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WHO'S PAINTING COPYRIGHT'S HISTORY?¹

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*Some beauties yet no precepts can declare,
For there's a happiness as well as care.
Music resembles poetry, in each,
Are nameless graces which no methods teach,
And which a master-hand alone can reach.²*

*True ease in writing comes from art, not chance,
As those move easiest who have learn'd to dance.³*

Alexander Pope (1688-1744)

The history of copyright has overwhelmingly been concerned with literature and not art. Most writings have focused on the economic and legal relations of the book trade, publishers and authors in the 18th and early 19th centuries. In most accounts copyright protection was gained by other kinds of works by the passing of subject specific legislation throughout the 19th century, including for the fine arts and some decorative arts. This occurred only after legal cases involving literary property rights had already established the general nature of the legal right. From this perspective it may be thought that art, as a relative late-comer in the legislative scheme, had little bearing on the origins and development of copyright law.

We are now accustomed to media specific classification of cultural production in copyright law. The discriminations we tend to make between kinds of works are based upon reference to the technology or production techniques used. For example, to us literature involves written expressions made with pen and ink on paper or word processor; art involves forms of pictorial representation by means of paint and brush, charcoal or other substance marked upon a surface. However as a matter of history, there is a problem in separating cultural production into discrete media specific categories, and especially where literature is separated from art. This way of classifying works had little resonance with how cultural production was

classified and valued from the Renaissance into the romantic period of the late 18th and 19th centuries. As the above quotation from Pope infers whether a work was, as a technological artefact, a literary or an artistic work mattered far less than the judgments made about the conditions of execution and cultural reception of the work. Artists and poets were distinguished from mere artisans and scribes. Was this the work of a Master; was it sublime; was it original; an expressive work; the act of a God like creator? Or was it merely a useful work; a likeness produced to order; a servile copy; an effort deserving no more than the anonymous attribution due to any other skilled worker?⁴

Though copyright historians have predominantly focused on the realm of literature, writings consistently question the importance of the creative subject to the law, in broad terms that would be familiar to those with an interest in art and literary theory. Most copyright writers have been driven to discount the influence of the creative personality, and particularly the romantic subject, on the law. Nonetheless this theme has and still marks how the copyright story is told. Questions that have loomed large in postmodern theory about reading the status, significance and value of works, have also framed many recent approaches to copyright as a subject of legal history.

The challenge of understanding this area of legal history is to understand how questions about the cultural specificity of the subject privileged by law, have come to define the telling of the origins of copyright, even though writers are nearly always trying to show the absence of any universal subject or value being embodied in the law.

What follows is an overview of influential writings on the history of copyright dating from the late 1960s to the present. Works are categorised thematically, rather than strictly sequentially. Though ‘art’ is not the primary concern of writers, works in each grouping address different attitudes towards the creative subject and the law.

I. Copyright and the rise of the modern author

In the late 1960s, within a year of each other, two American legal scholars, Benjamin Kaplan⁵ and Lyman Ray Patterson,⁶ published their works. “Publisher”⁷ and “author”⁸ perspectives on the history of copyright emerged throughout the seventies and, through the enormous output of John Feather,⁹ continued to flow in the nineties.

In these early writings about copyright's history the primary concern was to explain why the priority of the law was not that of protecting the author's private property rights in the text. Though modern copyright law developed at the same time as the rise of the professional author and the birth of the modern romantic author, the law was relatively unsympathetic to either of these changes to the writer's social status. For example, John Feather's research unearthed an enormous amount of detail about the nature and diversity of British printing practices from the fifteenth to the twentieth century. 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.

These writers 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.

Many of these early works present copyright, as a subject of history, as an unfinished project. Though it is not necessarily stated, they read as if the law's destiny would be fulfilled were copyright to better serve the first poets, and it could also better reward the scribes.

Michel Foucault's work "What is an Author?"¹⁰ redresses this literary politics. Foucault interrogates the philosophical presuppositions related to the "rise to the author", including the juridical and institutional system that placed the author and her/his text in a system of property relations. The work has had a major influence on the telling of copyright's history. Many conferences were held in the 1980s and early 90s to explore the relevance of Foucault's work and literary theory more generally to copyright law.¹¹ This marks a new stage in reading the history of copyright, seeking to refocus the relationship between law and authorship.

Mark Rose's paper "The Author as Proprietor"¹² was one of the first to deal with the history of British copyright following Foucault's lead.¹³ This paper centres on a discussion of the late eighteenth century case *Donaldson v. Beckett*.¹⁴ In this decision the court addressed the question of the origins of copyright law and specifically the argument that the author was a proprietor - a claim justified by Locke's theory of labour and romantic theory.

Donaldson v Beckett was just one in a series of cases pursued by publishers in the 18th century, when exclusive rights to publish literary works started to expire under the limited terms of the first copyright statute, the *Statute of Anne 1709*¹⁵. Publishers fashioned themselves as the time honoured guardians of the author, whom, it was claimed, had always "owned" their texts-

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.¹⁶

Lockean discourse concerning real property was translated to the cause of literary property -

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.¹⁷

It was also 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.¹⁸

It was argued there were exclusive rights to texts beyond those granted by statute law. These "perpetual" property rights, originally owned by authors, were grounded in common law and natural law, and assigned via contracts to publishers.

In *Millar v Taylor* (1769)¹⁹ publishers had some success. The majority of the court found that there was an author's perpetual property right to their texts. However when the defendant initiated an appeal to the House of Lords "the booksellers prevented this appeal from going forwards by coming to term with him". 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 also judged as against anything that looked like a monopoly in the book trade.²⁰

Donaldson v Beckett was essentially an appeal of *Millar v Taylor*, dealing with disputed rights to the same work, James Thomson's *The Seasons*. This work was a poem in blank verse, in four books and a final hymn that was first published 1726-30. It was a very popular work and it is claimed to have inspired reflections on Nature by Turner, Wordsworth and Coleridge.

The majority of the *Donaldson* court failed to find any authoritative legal precedent in support of the perpetual right of authors. 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 *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?²¹

He rejected the claim that the common law had ever recognised such a right. This was in line with Lord Mansfield's thoughts in *Millar v Taylor* that it could not have existed a right from time immemorial since there was no record of it prior to the invention of the printing press.

He 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.²²

A dissenting judgement by Justice Ashurst endorsed the view of Lord Mansfield in *Millar v Taylor* that such a right was warranted by the principles of "natural justice and solid reason". He 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.²³

Donaldson was significant for its finding that there was no common law literary property right. This left the power to define (and limit) copyright exclusively with Parliament.

Statutory rights could not be beefed up in the interest of authors and publishers, by way of legal reference to rights that might be claimed as existing according to “natural law”.

However though the Law Lords had discredited the case for a common law literary property the significance of this was not so clear at the time. There was confusion surrounding the reasoning behind the decision, there being no official case report and incomplete and anonymous copies of judicial speeches in public circulation. Rose argues that 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”. He goes on to note that “. . . 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”.²⁴

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.’”²⁵ 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 *Authors by Profession*²⁶ continued to advertise the “author myth”. Rose’s work tries to redress this ahistoricism.

In doing this Rose 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 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 Lords could not see why literary 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 artistic 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, when there was broader acceptance of romantic ideas, 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 legal 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.²⁷ *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.

Rose expanded upon this article in his book *Authors and Owners*.²⁸ Here Rose ties his critique of romantic notions of authorship to a critique of Lockean possessive individualism. He argues that this period was marked more by relations of *propriety* than *property*. Whilst authors were paid for their work, payment symbolised honour, virtue and reward for the writer, not recognition of ownership of the text.

This propriety/property distinction can create some confusion for the reader familiar with the history of property theory. Rose treats “property” as if it is fixed to a particular idiom of transhistorical relevance, derived from CB Macpherson’s influential interpretation of possessive individualism.²⁹ It leaves 16th- mid 18th century literary property in a no man’s land of “pre-property”. This is unsatisfactory in a book that purports to map the links between economic and political theory and the realm of cultural production.

Secondly, whilst Rose is generally careful in his treatment of Locke, he tends to merge Locke’s views on literary property with Blackstone’s inventive reinterpretation of them in the literary property cases of the 18th century. This marginalises the significance of the enlightenment philosopher’s empiricist’s views. Whilst Locke’s ideas contributed to the

social construction of the author he was uncertain about how far the private property right that belonged to the author of a work should extend. The exercise of extensive private ownership rights could conflict with the pursuit of truth.³⁰ This created a philosophical impasse for Locke, however Rose treats it more as an oversight. It is precisely the coincidence of the need for both public and private rights in a text that makes copyright a peculiar and indeterminate subject of private property, as was recognised in *Donaldson v Beckett*. Much of the objection to acknowledging in law the social importance of “good works”, by defining copyright as the natural right deserved by the creator of expressive works, related to concerns over the educational implications of this for society. The law that respected the natural property right of the author was also a law creating a “tax upon knowledge”. There were competing social goals at stake in the literary property debates. This complexity should not be confused with the law’s lack of development. Because of historical, philosophical and jurisprudential reasons there could only be a very loose and uncertain connection between the romantic notion of authorship and possessive individualism.

David Saunders, *Authorship and Copyright*³¹ is, in a sense, a scholarly response to the work of Rose. His main 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 hence to save it from postmodern criticisms like Rose’s, “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.³² 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, 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. 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” is quite broad, but his analysis of law is quite narrow.

Catherine Saville's more recent work *Literary Copyright Reform In Early Victorian England*³³ also focuses pretty much exclusively on copyright as defined in legislation. Her work picks up where Rose had left off. Though the modern author may not have been accorded great respect in the literary property debates of late 18th century, surely by the 1840's his (sic) prospects for a more favourable legal right must have improved? What happened to author's rights with the passage of *The Copyright Act 1842*? She considers why efforts to reform copyright law in the interest of professional authors, supported by literary elders like William Wordsworth and sponsored in Parliament by Serjeant Talfourd, were compromised. Her reading is influenced by Feather's approach, however given her subject is the legislation, she focuses much more on Parliamentary politics than the politics of the printing trade - degrees of influence in the House, party pragmatics as well as more philosophical perspectives that affected legislative decision making. This combination of factors led to important concessions such as an extension of the copyright term for authors, but as with Saunders, not the adoption of any coherent rationale for copyright protection.

In theme *all* these works are preoccupied with authors and their claims to own texts in law. They are engrossed in literary property legislation. Where case law figures it is only considered in relation to how the courts interpreted the first copyright statute, *The Statute of Anne* 1709. Why the story of literary property legislation is presumed by many as the model for all copyright law is not explored. There was quite diverse subject matter protected in early 19th century legislation similar to the literary property acts, however these are left for others to chronicle. It is presumed that the copyright story is primarily about the legal meaning of "literature".

Literary culture was never exclusively concerned with "literature", that is, the printed word. In her seminal text, *The Printing Press as an Agent of Change*³⁴, Elizabeth Eisenstein points to the links between the rise of the artist and the development of printing press.

Before the printing press, great works of art, so far as they were considered to be earthly creations, were most clearly identified with the noble patrons that had sponsored the work. The presses allowed art works to be recorded and distinguished in the form of books of engravings of paintings and sculptures. Publishers quickly realized the commercial value of the printed image. Eisenstein argues that this form of publication allowed the development of sustained dialogues about art and arts practice, and by recognition of the great Masters, a

separation of the “true” artists from mere artisans. Biographies of artists and engravings of their portraits helped individualize the creative identity behind the work. Artists took their place as a subject of literary culture (even though the arts professional was not necessarily accepted in gentlemanly circles) and valued for their expressive contribution. The artisan/craftsperson remained identified by and with maintaining oral traditions, with competency judged in terms of technical mastery and not expressive input.

It became common for painters to assign to particular printers the exclusive rights to make engravings of their works. The second copyright Act, the *Engraving Copyright Act 1734*, also known as “Hogarth’s Act”, was legislative recognition of the economic value of engravings to book publishing. Hogarth was an established painter at the time of the Act, which reputedly followed the piracy of his popular series of images that satirized moral and social abuses in a style ‘similar to representations on the stage’, such as *A Harlot’s Progress* (6 scenes, c. 1731). Hogarth was also an engraver and from 1720 had run a business engraving book plates and painted portraits. The *Engraver’s Copyright Act* protected the rights assigned between artists and publishers of engravings, and publishers of engravings from piracy in the same manner as the *Statute of Anne*. It was not a law inspired by recognition of the engravers’ artistic rights per se. A distinction remained, in practice, between “artist” and “artisan” engravers. It was Hogarth’s worth as a creative and inventive subject that warranted protection, not his talents as an engraver. For the most part, though engravers were often required to exercise a high degree of skill and independent judgment in making engravings, they were considered scribal employees exercising at best a “secondary” claim to creativity—mere technical interpreters of another’s vision.

Whilst copyright law expanded to incorporate new reproductive technologies and protect the investments in the works produced by these means, there was not necessarily an associated rise in respect for the new skills and artistic practices related to technological “progress”. Engravers generally lacked the social standing to reap great benefits from copyright law unless they were also noted as “artists”. They struggled for acceptance in the Royal Academy of the Arts during the nineteenth century. In similar battles with the French Academy it was claimed: “If engravers have to be admitted to the Institute, then locksmiths will have to be admitted as well”.³⁵ In part the acceptance of engravers as artists was assisted by the arrival of another reproductive technology— photography. Engraving was favourably contrasted with the newer technique as “photography is incapable of correcting the faults of a picture, bad drawing, want of keeping. etc., but copies all the *vicious* with the *good*”.³⁶ It was argued that

the kind of labour engaged in engraving was closer to art, than it was to the craft of photography.

Copyright law may be relatively quick to protect economic claims associated with new reproductive technologies, but the apparent technological history of the new works created, generally led to a devaluation of the labour associated with these creations. The expansion of copyright's domain created new cultural struggles played out in society and in law for recognition of the talents associated with use of the new reproductive technologies. These are issues that are taken up in critical theoretical approaches to copyright's history.

II. Copyright in Theory

A second group of writing does not focus so narrowly on literature, and focuses in much more depth on the nature of law and legal rights.

Bernard Edelman's *Ownership of the Image*³⁷ draws on Marxist theory, specifically the work of Althusser. In relation to owning the image, here specifically the case for 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". For Edelman "creativity" is celebrated in copyright law not because of respect for art, but because it is a tool that can serve the interests of capital.

Edelman's approach has influenced a number of works that works offer political readings of the development and practice of intellectual property law, including Celia Lury's *Cultural Rights. Technology, Legality and Personality*,³⁸ Ronald Bettig's *Copyrighting Culture: The Political Economy of Intellectual Property*³⁹ and Jane Gaines' *Contested Culture: The Image, The Voice and The Law*.⁴⁰ These works tend to be ignored by mainstream copyright lawyers,

Lury and Gaines usually dismissed as being of greater relevance to cultural studies, than law. Though they are all scholarly and complex works, perhaps lawyers are nervous about seriously addressing what the writers say about the economy of copyright practice.

On one level Brad Sherman & Lionel Bently's *The Making of Modern Intellectual Property*⁴¹ addresses similar political themes but in terms of theory, it is written in the language of jurisprudence which is more familiar to lawyers.. This work discusses the origins of copyright with reference to a distinction between premodern and modern intellectual property laws. Premodern laws are characterised as subject specific and geographically localised. Modern laws are abstract, forward looking and are perceived as autonomous. The eighteenth century literary property debates are cast as a premodern struggle over the nature and legitimacy of intangible property rights. It is argued that the law was unable to effectively determine the metaphysical dimensions of intangible property- there was no universal philosophy to which the law could be confidently tied. Following the 18th century literary property debates, there was a jurisprudential shift away from a concern that the law reflect the "natural" property in mental labour, to a "consequential" analysis of the merits of granting a right. In the process it has been left up to the autonomy of law, rather than natural rights, to "create" the intangible property.

With modern law making, protecting creative efforts of many forms is accepted as legitimate. The main interest of law reformers is not with cultural questions about the meaning or significance of works but with legal aesthetics - drawing simple, uniform and precise laws. Legal simplicity does not come from reliance on definition in terms of philosophical essences or principles, but from a high level of legal abstraction in definitions. It is argued that these abstractions serve to include but never clearly exclude various objects from protection. The property at the heart of intellectual property rights is now only partially defined. It is mainly explained in terms of comparisons between different intellectual property rights. For example, copyright might still be cursorily distinguished from patents by reference to the essential creative activity at issue, patents cast as involving "discoveries" rather than creation. However the unique expression at issue in patents would only be legally defined with reference to the technical requirements of the patent specification and the conditions of its registration, and thereby differentiated from a copyright expression that lacks these distinctions. The authors suggest that by the late 19th century any reference to creativity in intellectual property texts is superficial.

With the full modernisation of the law in the 20th century “the law moved its focus away from the labour used to create, for example, a book . . . to focus instead on the book . . . itself.”⁴² With echoes of Edelman’s theoretical concerns, Sherman & Bently argue that rather than try to value the labour embodied in the book, modern law assesses value with reference to the (potential) macro-economic value of the book as a commodity, and in the main, tries not to value the work at all. The subject matter of intellectual property is decontextualised—seen as a “legal object”, that is represented as property in law by indicia such as legally significant drawings and writings, and as circumscribed by policy.

These more theoretical works draw out the implications of looking for creativity in copyright’s history. They are most conscious of tracking what is left out when an inquiry is too single-minded in pursuit of the creative subject in the law. Ultimately they also lead to a questioning of the point of dwelling too much on reading copyright law with reference to its historically contingent origins. The law is too fluid, legislators too creative and economic interests too powerful to be caught by culture and the past.

III. Postmodern histories

A third grouping of writings use a postmodern sensibility to inform their analysis of contemporary cultural and legal practice. Rosemary Coombe’s *The Cultural Life of Intellectual Property*,⁴³ and John Perry Barlow’s “The Economy of Ideas,” and “The Next Economy of Ideas”⁴⁴ explore the creativity inherent in cultural practices that confront intellectual property rights. Appropriative practices are considered as creative practices, often motivated by political objections to corporate power. The works are histories of the present, based on conclusions about copyright’s past. The writers reflect on how particular social and economic relations and practices have been historically favoured by the law, and discuss how others have been constrained.

Coombe’s work adopts Foucault’s insights into authorship and authority in her reading of contemporary cultural practices. She makes explicit the cultural specificity of the subject privileged by the law, by examining postmodern and transgressive appropriation of corporate intellectual property and its legal consequences.

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. We are not necessarily passive consumers of meanings produced by the author and marketed by cultural and corporate elites. In viewing cultural texts we can generate new, personally meaningful identities that resist manufactured culture.

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 numerous 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. For Coombe copyright law is a great site for exploration of contemporary art and cultural practice, read in terms of production of and resistance to cultural power.

Coombe is an acute observer of “fringe” cultural practice in contest with the “mainstream”. However she treats creativity as a defining characteristic of those resisting the law. Mainstream copyright practice is not interested in sponsoring creative activity. It is preoccupied with commercial considerations. This is also a perspective she shares with Barlow.

Barlow’s prophecy of the early 90s was:

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.⁴⁵

In analysing the concept of “ownership”, he argues that 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 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, supported by a market ethics that rewards “information (that) wants to be free”, but not necessarily at no cost. That is, the cyber-market is a place where consumers will loyally reward useful ideas and ease of access to the digital goods they desire and through this means a democratic kind of natural selection will advance manufacturers,

inventors and artists of merit. Barlow's update on the original article treats the massive appeal of Napster, as a mode for free digital delivery of music files, as proving his theory in practice. Peer to peer distribution technologies, such as Napster, will replace the "artificial" reward structures established by copyright law, allowing for a more immediate and direct relationship and exchange between "cultural producer" and "consumer".

Like Coombe, Barlow believes that intellectual property law has primarily constrained freedom of expression and creativity:

It's captivating to think about how much more freedom there will be for the truly creative when the truly cynical have been dealt out of the game. Once we have all given up regarding our ideas as a form of property, the entertainment industry will no longer have anything to steal from us. Meet the new boss: no boss. We can enter into a convenient and interactive relationship with audiences, who, being human, will be far more ethically inclined to pay us than the moguls ever were. What could be a stronger incentive to create than that?⁴⁶

Unfortunately Barlow fails to consider that entrepreneurialism is a force capable of undermining the development of an ethical community of technology users and consumers. He tends to assume that once the tyranny of intellectual property rights is overcome, cyber-competition will tap into an ethical framework that involves a commitment to unrestricted, democratic exchanges between producers and consumers of technology. What is the basis for such faith?

He romanticises the potential of "organic" reward structures. When Barlow distinguishes postindustrial society from earlier modes of production, he ignores the historical links between "Second Wave" and "Third Wave" markets. Such links impact upon chances for market success. They also affect one's ability to seek more favourable legislative rebirths of copyright law. Barlow's black and white treatment of law and of economic history makes an abstract argument easier to read but to anyone with some understanding of either of these things it is ultimately unsatisfying for this reason.

He also romanticises the appropriation of digital works. The motivation of users of peer to peer distribution services, like Napster in its original form, cannot universally be described as an interest in creative exchanges. At least for some the attraction is the relative technological ease of obtaining works for free. Once copyright owners put in place stronger technological and legal obstructions to stem free uses many of those that had practiced copyright "resistance" will drop out of the picture. Can those remaining be expected to influence

mainstream politics and ultimately the ongoing practice of the law?⁴⁷ What of the claims of mainstream creative artists who have no desire to contest copyright law? Barlow's writing appropriates the cultural cache associated with claims to creativity exclusively to his own cause, ignoring that other's claims to creativity will continue to legitimate mainstream copyright law.

The recent work by Matthew Rimmer⁴⁸ takes the form of microhistories of particular cultural disputes like Coombe, but he does not presume creativity to be the exclusive tool of any particular cause. Rimmer's work, drawing upon a different postmodern sensibility, looks at all cultural production as collaborative activity. As the product of collaborative activity any mass reproduced work at the heart of copyright is also a site of competing claims for artistic attribution and copyright ownership. He then accounts for how proponents advocate, contest, resist, litigate and lobby - manipulating cultural discourse, most especially surrounding relative claims to "creativity", in order to achieve desired legal outcomes. When viewed from this battleground, the law's mediations of creativity are complex and fluid. There is no creative subject universally favoured in law, nevertheless, there are numerous reasons that account for the success or failure of particular claims, such as historical privilege, money, professional organisation and support, access to and use of the media, effective legal counsel, political favour and personality. Because postmodern histories are deeply involved in the richness of contemporary cultural practice these works are potentially of interest to a broader audience than many of the more theoretical legal works.

IV. Conclusion

Writing the history of copyright has been through many fashions over the past few decades. Many writers have sought to combine the concerns of earlier writings - to write about the law without assuming a linear direction; to account for the "author affect" on the law and other social influences; to acknowledge localised resistances and politics; to consider how the politics of the law and of law making might influence the ensuing legislation.

Most writers have felt bound to pursue the truth of creativity in law – viewed through literature, literary theory, critical legal theory and postmodern practice. They share a motivation to explain what might seem counter-intuitive to the uninitiated – to tell why copyright is not all that interested in honouring the creative subject – to tell why it never has been. In law creativity has a shady legal presence and a certain dullness of meaning. And though in each stage writers have appropriated at least some of the concerns of those before

them, they have been at their most creative in reconstructing the concept of “creativity”. In copyright’s history creativity is both a constant and a most unstable subject.

¹ An earlier version of this paper was published as “Who’s writing copyright’s history?” (1996) *European Intellectual Property Review*, 18:6 pp322-329.

² Alexander Pope, *An Essay on Criticism: Part One* (London: Lewis, 1711). (eds) D. F. Theall and I. Lancashire, Dept. of English (Univ. of Toronto), and Univ. of Toronto Press 1997. Lines 141-5.

³ Alexander Pope, *An Essay on Criticism: Part Two*, Ibid, Lines 362-3.

⁴ This theme is further explored in K. Bowrey, “Don’t Fence Me In: The Many Histories of Copyright”, SJD thesis, Sydney University 1994.

⁵ Benjamin Kaplan, *An Unhurried View of Copyright*, (New York: Columbia University Press, 1967).

⁶ Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vandebilt University Press, 1968).

⁷ Ian Parsons, “Copyright and Society”, in *Essays in the History of Publishing*, (ed) A. Briggs, (London: Longman, 1974) p29.

⁸ Victor Bonham-Carter, *Authors By Profession*, Volumes One & Two, (London: The Society of Authors, 1978).

⁹ *The Provincial Book Trade in 18th century England*, (Cambridge: Cambridge University Press, 1985); *A History of British Publishing*, (London: Croom Helm, 1988); *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*, (London: Mansell, 1994).

¹⁰ In *Textual Strategies: Perspectives in Poststructuralist Criticism*, edited by J.V. Harari, (Ithica N.Y., Cornell University Press, 1979) p141.

¹¹ See for example, the conference proceedings published in (eds) Martha Woodmansee & Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, London: Duke University Press, 1994).

¹² Mark Rose, “The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship”, 23 *Representations*, (1988), p51. It was republished in Brad Sherman & Alain Strowel, (eds), *Of Authors and Origins: Essays on Copyright Law*, (Oxford: Clarendon Press, 1994) at 23-55.

¹³ Martha Woodmansee’s article, “The Genius and the Copyright: economic and legal conditions of the emergence of the ‘author’”, *Eighteenth Century Studies*, 17 (1984) p425, predated Rose’s work, however it is primarily about copyright and the development of a class of professional writers in eighteenth century Germany.

¹⁴ (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

¹⁵ For works published before the Act commenced the term was 21 years. For unpublished works the term was 14 years plus a further term of 14 years if the author was still alive after the expiration of the first term..

¹⁶ *The Case of Authors and Proprietors of Books*, as quoted in Rose (1988), supra n.12 at 57.

¹⁷ Ibid.

¹⁸ William Blackstone, *Tonson v Collins* (1760) quoted in Rose, ibid at 63.

¹⁹ 4 Burr. 2303, 98 Eng. Rep. 201.

²⁰ Rose(1988), supra n.12 at 67.

²¹ (ed) Stephen Parks, *The Literary Property Debate: Six Tracts 1764-1774*. (New York: Garland Publishing, 1975) at F32.

²² Ibid at F34.

²³ Ibid, at E35.

²⁴ Rose (1988), supra n.12, at 69.

²⁵ Ibid at 78.

²⁶ Supra n. 8.

²⁷ 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.

²⁸ The full title is *Authors and Owners. The invention of copyright*, (Cambridge, Massachusetts. London: Harvard University Press, 1993).

²⁹ *The Political Theory of Possessive Individualism: Hobbes to Locke*, (Oxford: Clarendon Press, 1962).

³⁰ See Bowrey, supra n.4, at 80-90.

³¹ (London: Routledge, 1992).

³² Id, at 237.

³³ (Cambridge: Cambridge University Press, 1999).

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- ³⁴ The full title is *The Printing Press as an Agent of Change: Communications and cultural transformations in early modern Europe*, (2 vols), (Cambridge: Cambridge University Press, 1979).
- ³⁵ quoted in Gordon Fyfe, "Art and Reproduction. Some aspects of the relations between painters and engravers in London 1760-1850", in (eds) Jerry Palmer & Mo Dodson, *Design and Aesthetics*, (Routledge 1996) at 197.
- ³⁶ Engraver, George Doo, *ibid* at 201.
- ³⁷ 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).
- ³⁸ (London: Routledge, 1993).
- ³⁹ (Colorado: Westview Press, 1996).
- ⁴⁰ *Contested Culture. The Image, The Voice and The Law*, (Chapel Hill: University of North Carolina Press, 1991).
- ⁴¹ (Cambridge: Cambridge University Press, 1999).
- ⁴² *Ibid*, at 174.
- ⁴³ *The Cultural Life of Intellectual Properties. Authorship, Appropriation and the Law*, (Durham, London: Duke University Press, 1998).
- ⁴⁴ "The Economy of Ideas: A Framework for rethinking patents and copyrights in the Digital Age," (1994), *Wired*, March, p84-89, 126-129. "The Next Economy of Ideas: Will Copyright survive the Napster bomb?" (2000) 8.10 *Wired* 240, 242.
- ⁴⁵ "The Economy of Ideas", *supra* n. 31.
- ⁴⁶ "The Next Economy of Ideas", *ibid*.
- ⁴⁷ For more on the politics of cultural resistance and activism (mainly in the vein of Coombe), see Naomi Klein in *No Logo. Taking Aim at the Brand Bullies*, (New York: Picador, 2000) and Kalle Lasn, *Culture Jam. The Uncooling of America*TM, (New York: William Morrow, 1999).
- ⁴⁸ See for example, "Shine: Copyright Law and Film", (2001) *Australian Intellectual Property Journal*, Vol 12 (3) p129.