject has further reaching implications than the Parliamentary case. Parliaments are answerable for policies through the ballot box regardless of the actual degree of responsibility taken for a particular policy's formulation or administration. We expect such policies to change over time. In late twentieth century consumer society much of the nineteenth century's elite concerns over "British good taste" seems quaint, particularly from an Australian perspective.

However with judge-made law, whilst decisions can be identified with a particular judge, s/he always represents *the law,* rather than her/his personal point of view. So when romantic values permeate the law no-one is responsible for them. In fact in the majority of the cases I have discussed the judges refused to acknowledge the existence of a space for any ongoing determination of cultural values. The judges stress *continuity* not change. Continuity with the Anglo tradition means that *the law* transcends particular judges, particular courts and even national jurisdictions.

An overview of copyright's history shows that individuals have always had diverse views about the purpose and merit of copyright. Copyright law comes from this history of struggle over its meaning. But at the same time, because copyright is a legal institution whose meaning is authoritatively determined by the courts, copyright is comprised of more than a history of individual disputes. Its destiny is directed and redirected by the courts with every decision they make, whether that be by the making of a "landmark" decision, or by a seemingly uncontroversial affirmation of "old" copyright values at this point in time.

Whilst we live in a constantly changing society, comprised of many different social agendas and persistent attempts to redefine our relations with others, *the law* is indifferent to these endeavours. Even though it may be slowly swept along with a dominant trend, as was the case in the nineteenth century, it is disturbing that *the law's* accommodation of social transformations is so haphazard.

At the individual case level there is some scope for flexibility. Cases can be classified in ways that avoid a socially unacceptable result. By this means a crisis of confidence about the relevance of the judiciary may be forestalled.

But it is difficult to recast the overall direction of the institution without generating hostility from the established interests that could be adversely affected by change. The foundations of copyright, as traditionally "evolved", may need to be recast so that the law can be seen to be more inclusive of contemporary social relations. However the question remains whether the law is capable of opening up to more diverse interests. Given the present lack of recognition that copyright actually requires value judgements, one cannot be too optimistic about this possibility.

Chapter Seven: An historical reading of contemporary challenges to copyright

This final chapter looks at postmodern[1] and postindustrial[2] perspectives of copyright and argues that what these perspectives offer is a challenge of a completely different order to that which copyright has encountered at any other point in its history. In the past there have been disputes about what the appropriate normative content of copyright law should be. There have been many battles over whose turf copyright really is. Was it for authors or was it for publishers? If it was for authors, which authors? If it was for publishers, likewise which publishers? However what no-one really disputed was the capacity of the legislature or the courts to deal with the problem. There was confidence in the ability of our law-making institutions to fashion a resolution to disputes. It was such trust in the possibility of authoritative law-making that inspired passionate protest about the wrongfulness of particular decisions and

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[1] Broadly speaking postmodernism is a theory and a practice. Addressing it as a theory, writers focus on the control of information and knowledge in a mass consumer society. They are critical of the way that western culture produces knowledge, arguing that we inappropriately privilege the role of "creator" of knowledge. As a practice postmodernism relies upon deconstructing the "truth" of cultural elites. Deconstruction relies heavily upon "quotation" from important texts, images and music. Quotes that seem to represent core values of the creator are "appropriated" to a new work and re-evaluated in it, with a view to revealing the "taken for granted" part, and in so doing identifying the preconditions that make the work something of value or significance. Or to put it another way, the new work tries to undermine the authority of the quote by exposing the particularity of the values represented in it. It is argued that this practice of subverting the power of the authoritative message creates a space in which new and diverse meanings can develop. For a more detailed discussion see Chapter 1, "Defining the post-modern", in Margaret A. Rose, *The post-modern and the post-industrial. A critical analysis,* (Cambridge: Cambridge University Press, 1991).

[2] Postindustrialism refers to the dominant interests and economies of a society involving complex interactions and varied knowledges and activities, primarily involving information rather than tangible goods. For a more detailed discussion see Chapter 2, "Defining the post-industrial", Id.

compromises that were constructed. When the law disappointed, what was desired was more enlightened reform.

Whilst postmodern and postindustrial critics offer diverse analyses of our current society[3] what they share is a lack of confidence in a generalist copyright law that can deal with both established practices and forms *and* contemporary practices and new media forms. It is argued that copyright has developed to navigate a different terrain from that which now presents itself. Because of this it cannot go much further forward. It is claimed that in the few cases where there have been attempts to stretch its limits, the answers cause as many problems as they solve. Discontent is no longer focused upon the appropriate normative content of copyright. It focuses on the damage caused by maintaining the regime - damage assessed with reference to copyright's role in maintaining social and political inequalities and/or frustrating economic advancement.

An historical reading of copyright suggests that a departure from a generalist approach to copyright law is unlikely. Though copyright was specifically designed to deal with a particular media form, i.e. the book, the trend has always been to open up that model to meet new comers. New media has always had to account for itself in terms of what copyright requires, rather than have copyright develop to deal with real diversity. This heritage has led to a confining of the way we think about copyright and the interests that it serves. The fear is that we now lack the ability to deal with copyright more creatively.

Some argue that the private boundaries copyright has established should be opened up - the space that copyright guards should be returned to the

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[3] It is for this reason that it takes Margaret Rose two chapters to broadly define the terms.

common. However this radical stance is unlikely to be supported. It goes against the grain of copyright's history and it directly confronts the established role of the court as protector of private rights. We should expect our legal institutions to continue to attempt to adapt new media practices and forms to the established law. However at the same time we cannot expect that contemporary copyright critics will be appeased by this stance. We should be prepared for the destiny of copyright to remain hotly contested.

Copyright and contemporary artistic practices

Copyright is a part of the "art" world in the sense that it forms part of the milieu in which contemporary artists position themselves. But artists are presented with a choice in how they position themselves, in relation to their works and to copyright.

Particularly since the early 1980's postmodern artists have been creating new artistic genres. These genres are at least partly based upon a confrontation with issues raised by copyright - Who "owns" a work? What does it mean to "reproduce" a work? How do reproductive rights affect the way others access the work? Does copyright limit free speech? How does it impact upon the way we see ourselves? In dealing with these issues artists "appropriate" the images of others and incorporate them into new works with new contexts. For example, Barbara Kruger's artistic practice involves montage, based upon the photographs of others. David Salle paints reproductions of appropriated images. Sherrie Levine rephotographs images of other well known works. Jeff Koons makes sculptures based upon others'

images. The New York "painter" Mark Kostabi claims authorship over art which is created by other artists whom he pays.[4]

Because the "art world" has recognised these new methods of expression as legitimate art forms,[5] these practices are breaking down the traditional categorisation of "art" into painting, photography, sculpture etc. Contemporary art practices may incorporate many media forms, and they may rely upon technology such as digital sampling, eg. "computer art" and "sound sculpture".[6] The new art genres are not skills and practice specific but are delineated by their conceptual positions - one of those taken into consideration being direct confrontation with copyright issues.

Copyright classifies works in terms of established media forms. It is thus worth exploring how it deals with these new forms and practices. Does copyright law redefine the significance of these kinds of works? Does the law resist changes in artistic practice?

For this purpose I intend to focus on the copyright implications of the works of just two postmodern artists - Sherrie Levine and Jeff Koons. These artists represent two similar, yet distinct, postmodern interventions that challenge the copyright system. The approaches are similar in that both acknowledge the foundational role law plays in structuring and interacting

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[4] For a discussion of these practices see Benjamin Buchloh, "Parody and Appropriation in Francis Picabia, Pop and Polke", (1982) 20 *Artforum*, No 7 at 28; Benjamin Buchloh, "Allegorical Procedures: Appropriation and Montage in Contemporary Art", (1982) 21 *Artforum*, No 1 at 43; Martha Buskirk, "Commodification as Censor: Copyrights and Fair Use", 60 *October*, Spring 1992 at 83; John Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law", (1988) *Columbia-VLA Journal of Law and the Arts*, Vol 13 at 103 and Elizabeth Wang, "(Re)Productive Rights: Copyright and the Postmodern Artist", (1990) *Columbia-VLA Journal of Law and the Arts*, Vol 14 at 261.

[5] See Hal Foster, "Against Pluralism", in his book *Recodings. Art, Spectacle, Cultural Politics*, (Washington: Bay Press, 1985).

[6] This is one of the most interesting developments in that it involves artists none of whose practice has any relationship with traditional art media.

with social relations. They both address how copyright law constructs "legitimate" and "illegitimate" artistic practices. However they are also radically distinct in their response to copyright law. Levine's strategy involves problematising the role of art and its relationship with law by exposing the historical and philosophical specificity of this front. To do this she "infringes" the copyright of others. However she has attempted to negotiate around litigation by seeking permission from copyright holders. Koons, on the other hand, directly confronts copyright by refusing to respect its authority. As a successful artist deliberately appropriating the work of others, without seeking permission or paying for the privilege, he has come to judicial attention. The court has expressed alarm over the implications of his practice upon the "order" of civil society. However as confrontation is part of Koons' artistic process, judicial disapproval is unlikely to "resolve" the dispute.

Koons' and Levine's different approaches have had different impacts upon copyright law. A comparison of the two thus allows one to consider the "flexibility" of the existing regime, based not only upon an understanding of "the law" as it is enforced, but also of the decorum the system expects artists to observe.

Sherrie Levine's *Pictures*

Sherrie Levine is a feminist artist who began exhibiting and performing works in New York in the early 1970's. Her participation in the 1977 *Pictures* exhibition at the Artist's Space, New York generated mainstream critical attention and in that sense signified the "arrival" of postmodern artistic practices. Whilst she has worked with a number of media, it is her work with photography that I want to discuss here.

Levine uses photography amongst other media, to explore the historical specificity of the concepts of originality and authorship. Photography was problematic from the perspective of "art" for the same reason that it was problematic as "copyright". The photograph's mechanical reproducibility challenged its claim to be original art -

> Mediums that are inherently multiple - like photography - test the notion of authenticity - for to ask for the "authentic" print makes no sense - there are only multiples in the absence of an original.[7]

"Photography as art" must suppress the specific material conditions of its production that distinguish it from painting. Thus to re-controversialise photography reminds us of its recent transition from a reproductive technique or craft of value to industry, to its status as original art.

Her photographic works point to the reason for this - it uncontroversially circulates as "art" in the twentieth century because the issue *how works are produced and reproduced*, has been subjugated to the question of authorial intention. Levine illustrates this by re-photographing the famous photographs of others, and displaying them as original art. This practice brings forth a dilemma. We recognise the works as the works of others, and if we don't the titles *After Walker Evans, After Edward Weston, After Franz Marc* tells us who the "original" artist was. But it is also clear that her artistic intention must be different. She has chosen to represent the works, but she has chosen not to change them -

> So persuasively did Levine's project insist on the inadequacy of traditional formal and iconographical methods of analysis in deciphering its meaning few people even bothered to look inside the frames to consider what she was rephotographing. Pleasant though it was to be in the room with the photographs that comprised *After Walker Evans* it did seem embarrassing to be caught looking at them too closely. As initiates had concluded, the meaning of Levine's curiously covert art had to lie elsewhere beyond the frames of these pictures, perhaps in the circumstances of their exhibition.[8]

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[7] Rosalind Krauss, *The Originality of the Avant Garde and Other Modernist Myths*, (Massachusetts: MIT Press, 1986), at 156.

[8] D. Deitcher, "Sherrie Levine: Rules of the Game", in *Sherrie Levine*, (Zurich: Kunsthalle, 1992), at 9.

In "Levine's" works the meaning cannot comfortably rest with her intention, her creative personality. -

> To the degree that the various sources and authors of "quoted texts" are left intact and fully identifiable in truly contemporary montage, the viewer encounters a decentralized text that completes itself through his or her reading and comparison of the original and subsequent layers of meaning that the text/image has acquired.[9]
>
> It involves the presentation of an event in such a manner and at such a distance that it is apprehended as representation - representation not as *re*-presentation of that which is prior, but as the unavoidable condition of intelligibility of even that which is present.[10]

This playing with the notion of the original work restores the artist to art history by reminding us that Levine is in fact *after* Walker Evans, *after* Edward Weston, *after* Franz Marc and that their "originality" in turn, follows other artistic traditions.

Levine's approach places her directly in conflict with copyright law. Copyright law promptly restores the images to the "original author" or his assignee. To copyright, the way Levine positions herself in relation to "her" work is irrelevant. According to the law the images belong to Weston, for example, or rather to his estate. Levine is free to "copy" the ideas present in the work, but she cannot appropriate his very expression of those ideas. In this case she can copy the composition or style of the work derived from the nude male in classical sculpture. But what she cannot appropriate is Weston's presentation of this style, his photograph of his son.[11]

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[9] Benjamin Buchloh, "Allegorical Procedures: Appropriation and Montage in Contemporary Art", in (1982) 21 *Artforum*, No 1 at 52.

[10] Douglas Crimp, "Pictures", (1978) 8 *October* at 77.

[11] The nude subject in the case being both literally and figuratively Weston's son. Apart from appropriating Weston's "son" Levine appropriates other imagery that also attest to a feminist context. As Craig Owens says "Her purloined images have invariably been emblematic, allegorical; Levine does not represent women, the poor, or landscapes, but Women, Poverty, Nature. She is not, however, primarily interested in these subject per se, but in images of them. This is the primary motive behind her strategy of appropriation: she does not photograph women or landscapes but pictures of them, for we can approach such subjects, Levine believes, only through their cultural representation." from "Sherrie Levine at A & M Artworks", in Craig Owens, *Beyond Recognition. Representation, Power and Culture,* edited by S. Bryson, B. Kruger, L. Tillman and J. Weinstock, (Berkeley: University of California Press, 1992) at 115.

In this sense Levine shows that copyright's reliance on "original" representation is a misnomer -

> It is only in the *absence* of the original that representation may take place. And representation takes place because it is always already there in the world *as* representation . . . The a priori Weston had in mind was not really in his mind at all; it was in the world and Weston only copied it.[12]

Weston's expression was not unique or original, but derived its meaning from the idea or style in which it followed. But if the idea/expression dichotomy is not, as is often thought, a distinction of originality, from where does it derive its meaning? What is it that delineates the idea, free to appropriate, from the expression which is unobtainable?

Krauss suggests that -

> the concept of style is a product of the way style is conceived as having been generated: that is, collectively and unconsciously . . .[13]

If this is so, it suggests that copyright's idea/expression dichotomy derives its meaning from the absence or presence of a private property relation. Its limit derives from an understanding of the relations of production that devalues collective efforts, not from a distinction found within the work itself.

To allow Levine to address Weston's idea but not his expression simply means that the artist is free to investigate the form of the visual representation, but she is prohibited from addressing the relational aspects of the work - its position to its subject, its place in time and history. Accordingly Levine's appropriation of Weston's "son" not only problematises the way art has been historically constructed. It also shows that it is the power, located in copyright and upheld in court, to inscribe the image as Weston's "property" that closes the possibilities for an inquiry into this construction. Through the institution of

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[12] Douglas Crimp, "The Photographic Activity of Postmodernism", (1980) 15 *October* at 99. (my italics)

[13] Krauss, supra n.7 at 157.

copyright the personal and subjective aspects that contribute to a work are elevated - the work is given to Weston - and the collective and intersubjective dimensions that give the work its context are devalued.

> How does this affect our ability to address the politics of representation? -
> We are accustomed to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations. We are used to thinking that the author is so different from all other men, and so transcendent with regard to all languages that, as soon as he speaks, meaning begins to proliferate, to proliferate indefinitely.
> The truth is quite the contrary: The author is not an indefinite source of significations which fill a work; the author does not precede the works; he is a certain functional principle by which, in our culture, one limits, excludes and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition and recomposition of fiction. In fact, if we are accustomed to presenting the author as genius, as a perpetual surging of invention, it is because, in reality, we make him function in exactly the opposite fashion. One can say that the author is an ideological product, since we represent him as the opposite of his historically real function. The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning.[14]

We defer to the author to tell us what the meaning of a work is, rather than take on the responsibility for developing our own meaning. Copyright works in a similar fashion. Rather than engage in a discussion about what kinds of transgressions, what uses of prior works might be permissible, we leave that to the "owner". S/he is given the right of custodianship of meaning. Once this occurs our latitude to access these works, on our own terms, is subject to their fancy. Questions about how meaning is represented, how we are represented in imagery, can be stifled by the copyright owner.[15]

It should not be assumed that just because this power exists that it will necessarily be exercised by the copyright holder. As noted above, Levine's confrontation with copyright has apparently proceeded without her being

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[14] Michel Foucault, "What is an author?", in *The Foucault Reader*, edited by P. Rabinow, (New York: Pantheon Books, 1984) at 118.

[15] This perspective is similar to that of Rosemary Coombe. see "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue", *Texas Law Review*, Vol 69, (1991) at 1853.

sued over appropriation of copyright images. As Rauschenberg and Warhol did before her, she appears to have been able to settle any disputes she had outside of the precinct of the court.[16] But what Levine asks is why we must engage with works on these terms, on the owner's terms, whether those terms be strict or generous? These terms prevent us from addressing some fundamental questions about cultural meaning and its production.

By using imagery in which the copyright term has seemingly expired and by keeping her negotiations with copyright owners strictly private, Levine makes it clear that her target is the artistic and legal construction of *the* artist. It is not necessarily any particular artist. Despite her quite critical viewing of works, her practice still demonstrates respect for the artist's endeavour to represent a meaningful work. This is one matter in which her practice is quite different to that of Jeff Koons. For whereas Levine's work is predicated on the assumption that copyright cannot accommodate her practice even though an individual copyright owner's might, Koons' practice is deliberately much more confronting to both the system and the individual artist.

Jeff Koons' *String of Puppies*

Koons' installations were exhibited in the early 1980's in New York and in 1986 art critics developed the concept of "Neo-Geo" for his genre of postmodern works. In distinction to the "Pictures" artists, who appropriated imagery questioning their own position as producers of art, the "Neo-Geo" artists utilised objects or commodity sculpture, complicit in a process of producing seductive, bourgeois objects.

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[16] See Buskirk, supra n.4 at 100ff. It is interesting to note that part of Rauschenberg's 1974 settlement with the photographer Morton Beebe was an agreement that when Beebe's work was reproduced it would be accompanied by the statement that "the image of the Diver in *Pull* is after a photograph by Morton Beebe".

Koons displays "kitsch" as "art" in order to -

> . . . forc(e) the patrons of contemporary art to acknowledge the vast reserves of power secreted in goods, colors, shapes, images, textures and texts that comprise the normal, yet unmediated existence of working and middle class citizens of post-industrial societies.[17]

He argues that -

> Art lacks charisma. I try to create *charisma* through materialism and I try to manipulate an audience and I try to control this environment and their sensations . . . I'm disillusioned with art. It doesn't have a place. People don't believe in it.[18]

Whilst Koons' work is addressed to the "art world" and its uncharismatic productions, Koons suggests that his "real" audience is not the "art" community, but rather the bourgeois masses who are alienated by the preoccupations of Modern art.[19]

Koons argues that contemporary art is not made to reflect the interests and concerns of the public at large. To Koons, kitsch better encapsulates the "art needs" of the community. His *Banality* exhibition was an example of "art" designed to suit the tastes of the masses -

> *Banality* [1988 exhibition] was about communicating to the bourgeois class. I wanted to remove their guilt and shame about the banality that motivates them and which they respond to.
>
> . . . And I wanted to remove their guilt and shame so that they can embrace what motivates them and what they respond to - to embrace their own history so that they can move on and actually create a new upper class instead of having culture debase them. And they would start to respond to or have beliefs in things that they have truly experienced, what their own history actually is.[20]

Koons' art offered moral leadership to the masses following the "High Priest" tradition of Michelangelo, Milton and the romantics. This rôle brought him into conflict with the law of copyright, because the "kitsch" images Koons chose in order to "cleanse" the masses were owned by other artists.

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17 Dan Cameron, "Art and its Double. A New York Perspective", in (1987) 134 *Flash Art* at 67.

18 "Jeff Koons - Anthony Haden-Guest Interview", in *Jeff Koons,* (Cologne: Muthesius A. Benedikt Taschen, 1992) at 26. (my italics).

19 He says that "For me, the issue of being able to capture a general audience and also have the art stay on the highest orders is of great interest. I think anyone can come to my work from the general culture." "Flash Art Panel. From Criticism to Complicity", in (1986) 129 *Flash Art* at 47.

20 "Jeff Koons - Anthony Haden-Guest Interview", supra n.18 at 28.

In order to elevate kitsch, an image must be re-presented so it functions as "art", and at the same time remain instantly recognisable as "original kitsch". Recognition of the work's mass proliferation must obliterate the possibility of any sense of the image as "original art". It this sense the work must not be seen as "after" a particular artist at all. That kind of personal identification would obliterate the work's significance as kitsch.[21] The works must be the kind of object commonly bought by the masses, not as "art" and read intellectually with reference to authorial intention, but purchased as personal mementoes and responded to emotionally. And then they can be "real" art - their facelessness allowing the viewer to inscribe whatever personal meaning upon them that they choose.

The "artistic work" that led to the copyright infringement action arising out of the *Banality* exhibition was a postcard of a couple holding some puppies that Koons picked up in a gift shop. He claimed he decided to use it as the foundation for a work, *String of Puppies* because -

> he viewed the picture as part of the mass culture - "resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people".[22]

Koons said that "after buying the card, he tore off that portion showing Rogers' copyright of *Puppies*."[23] He claimed the right to do so because -

> The way I look at it is that all visual imagery should be available to the artist. . . . When visual imagery gets copyrighted, it is taking away a vocabulary not only from the artist but the total public.[24]

He commissioned some Italian sculptors to make a life-size object "just like (in) the photo".[25] The scale of the object and its display, amongst like others,

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[21] Arguably this makes the possibility of negotiating for access to images much more difficult to conduct.

[22] *Rogers v. Koons* 960 F.2d 301 (2nd Cir 1992) at 305.

[23] Ibid.

[24] "Jeff Koons - Anthony Haden-Guest Interview", supra n.18 at 35.

[25] *Rogers v. Koons* supra n.22 at 305.

in a reputable New York art gallery would allow the works to be perceived by the public as both works of kitsch and as legitimate works of art.

Koons' practice involved deliberately infringing the copyright of other "artists", and whilst Art Rogers has not been the only one to sue, this is the best known of Koons' legal encounters. Koons defended his case on the grounds that the part of Rogers' work he used was not an original work of art. What he took was a representation of "kitsch', which by its very nature is unoriginal and impersonal. However the court found that -

> the quantity of originality that need be shown is modest - only a dash of it will do . . . Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. To the extent that these factors are involved, *Puppies* is the product of plaintiff's artistic creation.[26]

It was Roger's intention to photograph *Puppies* that defined it as "art". How the work circulated and was valued in the community was irrelevant to the court.

Koons also argued that his use of Rogers' work was a "fair use" as permitted under §107 of the U.S. *Copyright Act* (1976), in particular because his use was "a satire or parody of society at large". However whilst the court affirmed that parody was "a valued form of criticism to be encouraged because this sort of criticism fosters the creativity protected by the copyright law",[27] they agreed with the District Court that Koons' *String of Puppies* did not involve a fair use of *Puppies*. *String of Puppies* was "a parody of modern society" and this kind of parody did not "conjure up the original work".[28] This last requirement was stressed as important because -

> . . .We think this is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of another's copyrighted statement on some aspect of society at large.

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[26] Id, at 307.
[27] Id, at 310.
[28] Ibid.

. . . The rule's function is to insure that credit is given where credit is due. [29]

Apart from this ground for rejecting the defence of "fair use", the court concluded that "Koons' copying of the photograph *Puppies* was done in bad faith, primarily for profit-making motives".[30] They found that "there is simply nothing in the record to support a view that Koons produced *String of Puppies* for anything other than sale as high-priced art".[31]

The true meaning of parody & giving "due credit" - 2 Live Crew's *Pretty Woman*

It is worth comparing this court's extremely negative view of Koons' "parody of society" to the judicial treatment of another parody by the band 2 Live Crew, dating from a year earlier. 2 Live Crew's parody involved Roy Orbison's musical hit "Pretty Woman" and although "2 Live Crew's primary goal . . . (was) to sell its music, that finding 'does not necessarily negate a fair use determination'".[32] In assessing the parody of the song the court concluded that "2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them".[33] It seems that both the works by Koons and 2 Live Crew had similar artistic and commercial motivations, therefore the question arises why was one allowed and the other not?

It would be tempting to presume that the answer lies in 2 Live Crew's decision not to exactly reproduce the original work. However it should be remembered that Koons' work was not really identical to Rogers'. Apart from there being a translation of a 2D image to a 3D medium of a completely

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[29] Ibid.
[30] Ibid.
[31] Id, at 312.
[32] *Acuff-Rose Inc v. Luther Campbell and others* 754 F-Supp. 1150 (M.D. Tenn. 1991) at 1154.
[33] Id, at 1155.

different scale, the sculpture was in colour, whereas the photograph was in black and white.

Perhaps the difference lies with "credit (being) given where credit was due", for when the parody of the song was released, a credit was given to Orbison and Dees as authors and Acuff-Rose as publishers.[34] However the problem with this explanation is that when 2 Live Crew's management approached the company seeking a licence to use the song in 1989, Acuff-Rose refused. Despite receiving this notice 2 Live Crew released its version and they deposited into the Court $13,867 maintaining it was due to Acuff-Rose for the use of the song.[35] If 2 Live Crew, or rather their management, showed "credit" in this case, it was equated with dollars and cents. It was clearly not "credit" in the sense of *respect* for the copyright owners' wishes.

Beyond the probability that different "humours" operate in different courts, the most obvious difference between the two cases hinges on the artists' attitudes to the right to appropriate the work of others. Koons aggressively asserted his "right" to appropriate - ripping the © symbol from the postcard. 2 Live Crew's management requested permission to use the work, and had the foresight to prove their "good faith" by setting a fee aside for that use. Although when the courts spoke about the need for "credit" they couched it in terms of respect for the "artist" and her/his assignee, it seems what they were really looking for was respect for the orderly commercial reproduction of works.

If this is so, Koons' real transgression was that his challenge was not just to Rogers, or to "modern society". In ripping off © he was challenging the

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[34] Acuff-Rose were assigned the rights in the song the year it was written.

[35] *Acuff-Rose Inc v. Luther Campbell and others* supra n.32 at 1152.

court's role in overseeing the orderly process of mass reproduction. This was a real "anti-establishment" act and the court failed to find it amusing.[36]

Nevertheless it seems that despite the negative court outcome Koons might be the one to have the last laugh. The case has generated a great deal of mainstream discussion about Koons and all his works and even those who seem uncomfortable with his attitude, have found themselves pushed into criticising the court for its failure to understand and accommodate legitimate postmodern artistic practices.[37] As an artist who has said that he judges success in terms of T.V. chat-show appearances, so long as the legal interventions are well publicised he can't lose. Even when he loses the legal point, in his terms, the notoriety increases his artistic success.[38] One way of looking at it is that in taking on Koons, all that the courts have been doing is contributing to his "self-production" as the avant-garde postmodern celebrity of the moment.

Postmodern artists have been confronting copyright to highlight political and personal points about its limitations. Copyright is seen to reflect the preoccupations and concerns of an earlier age of art. It marks artistic expressions outside of *the* established tradition as illegitimate, seemingly unaware that from the "art world" perspective the mainstream has moved on, or at least accepted more diverse practices.

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[36] It is interesting to note that in the 2 Live Crew case the court found connecting femininity with images of a "big, hairy woman", "a two-timin' woman", "a pregnant woman" and "a bald-headed woman" humorous.

[37] See Buskirk, supra n.4 at 100ff.

[38] Would Koons be disturbed if he achieved sainthood, not from respect for his art objects, but through a martyrdom executed by a law he claims he so despises? Or is he too good a businessman to be "ruined" anyway?

The presence of such artists such as Levine and Koons and their acceptance in the art world does not just mean that "art" has changed, it also means that society has changed. For all sorts of reasons many are now drawn to the conclusion that copyright hinders the development of socially relevant art. But law does not exist independently of society. Therefore if the law is to continue to be respected as a relevant tool of social organisation, more articulate responses to postmodernism will have to be formulated. Otherwise the law's apparent insensibility to the trends of civil society will only place the law further outside of the mainstream art and culture and generate more protest and social discontent.

Copyright and digital media

In suggesting that copyright is failing contemporary society postmodern artists and their critics share a common point of view with many working in the computing industry. However whereas the postmodern artist's attitude is seriously playful, postindustrial quarters are distinguished by a far more sombre mood. In public fora lawyers have been driven to lightening their message by joking about being from a class of "renowned purveyors of doom", whilst *The Australian* computer press warns of "Electronic Copyright a Nightmarish Minefield" (25/1/94) and "Copyright Chaos in Data Soup" (12/4/94).[39]

In order to understand this pessimism and alarm, it is necessary to consider what distinguishes computer works from other more traditional media forms. What is it that is so difficult about computer works? And why is it so difficult

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[39] See P.G. Leonard, "Beyond the Future: Multimedia and the Law", *Proceedings of the Multimedia and Design Conference,* University of Sydney, 26-28 September, 1994 at 51; and N. Dilanchian, "Interactive Multimedia: A Design Case Study", *Proceedings of the Multimedia and Design Conference,* Ibid., at 67.

to adapt our explanations of them to suit copyright's established forms? To answer these questions we need to look more closely at what computer works are and how they work.

Computer works are works that are expressed in a digital format. They can only be accessed by the public through interaction with an interpretative device. The problem this creates for copyright is that the expression- the information stored as source and object code[40] - is unintelligible until it is processed through another apparatus. With computer works we cannot but acknowledge that the medium is the message. We only experience the medium in a virtual landscape, that landscape being activated by the "reader". The arrangement of this "landscape" is affected by individual configurations of hardware, by the other software accessed by that machine and by further individual decisions made on the spot by the user. A large part of an expression in a computer work involves a close connection with the way it is duplicated, replicated and interfaced with. The user's reproduction of the program may involve the creation of a new expression, other than that provided by the program developer.

Because reader interactivity on a number of levels is required to make any computer work accessible, our experiences of it are inevitably different. Further beyond different individual experiences, the material form of a work accessed by any one individual is fleeting. The experience of the work will probably differ each time it is accessed. This means that even on an individual level, the work is experienced as endless, multiple variations rather than as a fixed, enduring form.

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[40] "A source code is a computer program written in any of several programming languages employed by computer programmers. An object code is the version of a program in which the source code language is converted or translated into the machine language of the computer with which it is to be used." as quoted by Mason & Wilson JJ in *Computer Edge Pty. Ltd. v. Apple Computer Inc.* (1986) 161 C.L.R. 171 at 194.

This does not make the experience of computer works inherently different to that of other media. It is a fiction that other literary and artistic works exist in a fixed form, fully inscribed with meaning formulated by a solitary creator.[41] However with computer works it is impossible to even fictionalise a moment at which the work appears complete. It waits to be acted upon by the "user" and because we cannot experience the computer work without also experiencing the technology, we have no temporal reference point that allows us to consider this work as currently "owned" or "occupied", prior to our interactions with it. Unlike the case of photography, we cannot comprehend a "real" in existence outside of the relations of mass circulation. When there is no fixed form that we can imagine "out there" how can we define what is to be protected once copies of the work are in circulation? There is no fixed form against which other alleged infringing works can be measured. At the same time the computer work can be interpreted as individual works already protected in copyright as works entailing other media, e.g. the text is a literary work, the sound is a sound recording, the graphics or photographs are artistic works etc.

This means that when there is an alleged copyright infringement of a computer work we cannot take the author's claim to own the *entire* work for granted, notwithstanding that we may accept that a tremendous amount of skill and judgement has gone into the making of the product. Whereas in other copyright cases a degree of skill and judgement leads to an assumption that the author owns the entire expression, in computer works it only leads to a questioning of the quality of her/his contribution, in order to refer to the boundaries to which s/he may have a claim. It cannot be assumed that the

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[41] This is addressed by J.P. Barlow in "The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age (Everything you know about Intellectual Property Law is wrong)", *Wired*, March 1994 at 85.

author's expression equates to the work as experienced on the machine. The author always owns *something less* than that.

The legal protection of computer works

When dealing with the copyright protection of computer works in the *Apple* case[42] the High Court dealt with this conceptual problem by splitting the computer work into two component parts - the source code and the object code. This was an anomalous way of dealing with this kind of work - the two "codes" are mutually designed. It makes about as much sense to sever these as it does to sever the taking of the photograph from the processing of the negative and the prints.[43] The work does not exist until both "components" are carried out. Nevertheless the High Court did so in order to try to accommodate copyright's need for a tangible expression, based upon the literary model. The "source code" most obviously fitted this requirement as Mason and Wilson JJ explained -

> We have no hesitation in coming to the conclusion that each of the source programs was an original literary work. . .
> Although the substance of the program in each case was expressed in 6502 Assembly Code, this is a language which was readily intelligible to anyone versed in computer science . . . *In the form in which it was created and before it was transformed into another medium,* each source program had an existence which was entirely independent of the machine. It was capable of conveying meaning as to the arrangement and ordering of instructions for the storage and reproduction of knowledge. In that form it was entitled to copyright protection.[44]

Copyright could protect the source code because it existed in a tangible form before input into the machine. That the only point of using such a code is so that it can be read by the machine was not considered by the court to be any obstacle to copyright protection. The court protects the expression without needing to judge the work itself.

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[42] *Computer Edge Pty. Ltd. v. Apple Computer Inc.* supra n.40.

[43] Whilst with photography copyright treats the latter as a subsidiary effort, it is not ever really acknowledged as a distinct, independent process.

[44] Supra n.32 at 193. (my italics).

However by determining this issue in this manner it then became inevitable that it would be difficult to protect the object code - an expression in the form of electrical impulses. As Gibbs CJ argued -

> They were not visible or otherwise perceptible, and they were not, and were not intended to be, capable by themselves of conveying a meaning which could be understood by human beings.[45]

He argued that a literary work must be expressed in print - the obvious tangible form for this kind of work. The majority agreed that because the object code had no tangible existence outside of the machine it was incapable of protection.

Though Mason and Wilson JJ dissented on this point their explanation is also telling -

> It is not correct to describe an object program as *merely* a sequence of electrical impulses within the computer. Electrical impulses there are, but those impulses serve to identify a set of instructions in machine readable language designed to guide the machine in its basic operations. They do not form part of the computer itself, notwithstanding that they may be embodied in a ROM or ROMs located permanently in silicon chips in a machine.[46]

The attempt was to find an independent existence for the object code itself, as if it had a life exterior to the machine.

It may be thought that the 1984 amendments to the Copyright Act, largely brought about as a result of industry lobbying, particularly by large American corporations,[47] removed the need for such an artificial approach to computer works. For example, "literary work" was defined to specifically include computer programs (source *and* object code), and "material form" now included any form of storage, whether visible or not.[48] However in case law

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[45] Id, at 183.

[46] Id, at 194.

[47] Dilanchian, supra n.39, at 68.

[48] See s10 (1) *Copyright Act* 1968 (as amended 1984).

the problem simply re-emerges further down the line. This can be seen from the *Autodesk* cases.[49]

Autodesk had tried to enforce their strict software license of one copy of the program per machine by encoding the AutoCAD program with instructions that were periodically sent to challenge the "dongle", a security device that could be attached to the serial port leading from the keyboard. This AutoCAD lock was programmed to respond to the challenges. The AutoCAD program Widget C interpreted these responses by comparing them to a "look up table" stored in its memory. If the dongle's response was not found in the "look up table" the program would cease to function. Dyason created their own version of the security device which could be connected in place of the AutoCAD lock, making unauthorised copies of the AutoCAD program viable. Thus a $500 device was offered in competition with the $5,200 package. In the first instance before the Federal Court Northrop J determined that the dongle was itself a computer program -

> It is fair to say that the amendments of the Copyright Act made in 1984 were designed to ensure that computer programs, even when constituted by electrical impulses which could not be perceived by the senses and were not intended to convey any message to any human being, could constitute copyright under the Copyright Act.[50]

However the problem was that the hardware within the AutoCAD lock was of a different form to the Dyason device. Northrop J overlooked this difference in form -

> Each performs the same function. It is this function which is the essential aspect of each lock. Function has a particular importance in the definition of a computer program and regard must be given to this concept of function in considering the question of whether there is a "sufficient degree of objective similarity" between the two locks.[51]
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> . . . Physical appearance is immaterial. The hardware or physical equipment within which the expressions of the sets of instructions are contained is immaterial.[52]

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[49] *Autodesk Inc and Anor v. Dyason and Ors* (1989) 15 I.P.R. 1; *Dyason and Ors v. Autodesk Inc and Anor* (1990) 18 I.P.R. 109; *Autodesk Inc and Anor v. Dyason and Ors* (1992) AIPC 90-855; *Autodesk Inc and Anor v. Dyason and Ors* (No 2) (1993) 25 I.P.R. 33.

[50] *Autodesk Inc and Anor v. Dyason and Ors* (1989) 15 I.P.R. 1 at 10.

[51] Id, at 27.

[52] Id, at 28.

On appeal the Full Federal Court and the High Court returned to more traditional copyright concerns. For example the judgement of Lockhart J began -

> The protection of the form of expression, not the ideas embodied in it, is fundamental to the law of copyright . . .
> So it is with function which is not itself protected by copyright, and it is this concept of function that this case is all about.[53]

Sheppard J discussed the analogy between the operation of a computer and the expression found in a book -

> The analogy is, I think, helpful, but ought not be taken too far. The very nature of a computer program cautions one against taking too much from it. Nothing needs to be done in relation to a book except to turn the pages. On the other hand, the computer program cannot be used for its intended purpose unless the program is run in a computer.[54]

In the High Court Dawson J noted that -

> . . . the significance placed by Northrop J upon the function of the two locks would appear to be in disregard of the traditional dichotomy in the law of copyright between an idea and the expression of an idea.[55]

The High Court's analysis shifted from a consideration of the hardware as independent computer works, to a comparison between the AutoCAD program Widget C and Dyason's anti-lock device. The attempt was to focus on the way the latter operated to see if, in carrying out its functional role, it copied a substantial part of the AutoCAD program. The Full Court found that despite the functional similarities the operational differences were too significant to find the expression had been substantially copied. However the High Court determined that despite these differences Dyason's anti-lock device copied the "look up table" and this was sufficient to constitute an infringement. Whilst the "look up table" was not considered substantial enough in itself to constitute a computer work, it was considered to be a substantial enough part of Widget C that to copy it constituted a reproduction of that program in material form. Thus the High Court considered the "look

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53 *Dyason v. Autodesk Inc* (1990) 18 I.P.R. 109 at 111.
54 Id, at 141.
55 *Autodesk Inc and Anor v. Dyason and Ors* (1992) A.I.P.C. 90-855 at p38,190.

up table" to be an indivisible part of the AutoCAD program Widget C, notwithstanding that on its own it was comprised of no more than an arbitrary sequence of numbers.

The controversy surrounding this decision flows from this.[56] In this case the copyrightable expression was considered to be the entire AutoCAD program, including its "look up tables". Autodesk was deemed to "own" the experience of the program operating on the machine. But it is we, as users, who are required to activate the "expression". To extend copyright so completely belittles our contribution. It confronts our common sense understanding of computer works as something less than full, complete and indivisible works.

It is unlikely that the *Autodesk* decision will herald a new approach to copyright in computer works at large. In general the protection offered by the approach is too expansive. It is out of step with copyright's desired goal in this area which is not the full protection of computer works per se, but "the balancing of rights, allowing scope for innovation, while providing security against unfair competition."[57] It is not only because we experience computer works differently to other works that something less than full protection is "obvious". The commodification of computer works operates differently to that of other works within the established copyright regime. *Something less than full protection might actually be required* to ensure the viability of these markets or products or to serve the interest of consumers.

This is not a new idea. For example, in 1984 the Victorian Q.C. Dr John Emmerson cautioned against amending the *Copyright Act* to include computer

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[56] See Gail Evans, "The Role of the Court in Limiting the Scope of Program Copyright", (1994) 5 A.I.P.J. 56 at 60-62.

[57] Copyright Law Review Committee, *Issues Paper: Computer Software Protection,* (Canberra: AGPS, 1990) at 4.

software, arguing that a more detailed inquiry into the industry was needed first. He suggested that an inquiry consider the following points -

> a. protection should not be such that it hinders development within the industry or forces up prices unduly;
> b. the protection should be for a limited term and at the end of the term competitors should be free to use the innovation. In the public interest the term should end while the innovation is still of commercial use;
> c. manufacturers should be told how to work the innovation so that they can make use of the freedom to work it at the end of the term;
> d protection should not be given to merely routine developments within industry.[58]

Recent American decisions have also articulated concern over maintaining industry competitiveness, suggesting that such factors should have some bearing on the scope of copyright protection awarded. For example in *Sega Enterprise Ltd v. Accolade Inc* (1992)[59] the U.S. Court of Appeal expressed sympathy with Sega's attempts to protect itself against piracy but -

> . . . recognised that, given the hybrid nature of computer programs, facilitating public access to ideas requires flexibility in the level of copyright protection given, so that the more functional the work the less eligible it is likely to be for full copyright protection. Consequently, in characterising the Sega key as "functional", their video games were accorded a lower degree of protection than more traditional literary works.[60]

American cases can draw upon the U.S. Constitution in support of their balancing of rights of protection and access, that balance enshrined in their fair use provisions. No comparative provisions apply in Australia.[61] However it should not be assumed that because of this no such "balancing" of interests takes place in the Australian context. In the courts the "balancing" continues under the rubric of the idea/expression dichotomy and the general ambivalence about the "expression" involved in computer works.

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[58] Emmerson, as cited in Sam Ricketson, *Intellectual Property. Cases, Materials and Commentary,* (Sydney: Butterworths, 1994), at 19.

[59] 977 F.2d 1510 (9th Cir. 1992).

[60] Evans, supra n.56 at 67.

[61] See Evans, Id, at 75-76.

Is the "balancing" of rights of access with rights of restriction the answer?

The answer here is both yes and no. There is already, everyday "balancing" occurring in industry. It can be found in industry attitudes to piracy, where a certain level is tolerated as a sensible business practice -

> With physical goods, there is a direct correlation between scarcity and value. Gold is more valuable than wheat, even though you can't eat it. While this is not always the case, the situation with information is often precisely the reverse. Most soft goods increase in value as they become more common. Familiarity is an important asset in the world of information. It may often be true that the best way to raise demand for your product is to give it away.
>
> While this has not always worked with shareware, it could be argued that there is a connection between the extent to which commercial software is pirated and the amount which gets sold. Broadly pirated software, such as Lotus 1-2-3 or WordPerfect, becomes a standard and benefits from the Law of Increasing Returns based on familiarity.[62]

Because of the interactivity computer works require in order to make them function, you can't easily sell the packages to people who don't understand what role they have to play to make the program work. Computer works are more demanding of the consumer than other types of copyrighted works. For the same reason once the user is hooked up to a particular package s/he usually wants to stick with it, maintaining her/his skill level by reading the manuals, chasing up the upgrades, etc. Thus whilst an enormous amount of software is pirated, once tried and tested a lot is also purchased.[63]

"Balancing" is involved in the decision whether or not to encrypt a program. Encryption can take much more sophisticated forms than that used by Autodesk -

> For example, (a program) might contain a code that could detect the process of duplication and cause it to self destruct.
>
> Other methods might give the file the ability to "phone home" through the Net to its original owner. The continued integrity of some files might require periodic "feeding" with digital cash from their host, which they would then relay back to their authors.[64]

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[62] Barlow, *supra* n.41 at 126.

[63] This argument is perhaps less persuasive where the computer software involves a specialist application designed for a small, niche market.

[64] Barlow, supra n.41 at 129.

To a degree such programming obviates the need for copyright litigation. However it hasn't been all that strenuously pursued because it creates impediments to access. For this reason it is much more likely to be used in small, specialist applications than in everyday ones. But even in these markets "people are not going to tolerate much that makes computers harder to use than they already are without any benefit to the user."[65] If there is a less complicated alternative package to the encrypted one, the fear is that sales will suffer.

In the multimedia industry an interesting "balance" is emerging in the form of intellectual property infringement insurance, an "Errors and Omissions Policy".[66] Clearing copyright is one of the most fraught, time consuming and expensive parts of this kind of production. The need for protection is balanced against the need for quicker and cheaper consumer access. Insurance helps to reconstruct that "balance".

"Balancing" of interests can also be seen in the much mooted idea of "share-right" media, where you allow material to be reproduced free of charge, if the recipients of your work may do the same.[67] This development reflects the understanding of those working in software development of the collaborative nature of their work - and hence the inappropriateness of any one party to restrict access to the entire work.

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[65] Ibid.

[66] See M. Scott & J. Talbot, "Interactive Multimedia: What is it, Why is it Important and What does one Need to Know about It?", [1993] 8 E.I.P.R. 284 at 288.

[67] See Bob Cotton & Robin Oliver, *Understanding Hypermedia: from multimedia to virtual reality,* (Phaidon Press, London, 1993) at 38 and Arthur Matuck ,"Information and Intellectual Property, including a Proposition for an International Symbol for Released Information: SEMION", *Leonardo,* Vol 26, No 5 1993 at 405.

A similar sentiment can be drawn from some industry responses to attempts to enforce intellectual property rights. For example, Compton's New Media claims to own a patent in the basic technology that makes it possible to search and retrieve information from a database containing text, graphics, audio, video and animation. This development was reported in the computer press as follows -

> COMPTON'S NEW MEDIA STUNNED the fledgling multimedia industry last fall when it announced that it had been granted a patent that could apply to most interactive multimedia presentations being created for Macs and PCs.
> . . . If the patent is everything Compton's says it is, the company, a division of the media giant Tribune, will have a stranglehold on the burgeoning interactive market.
> . . . Compton's has asked developers to join up or pay up. They can either participate in co-development and distribution deals or pay a minimum 1 per cent royalty on products that use interactive technology.[68]

Industry response was to organise opposition across the U.S.A. with the Multimedia Developers' Group, the Interactive Multimedia Association and the International Interactive Communications Society working together to challenge the patent on the grounds that the technology has been an accepted part of the public domain for years. In response to this opposition the Patents Office agreed to review the patent. They have since accepted that the technology was "obvious in view of the prior art", and hence unsuitable subject matter for a patent. However Compton's may appeal this decision.[69] Even if the patent were to be eventually upheld because of industry opposition to the idea Compton's will have a lengthy and costly process picking appropriate targets and courts, in order to enforce its right.

There is already a great deal of balancing of rights of access and rights of restriction going on at the level of industry practice. The problem is however that whilst these numerous, diverse decisions reflect practical approaches to copyright law, they are invisible to the domain of copyright litigation. And the court, guided by the legislation, pursues a universal definition of computer

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[68] C. Guglielo, "Patents Challenge Multimedia Development", *MacUser,* March 1994 at 42.
[69] Kurt Kleiner, "Stop. Software Speed Trap Ahead", *New Scientist,* 23 April 1994 at 14-15.

works. The law is yet to appreciate the significance of computer works comprising many types of forms and functions - from lock & key security devices, to games, to everyday domestic and business software, to sophisticated specialist applications, to authoring packages to make other computer works, to visual and aural explorative works, to machine interfaces etc. Computer works are generally multi-media experiences - to look for "the" expression as if it exists in the one medium (reduced to an aggregate of "source" and "object" code, or a program's "look and feel") completely mischaracterises the experience. And whilst all computer works are interactive, they encompass many kinds and levels of human interactions - in short, the way they function is not fixed, but is fluid.

Copyright is very good at fictionalising a tangible, real expression from which a right to reproduce can be determined. However computer works do not fit comfortably within this framework. Whilst individual cases have proceeded by establishing what the expression is in that instance, they are incapable of establishing any useful, universal approach. Further to the extent that any one case purports to establish a universal approach this possibility is met with alarm because of its potential affect on other producers of computer works.

The difficulty with protecting computer works stems from our inability to visualise a single expression, fictional or real. The first problem stems from our tactile experience of these kinds of works. It is each of us, as users, that makes the works real, not the "author" or the "producer". In a sense there is no original "out there", but rather we bring it to life on our machines, as a reproduction. This means that something less than full protection of the work seems appropriate. But how much less? A second problem flows from this - by our efforts in interacting with the "original reproduction" can we create

further new, independent expressions? Or is the whole experience of computer works one that is not easily severable into individual efforts? Can copyright adequately accommodate the reality of a compilation of efforts that is more than an aggregate of smaller parts? A third problem flows from this - if copyright cannot accommodate collaborative work of this nature, should every part of the process and every person involved be able to independently claim a copyright? Should every activity be considered an expression? Or alternatively, if individual contributions should not be counted in this way, does this mean that the *major* contributor owns the entire expression? The resolution of these questions has very real implications for the development of the computer trade.

The anti-copyright strategies being advocated in industry/cyber-culture magazines such as *Wired* are aimed at proving that contemporary copyright is more of a hindrance than a help to a healthy, competitive computer industry. Despite a much more conservative presentation and style, the message from industry lawyers is not all that strikingly different -

> New media has created a vortex in which are spinning many anomalies, gaps in coverage and interpretational Gordian knots. To some it seems that centrifugal forces may cause various branches of the copyright tree to split off, collapsing traditional protection for authors and artists into an electronic black hole from which no light can escape. [70]

However even though they share in their despair over the current state of the law, copyright's more conservative critics do not agree that the system should or will be abandoned -

> The argument in this paper is that the dollars and politics at stake will more likely than not ensure that darkness will not prevail. Some of the most profitable and influential corporations in the world today depend on copyright and are major players ensuring their needs are considered.[71]

This foretelling of copyright's future seems plausible given the historical connection between major industry players and the reform of copyright law.

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[70] Dilanchian, supra n.39 at 68.

[71] Ibid.

But the question that remains is *how can industry and community needs be translated into an effective law?*

Computer works are produced and circulate differently to any "art" work which we have dealt with before. They involve a different nexus between author, publisher, distributor and consumer. The flow is not in a unilinear direction- from birth to reproduction to consumption. It is difficult to determine when and where the computer work is born.

In a sense the expression is stillborn without the continuing collaboration of authors, producers and consumers. To the extent that the work has to conform to conventional standards so it will run on consumers' machines, authors and producers have to work together across the industry. Every work has to be continually updated to accommodate new developments in hardware and software, or it will cease to run on contemporary machines. Consumer feedback, particularly about ease of access is crucial to the success of the work. Decisions consumers make about their machinery and other programs also have to be taken into account. The issue of a particular work's protection has to be considered in this overall context.

Copyright has no established means for considering this level and type of interaction with works. Further, the diversity of practices and their fluidity cannot easily be accommodated by any universal or general rule or principle. Some lawyers, such as Peter Leonard, seem to be arguing that a *sui generis* treatment of computer works can be expected to unfold as time marches on -

> . . . the road is still a bullock track in parts. . . For the moment, all we can do is tinker with minor road works and caution you to drive carefully. In the next three to five years we will need to build a whole new road - that is, create a new copyright paradigm - or the current copyright system will become an impassable bog.[72]

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[72] Leonard, supra n.39 at 52. He does not necessarily imply that there will be altogether separate legislation. Computer works may simply develop a different treatment within the

Presumably as we observe how the current law fails to adequately accommodate computer works we will develop the experience required to fashion new solutions. However what is of concern about this particular method of transforming the bullock track into the superhighway is the question of *whose experiences* of the current law will be perceived as worthy of notice and legislative redress.

In attempting to break away from the weight of copyright's past, we could easily duplicate one of copyright's more enduring problems. Whilst computer protection won't end up being designed to meet the needs of the erudite poet - the Wordsworth or the Pope, it may just end up being designed to suit the interests of their twentieth century equivalent - the "self-made" techno-wizards such as Microsoft's Bill Gates.

It may be much more difficult for the law to be as partial as it was in the past because of the access critics of copyright have to the mass media, and thereby to the public and Parliament. Whilst in the nineteenth century the depressing condition of the real Grub Street hack could be manipulated by the successful writer and her/his Parliamentary advocates to advance their own interest, in the twentieth century those disserviced by copyright can advocate their own case. They are already are "hooked up" and waiting for the opportunity to respond.

Diverse participation will also be advantaged by the change that has taken place in the nature of law and politics in the intervening years. In the nineteenth century law had to (at least appear to) correspond to the liberal legal norms of uniformity, universality and neutrality. However with the

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existing copyright framework, such as has occurred with works of artistic craftsmanship, for example.

development of the corporate-welfare state and post-liberal law, law making is more likely to be assessed in terms of the interests that are served.[73] Whilst this does open up the possibility of even closer ties between industry and government, where industry advocates expose that they have diverse requirements, law-making still has to be perceived as open and democratic. Thus whilst law makers can be seen to be responsive to a broader range of special interests, they cannot necessarily afford to be linked too closely with any one group or lobby. The twentieth century equivalent of Wordsworth's relationship with Talfourd and Parliament may be perceived to be a problem if the new Coleridge is known to be advocating for a completely different remedy.

However whilst we might expect diverse participation at the national level or on the Net, there remains the problem of access to the international copyright stage. Part of the problem here lies with the copyright expertise of the international lawyers who engage in law reform at this level. As Nimmer and Krauthaus describe them, their client base, client-related agendas and professional interests place them in an elite class. They are characterised by a reasonably homogenous and narrow range of social and business contacts.[74] This leads one to wonder if the political agitiations of various, smaller, localised groups would ever find a mark, let alone make any impact upon their debates. From forums such as the World Intellectual Property Organisation (WIPO) and the Trade Related Intellectual Property discussions, (TRIPS) emanating from the Uruguay round of GATT at the instigation of the

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[73] For a discussion of this shift from liberal to post liberal society see Roberto Unger, *Law in Modern Society,* (New York: Free Press, 1976).

[74] For further discussion see Raymond T. Nimmer & Patricia Ann Krauthaus, "Globalisation of Law in Intellectual Property and Related Commercial Contexts", *Law in Context,* Vol 10, No 2, at 80.

U.S.A.,[75] many of those currently engaged in the debate over copyright's future would probably appear as the looney fringe. To address this there is a need to work on such lawyers' understanding of, and sensitivity to, the complex social relations of copyright. A deeper appreciation of copyright's history may be a good place to start!

Copyright's destiny

To suggest that copyright has many histories is to remind us that not all authors, not all artists, and not all those who contribute to the production of a computer work feel the same about the way copyright functions. This diversity of opinion towards copyright is also to be found amongst the various agents involved in the mass reproduction and distribution of works. However this diversity is not necessarily acknowledged because of the way we have come to expect copyright to function as law.

When copyright was seen as a mechanism of social control, fashioned to meet the challenges of Renaissance and Reformation society, it was acknowledged that copyright was a site of struggle over meaning. There was dissent and opposition to the process of "authorisation" of copyright works. The issue of the "right to copy" was inseparable from the issue of freedom of expression. But once copyright shifted from being a mechanism of social control to its modern form as a vehicle for mass cultural reproduction, the minimum standard of "originality" and "aesthetic quality" was thought to open up the domain of copyright to all comers. Whatever struggle over meaning there was, was expected to take place outside of the domain of law. In fact rather than law suppressing meaning, copyright was thought to facilitate the

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[75] For a discussion of future pressures for international change involving these organisations, see Sam Ricketson, supra n. 58 at [8.1.8-8.1.13].

proliferation of meanings through the separation of the protected expression and the public's access to the ideas in the work.

This legal heritage has led some to assume that copyright has one history, encapsulated in the generous definitions of an "original work" and the idea/expression dichotomy. The presumption is that these ideals are flexible and indiscriminate. They can be stretched to deal with new media forms and new practices. They foster creativity and its public dissemination. However copyright's recent past has demonstrated how problematic that assumption is. Rather than copyright being an open terrain, both postmodern and postindustrial critics find it injudiciously surveyed - valued, sub-divided and fenced, without anticipation of the need for cultural sensitivity in order to appropriately greet the latest new arrivals.

We need to choose copyright's destiny, rather than blindly let it unfold. Whilst there will be conflicting views of the best way forward, if we reintegrate copyright's many histories into the mainstream, this might help more clearly focus the current antagonistic debates. We should be generating dialogues about precisely what copyright is good for, what kind of production it supports, what cultural forms it is sensitive to. Apprised of this knowledge we can begin to acknowledge its particular shortcomings. Perhaps then we will be in a position to start addressing these problems more creatively.

Conclusion

Every exploration of copyright starts with presuppositions about this institution. They guide the writer's work. They equip her/him with a sense of direction. Differences emerge from the nature of the original presuppositions that various writers make. These lead her/him on to other writers. These might also lead her/him away from those coming from an entirely unfamiliar direction. But in all cases, the writing of copyright's history involves a multiplicity of viewpoints which provide the writer with a sounding board against which s/he can reappraise her/his own expectations and understandings.

My presuppositions about copyright were based upon a number of histories that had already been written about it.

From the legal historians I had learnt to be wary of presuming that copyright was for authors. Both Patterson's and Kaplan's works demonstrated how tenuous that link was, particularly in the seventeenth and eighteenth centuries. There was a stronger association between copyright and publishers, however as much of the Parliamentary and judicial debates involved a battle *between* publishers, an awareness of this connection did not lead to a great deal of enlightenment about copyright's legal definition.

The legal perspectives on copyright suggested that not much could be found out about it by studying the law alone. There was more to be found by exploring the relationships between London and Scottish publishers; publishers and authors; publishers and Parliaments; authors and Parliaments;

and publishers, authors, Parliaments and the courts. A primary source of such information was the author and publisher perspectives on copyright.

These histories offered much more detail about the socio-economic situation of authors and publishers and their actions for legislative and judicial reform. However, the "practical" focus of these works seemed to render an understanding of the laws that were enacted even more elusive. The law never reflected any *one* of the conceptions desired by the various parties. It was always based upon compromise. This led to an implicit judgement within these histories that copyright law was an "unfinished" project. It was generally assumed that the law could better serve the interests of one of these parties, but there was no real evaluation of why copyright *should be* for authors or publishers and in particular of how this affected the rest of society.

As a lawyer I was suspicious of the assumption that law should be for the benefit of this or that social group, particularly when there had been no careful appraisal of how such a law would affect others in the society. How was copyright law affecting the community, notwithstanding its impact upon known authors and publishers?

Postmodern and postindustrial writings both suggested that copyright created problems for contemporary communities. Postmodern artists and writers feared that it never lost its links with censorship - that role was simply transferred to those who invested in, and mass reproduced, works in the eighteenth, nineteenth and twentieth centuries. Copyright enabled the proliferation of messages in support of the status quo and disabled cultural criticism by denying certain groups and individuals access to the text, images and sounds of popular culture - the very material that would enable communication of dissent to a wide, public audience.

Postindustrial writers also tapped into this sentiment, not so much in sympathy with the political aspirations of those socio-economically marginalised but more in outrage at their own frustrated economic ambitions. They faced similar problems of access to works protected by intellectual property and some felt that they lacked the level of protection awarded to other works copyright protected. From the perspective of postmodern and postindustrial writers the question of access to works and the level of copyright protection seemed primary considerations. But from *whose point of view* should these questions be examined?

Based upon my readings I concluded that copyright had a legal dimension, a social dimension and a subjective combination of these two that guided individual actions and dealings with others. But I wasn't sure what these three aspects added up to. In many of copyright's existing histories there was impressive conceptualisation and historical detail concerning each of these things - what was missing was the links in between them. What had been the relationship between law and society as it had developed through copyright? How did this relationship stand in the contemporary world? How did it construct individual possibilities for action? How did it affect human identities?

Like the more detailed of the works about copyright[1] I decided to start to address these questions by trying to understand the society in which the press first appeared. I was however, dissatisfied with these writers' assumptions

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[1] Such as the works of Benjamin Kaplan, *An Unhurried View of Copyright,* (New York: Columbia University Press, 1967); Lyman Ray Patterson, *Copyright in Historical Perspective,* (Nashville: Vandebilt University Press, 1968); Ian Parsons, "Copyright and Society", in *Essays in the History of Publishing,* (ed) A. Briggs, (London: Longman, 1974) p29; Victor Bonham-Carter, *Authors By Profession,* Volumes One & Two, (London: The Society of Authors, 1978); John Feather, *A History of British Publishing,* (London: Croom Helm, 1988); and David Saunders, *Authorship and Copyright,* (London: Routledge, 1992).

about Renaissance society's understanding of reproductive power. As a feminist I knew that our dialogues about reproduction have long traditions. I didn't want to fall into the trap of assuming that simply because this form of reproduction involved technology, that it had no relation to those other dialogues. In Chapter One this led to me to consider the significance of the Renaissance artists who had called their works their progeny, which was such a firm indicator of a reproductive awareness.

What was striking about the Renaissance artists was their striving to be associated with the poets and to be identified as different from artisans, even though their "craft" utilised similar media. This suggested that it made more sense to classify cultural producers in terms of attitude to their craft and to their "peers", than it did to define them by medium. But attitude alone was an insufficient measure. It had to read in light of her/his actual social relations and in connection to the qualities of the work s/he created. The works of self-professed artistic leaders could be, and were, rejected by other artists, by patrons and by the community as works unworthy of attribution as *his* work of art. Reproductive *claims* were one thing, reproductive *rights* were quite another.

This suggested that Chapter Two needed to more carefully consider the kind of person who made reproductive claims. What kind of person was s/he and what kind of bodies respected her/his "right"? As literary property has been the most consistently documented of the reproductive property claims, at this juncture it seemed apt to explore the literary property relations of the sixteenth and seventeenth centuries, keeping in mind that one should expect to find differences in attitude amongst the various cultural producers of this time.

Conventional wisdom had it that only publishers had reproductive rights until the Statute of Anne. Accordingly most historians have focused on the literary property arrangements of significant publishers in the sixteenth and seventeenth centuries. This has tended to diminish the importance of this period's writers' views about literary property and it has put out of sight the difficulties they faced in asserting literary property "rights". Chapter Two challenges the conventional view of the early history of literary property which, it is argued, is based upon a misunderstanding of the significance of positive law. In the writing of copyright's history there has been a failure to carefully consider the complex relationship between law and society that existed *at that time*. Such sloppiness has also led to the glossing over of the possibility that there were connections between the successful reproductive claims of this period and those made by later writers.

Most histories of copyright imply a divide between the "writers" who survived on patronage and the modern "authors" who might live off copyright. The period of "literary property" is marked off as a time when there was "no law" for writers, whereas copyright is characterised by a sequence of positive laws. These laws were not necessarily designed for "authors", however they are seen to be important because they could be used as a springboard to success for some, such as Alexander Pope. They also gave authors a legislative focus that enabled action for further reform. The former period is seen as oppressive because writers "without laws" were subject to the whims of their social "betters". By way of contrast the modern period is perceived as potentially more inclusive, because ostensibly the law attended to every author.

My history suggests that a different view should be taken of the period surrounding the Statute of Anne. In the period before the enactment, a

number of individuals had views about the merit of a literary property right and some were in support of it. However it could *only* be successfully claimed by the intellectual leader who was respected for his social standing and personal qualities so far as they were represented in his good works, and for the market that he commanded. What the Statute of Anne provided was an opportunity for such a man to add to his social and economic "protection". Before the statute his position had been secured by the kindness of patrons and the respect, for his bearing and his market, awarded by stationers. What the Statute allowed for was the *reinforcing* of this position, particularly in relation to the latter, by a positive law that thereafter stood by his side. In this way, the Statute of Anne could be read as marking the continuance of earlier reproductive traditions, rather than as the dawning of the modern copyright era.

This is not to suggest that the qualities of the reproductive property relied upon by the likes of Pope were identical to that of Milton or Michelangelo, or for that matter Coleridge or Wordsworth. However there is a similarity between these writers in the importance they placed upon the creative act; the significance they attributed to writing, for themselves and for the masses; their distinction from other writers and cultural producers of their time based upon these other workers' lack of an appropriate professional ethos; and in their attitude to their reproductive property, which they expected others to respect and pay a fair price for. Regardless of the formal legal statuses of these reproductive claims, it is clear that throughout western history many cultural producers have felt very personally involved with and connected to their works. This helps explain why so much energy has been expended in examining, criticising and responding to analyses of copyright. It is this issue, more than any other, that continues to motivate writing about the subject and polarises approaches to it.

In order to discuss the role played by law in this context, a primary question that needs to be asked is - how did this "tradition" of *reproductive authority* affect the court's assessment of common law literary property claims in the landmark cases of the late eighteenth century? Did the courts appreciate and respect the idea of reproductive property or did they disable its advocates, in light of other concerns struggled with by this society and influencing its future direction? Such questions formed the basis of inquiry for Chapter Three.

Chapter Three recognises that the notion of literary property was affected by transformations in how *property* and *law* were understood in the eighteenth and nineteenth centuries. However it is argued that the tradition of reproductive authority also impacted upon that transformation. Its influence was not direct, which makes it all the more difficult to trace, but such an effort is required because the notion of reproductive "rights" was a subtext around which the copyright players of the time positioned themselves. To try and make sense of these debates without reference to this notion diminishes the significance of the arguments featured in the debate and impairs an understanding of the judicial resolutions for the future.

The publishers' case, as devised by Blackstone and articulated in *Millar v. Taylor* (1769)[2] and *Donaldson v. Beckett* (1774),[3] drew heavily for support upon the respect that could be generated for the idea of reproductive property. The long-standing respect for the poet could be drawn upon in order to found the publisher's claims in the "author's" name in the author's absence.

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[2] 4 Burr. 2303, 98 Eng. Rep. 201.
[3] 4 Burr. 2408, 98 Eng. Rep. 257.

Blackstone's case selectively borrowed from the work of John Locke. He dropped Locke's enlightenment concerns and his empiricist attitude towards language and literature. When challenged to identify exactly what it was that the author purported to produce he appealed to the importance of the poets' "special" labour, the "style and sentiment" brought forth in a work. To those who were more sympathetic to the enlightenment debates of the time, Blackstone's construction of a common law literary property claim could be perceived as both compromised and opportunistic. It was compromised by its inconsistent reference to reproductive authority - on the one hand it was for all those who laboured on a text, regardless of the quality of the work, on the other it was needed to protect the author's "style and sentiment", an attribute most commonly associated with poetry and not other texts. It was opportunistic because the beneficiaries of such a conception were not writers in general or poets in particular but the publishers who had bought the right to copy some time in the past. The publisher who "celebrated" the author's contribution did so in order to fence off particular works from other publishers. The theory put forward in support of common law literary property was not an argument that protected originating authors in any practical way.

The Scottish publishers rejected this argument by stressing a need for a consideration of the need for "practical" regulation of the trade. They suggested there was no "legal" tradition in support of Blackstone's reproductive property claims, a view supported by a majority of the House of Lords in *Donaldson v. Beckett* (1774).

What *Donaldson v. Beckett* demonstrates is respect for the creative power of the author but a failure to articulate exactly what that might amount to as a

matter of legal ownership. The Lords were uncomfortable with endorsing the idea of an author's special relationship with the text, as the Kings Bench had done. There was no obvious way of reconciling this "right" with the empiricist philosophies so popular at the time. Whilst this left literary property negatively defined, it did not discredit the notion altogether. This, and the misreporting of the decision meant that the ideal of reproductive authority remained a current view. Rather than fading, its spirit could be evoked most effectively in the nineteenth century by a different group of reproductive authors - the romantics.

Chapter Four considers how the romantics reworked the ideal of reproductive property, distinguishing it from that claimed earlier by poets and artists. The romantics emphasised the importance of the solitary originator of a work, who produces his own consciousness in a work; they contrasted this "pristine" art with the "soiled" productions of industry; they doubted the ability of verbalisation to effectively convey the glory of "authentic" creation; and they mass reproduced their own works in order to lead the masses and instil in them the virtues associated with romantic good taste. They also fought for a copyright law that more effectively rewarded their endeavours.

Whilst this is well documented in numerous other works on the history of copyright, what most have failed to realise is the domestic implications of the romantic author's reproductive claim. The romantic appeal to the qualities of art devalued that which results from collective efforts. In particular it has circumscribed Woman's "art", which tends to be read in light of her natural domesticity. Her works were, and still are attributed to her familial relations, not her creative spirit. She makes "craft" not "art". The former does not require a copyright because her financial security is secured by her marriage. This further lends support to the claim for the romantic author's enlarged

copyright, for he is responsible not only for his own needs, but also for hers and the others in his family.

The romantics were radical in their opposition to industrialisation, however this did not mean that they were opposed to the idealisation of middle class domestic relations. It could be argued that they sponsored precisely such a view.

Whilst opposition to industrialisation was not a romantic goal shared by the British Parliament, Parliamentarians were not unaffected by the persuasiveness of the argument put forward by famous artists of the time. For this reason Chapter Five considers how Parliament reacted to the romantic authors' claims. How were romantic views adapted by other people of the time and used to support copyrights that the romantics would have disclaimed as creative efforts lacking anything like reproductive authority?

It is well known that Parliament awarded copyright protection to an increasing number of "industrial" works throughout the nineteenth century. However there has been little analysis of how this sits with Parliamentary receptivity to the author's case. The apparent contradiction involved in rewarding both "art" and "industry" has led some to presume Parliamentary eclecticism - to argue that British copyright followed no one cause[4] - rather than to look for possible connections between "industry" copyrights and the romantic author's case. For this reason Chapter Five contrasts Parliamentary receptivity to the romantic authors' claims with the treatment given to the textile printers who also sought greater copyright protection. It is argued that whilst Parliament did not accept all the dimensions of the romantic author's

[4] As discussed in the Introduction, this is Saunders' view. See p15.

case, they developed their own romantic agenda and pursued it, through law, when the opportunity arose.

Parliament assisted both the romantic author and manufacturer of commodities because of a perceived need to direct and support the commercialisation of "good taste". This social program specified particular rôles for various members and classes of the community. Aristocrats and creative artists were the source of "good taste", the mass reproduction of which was hoped could stabilise and harmonise the nation. Entrepreneurs would finance and manage this operation. Workers were the functionaries that provided the labour "industry" required. Middle class women were the consumers that displayed "taste" in the home.

Parliamentary action was inspired by romanticism even though the interpretation was not exactly what romantic authors desired. Copyright laws were drafted to support and reinforce the establishment of new social rôles and distinctions in British consumer society. These laws and the rôles that went with them were also exported to other nations that respected British common law.

When dealing with this period of history, postmodern critiques of copyright have tended to focus too much on the theoretical claims of authorship and too little on the author's actual industrial relations. Likewise, opponents of such a view, such as Saunders, have been too caught up in responding to the weaknesses in the postmodern analysis of the relations between author, Parliament and copyright law. Neither "side" has done justice to the complexity of the social relations of the time. The former has conceded to the romantic author too much power over social relations, the latter has diminished the extent of that influence. Each has considered the political

permutations of the time in terms too far removed from the life of that society. In the process both have overlooked the possibility of a romantic "deviation" of the authorial claim emerging.

A similar problem could be said to apply to the analyses of the courts and romanticism, although the treatment of judicial decisions as a form of historical record has been even more rudimentary than that of copyright's social relations.[5] One gets the inkling that most writers have felt that *Donaldson v. Beckett* resolved all the "big" questions, so far as they could be resolved, and that the law has continued to "evolve" since then without distinction.

Chapter Six set out to explore the way the judiciary responded to similar demands to that fielded by Parliament. Given that the judiciary were a part of nineteenth century British society, and hence, they would have been aware of the social issues of the day, how responsive were they to these pressures? How autonomous was the law from the social forces that influenced the British Parliament? As in Chapter Five, I decided to look at more than works of literature. I didn't want to neglect consideration of how the "literary" context of copyright has impacted upon other media forms.

What Chapter Six argues is that despite there being no explicit judicial adoption of the tenets of romantic philosophy, romantic influence on the court is easy to detect. It can be seen in the presuppositions about what needs to be proven in order to bring a case; it is present in the terms used to explain copyright "protection"; it can be read from the silences that the judges find they cannot explain; it can be seen from the nature of that which copyright doesn't protect. It is argued, that like Parliament, the court assisted

[5] Kaplan is really still the only writer who consistently draws case law into his history.

in the commodification of works. The judiciary enabled, and continues to enable, a stable social and economic environment conducive to investment in, and distribution of, mass reproduced works.

However, unlike Parliament whose laws can be traced directly to petitions and lobbying, the judiciary's "modernisation" role seems to have been adopted as a matter of "common sense" rather than as a matter of design.[6] This has created all sorts of difficulties. When the law develops in line with "common sense" it incorporates values that reflect the time, suiting the specific problem of concern at that time. However because the authority of liberal law rests with its universality, there is a pressure to broaden the specific model for judicial resolution of a dispute, to deal with an ever increasing range of circumstances and problems. This can lead to a failure to appreciate when there is a need to adapt or rework the basic concepts and approach, in order to meet new requirements and/or to accommodate different social relations from those considered important in the formative period of the law.

The requirement that reproductive possibilities, brought about by new technologies, be explained in term of the old "literary" model, needs to be understood in this context. The courts are under great pressure to continue to stretch "old" copyright concepts in order to accommodate "new" kinds of works that, philosophically, deserve as much protection as the "old" ones. However, even though this can be, and is done, as in the case of photography, the lack of fit is often felt to be quite unsatisfactory.

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[6] For a discussion of the politics of "common sense" see Jane Gaines, *Contested Culture. The Image, The Voice and The Law,* (Chapel Hill: University of North Carolina Press, 1991) at 12; 14.

To the postindustrial and the postmodern critics of copyright, the gap between the coverage of the established law and the social and commercial expectations of late twentieth century society is thought to now be very great and ever increasing. Chapter Seven examines the veracity and clarity of these claims, in particular in view of the way the law has dealt with the new copyright "claimants" and "infringers".

It is argued that copyright law has struggled to deal with the commercial expectations of postindustrial society, even though it is not exactly clear what meeting these expectations requires of the law. Different commercial realities for different digital media producers has meant that demands on copyright have not been unified. It is impossible to discern a distinct, long-term industry focus. This has further engendered a climate of anxiety and, in some quarters, further frustration and anger about copyright.

Similarly, postmodern artists are also by no means homogenous in their view of copyright, or in their practice. However unlike postindustrial critics, postmodern artists have tended to be univocal in opposing the values represented by contemporary copyright law. The works of many of these artists, such as Sherrie Levine and Jeff Koons, clearly express resentment at the way copyright law commodifies works and fetishises the social relations pertinent to that end. Copyright law is seen to obstruct creative and meaningful social commentary. The judicial treatment of Koons, particularly when compared to that of 2 Live Crew, seems to support this analysis.

It is not clear what the next stage in postmodern and postindustrial legal challenges to copyright will comprise. We can predict the broader sense of the contest, based upon what we already know of the various protagonists. However it is difficult to identify anything other than a broad *sense* of the

future, because it is hard to reconcile contemporary "pressures" with any current movement *within* copyright law. Copyright seems to be firmly tied to the foundations laid for a completely different society.

If my reading of copyright's history is sound, then the challenge facing this institution and those concerned about its future is momentous. Legislation can be expected to build some bridges from the old to the new and becoming. However legislation is only as good as its legislators and its guardians and one wonders from where these women and men will find the perspicacity that seems to be required.

To me to hope for *the answer* seems foolish. I feel that I know enough of what has gone before to suspect such solutions as misguided and selective. But I also know from copyright's history that this is what to expect. Our copyright reform has always been in response to the political lobbying of specific interest groups. This leaves the challenge for those concerned about making this institution more socially, politically and economically inclusive, that of actively supporting and publicising those who are currently out of the legislator's view.

I see the popularising of more contextual histories of copyright as a crucial part of this project, for it seems to me that our current lawyers and decision-makers are all but too unaware of the formative social and political role that copyright, as law, plays. A deeper interdisciplinary appreciation of the complex nature of the institution may lead to more socially responsible and intellectually accountable decision making, case by case and in the longer term.

For this reason it is important that the professional indifference and backbiting amongst scholars that has marked the writing of copyright's history to date, be done away with. Copyright is interdisciplinary and thus there needs to be close and continuing ties forged amongst all the disciplines. This is all the more important, given that at this stage in writing this history, it is our understanding of the links between the disciplines that are the weakest. At the same time more diverse community ties might also offer to the academic, lawyer or policy adviser insights into attitudes and practices that on the surface seem obscure or absurd, but which from a deeper consideration provide a new position from which to appraise what is actually going on.

It is from breaking down fences that our understanding of copyright will be enriched. And it is only from such a position that its many histories will be told.

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