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## ***Who's writing copyright's history?***

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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.<sup>1</sup>*

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 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.

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<sup>1</sup> 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.

## 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

## Publishers' and authors' perspectives

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

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<sup>2</sup> Benjamin Kaplan, *An Unhurried View of Copyright*, (New York: Columbia University Press, 1967); Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968).

<sup>3</sup> *Id.*, at 4.

<sup>4</sup> Sam Ricketson, *Intellectual Property. Cases, Materials and Commentary*, (Sydney: Butterworths, 1994).

<sup>5</sup> 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).

<sup>6</sup> *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). This recent book is based upon his numerous journal publications: "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; "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 No 2 (1992) p455.

<sup>7</sup> 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.

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*.<sup>8</sup> This history is more about the practical relations of copyright than it is about its legal foundations.

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 books also track 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?"<sup>9</sup> 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

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<sup>8</sup> (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

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

opening paragraphs<sup>10</sup> - 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”<sup>11</sup> was one of the first to deal with the history of British copyright following Foucault’s lead.<sup>12</sup> However Rose is not so much interested in writing about copyright’s history as he is in using 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*.<sup>13</sup> 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.’”<sup>14</sup> 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 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

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<sup>10</sup> 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 No 2 (1992) p279 etc.

<sup>11</sup> Id. It has recently been republished in Brad Sherman & Alain Strowel, (eds), *Of Authors and Origins: Essays on Copyright Law*, (Oxford: Clarendon Press, 1994) at 23-55.

<sup>12</sup> 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.

<sup>13</sup> (1774) 4 Burr. 2408, 98 Eng. Rep. 257.

<sup>14</sup> Supra n. 10, at 78.

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.<sup>15</sup> *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*.<sup>16</sup> Here Rose ties his critique of romantic notions of authorship to a critique of Lockean possessive individualism. In doing so Rose again links literary and economic discourses.

This is an interesting work where a complex argument is illustrated and enlivened with reference to a wide range of literary works and personalities. One cannot help but be amazed by Rose’s great knowledge and understanding of literature and English literary relations.

Rose’s analysis of literary property relations focuses on the relationship between the author and the text, arguing 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 makes a lot of sense from a literary perspective. However it can create some confusion for the reader familiar with the history of property theory. Aristocratic notions of property combined property as virtue *and* property as a private right of ownership. Rose mentions this in relation to 18th century civic humanism, arguing it had little influence on the literary property debates in England, unlike in France and America. However this notion of property was not unique to the 18th century.

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,<sup>17</sup> 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<sup>18</sup> 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

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<sup>15</sup> 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.

<sup>16</sup> The full title is *Authors and Owners. The invention of copyright*, (Cambridge, Massachusetts. London: Harvard University Press, 1993).

<sup>17</sup> *The Political Theory of Possessive Individualism: Hobbes to Locke*, (Oxford: Clarendon Press, 1962).

<sup>18</sup> see Paul Edward Geller, “Must Copyright be For Ever Caught Between Marketplace and Authorship Norms?” in Brad Sherman & Alain Strowel supra n.11 p164-5.

ownership rights could conflict with the pursuit of truth.<sup>19</sup> 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*.

It could be argued that 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. It is these uncertainties and obstacles that are of great interest to a lawyer seeking to understand philosophical influences on the development of copyright law and the resulting foundation “principles”, to the extent that any can be found. This book is of great assistance in understanding the social construction of authorship and copyright, but the connection between this and its legal construction remain unclear. This limits the impact of this work upon legal discourses about copyright.

### **The view of Edelman, a less popular French writer**

Edelman’s *Ownership of the Image*<sup>20</sup> does involve a detailed discussion of the nature of legal rights and private property. 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-legitimizing domain of law and of private property to continue unchallenged.<sup>21</sup>

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

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<sup>19</sup> See K Bowrey, *Don't Fence Me In: The many histories of copyright*, unpublished SJD thesis Sydney University, 1994 p80-90.

<sup>20</sup> 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).

<sup>21</sup> 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 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.

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.<sup>22</sup> Edelman’s work is perhaps impenetrable to those without a commitment to pursuing the same kind of questions about law and legal ordering.

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.<sup>23</sup> There are fundamental differences between French and British or American copyright.<sup>24</sup> 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.<sup>25</sup> 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.

This book was quite savagely reviewed by C.R. Westering in the *European Intellectual Property Review*.<sup>26</sup> 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

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<sup>22</sup> See Jane Gaines, *Contested Culture. The Image, The Voice and The Law*, (Chapel Hill: University of North Carolina Press, 1991) at 2-4.

<sup>23</sup> 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.

<sup>24</sup> For an historical analysis of these differences see David Saunders, *Authorship and Copyright*, (London: Routledge, 1992) Chapters 3-6.

<sup>25</sup> *Supra* n. 22.

<sup>26</sup> [1994] 3 E.I.P.R. 140.

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.”<sup>27</sup> 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.<sup>28</sup> Like Gaines, Coombe also argues that the subject privileged by the law is capital. However her analysis differs from Gaines 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.<sup>29</sup>

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.

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<sup>27</sup> “Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue”, *Texas Law Review*, Vol 69, (1991) at 1588.

<sup>28</sup> See “Introduction: The Potential for an Interdisciplinary Approach to Intellectual Property Scholarship”, (1991) 6 I.P.J. 265.

<sup>29</sup> 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).

The postmodern “history” of copyright has recently been explored and soundly criticised by David Saunders.<sup>30</sup> 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.”<sup>31</sup> 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 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.<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup> 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 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

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<sup>30</sup> Supra n. 24.

<sup>31</sup> Id, at 3.

<sup>32</sup> Id, at 237.

<sup>33</sup> 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.

<sup>34</sup> This point is taken up in Chapter 6.

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.<sup>35</sup>

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.<sup>36</sup>

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.

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 . . .<sup>37</sup>

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.<sup>38</sup> What seems to be emerging is an articulate, loosely organised “anti-intellectual property” position, coalescing around frustration with the way that digital media is dealt with by the established copyright and patent regime.

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<sup>35</sup> Gaines, *supra* n. 22 at 11.

<sup>36</sup> *Id.*, at 13.

<sup>37</sup> Nancy Anderson & David Greenberg, *supra* n. 21, at 82.

<sup>38</sup> 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, “Crypto 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.

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.”<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> But what is significant about Barlow’s contribution is that he is not addressing lawyers per se, but the creators and investors in current technologies. The work has been very successfully shipped through the on-line community, reaching an audience likely to be intensely interested in his ultimate message - how to make money in cyberspace.<sup>42</sup>

Barlow’s perspective on this is historically grounded. It involves an analysis 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 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. These “organic” market mechanisms will replace the “artificial” reward structures established by copyright law.

Barlow’s predictions are clearly and defiantly utopian, which is refreshing at a time characterised by print-media inspired hysteria over our digital future. Nevertheless it is also a flawed view that overdraws a distinction between the creative forces of ethics and technology, and the retardant force of law. Copyright as law is not as limited as Barlow surmises. It is not merely an historical artefact of the Second Wave, with inflexible legal categories. Copyright is a complex organic body of law, containing possibilities for development, re-development and reform.

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<sup>39</sup> Barlow, *Ibid.*

<sup>40</sup> That is, the principle that copyright only gives protection to the expression of ideas, it does not restrict access to ideas.

<sup>41</sup> Kaplan, *supra* n. 2; David Vaver, “Some Agnostic Observations on Intellectual Property”, (1991) 6 I.P.J. 125.

<sup>42</sup> It can be found at <http://www.eff.org/~barlow/>

Secondly 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 access to information on the part of both producers and consumers of technology. What is the basis for such faith?

A case in point is the U.S. government's development and specification for the "clipper chip", which is a "DES" encryption and decryption device. The Clinton administration have tried to implement the fitting of clipper chip technology to all telephonic devices, selling it's encryption code as a citizen "privacy" initiative. The device also incorporates a specific "back door" that enables government agencies, such as the C.I.A., N.S.A and F.B.I. to decode private communications by telephone or modem.<sup>43</sup> Debate about the merit of the chip demonstrates diverse, informed opinion about the virtue of free communication, as well as the potential for conflict between entrepreneurial principles and any ethics of free communication. It also demonstrates the possibility for much more invasive forms of control over communications to emerge than the comparatively benign ones imposed by copyright. New technologies provide fresh opportunities for legal regulation and legal regulation can take various forms. This means that questions about access to and control over information will remain at the centre of all technology law, regardless of whether or not intellectual property rights are involved.

Barlow also 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. These links will impact upon one's chances for Third Wave market success, regardless of changes to 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.

### **Recent Developments**

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 found *within* any of the established perspectives - of law, industry, literature, cultural or cybercultural theory. History shows that our understanding of copyright develops out of the interaction of a number of 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 was over deciding *what the legitimate interests and concerns of copyright are* and *who is authorised to speak for them*. There was 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, had lost sight of the whole.

This criticism of the writing of copyright's history does not apply to two recent books, both of which are collections of essays which are distinctly multi-disciplinary. *The Construction of the Author*<sup>44</sup> and *Of Authors and Origins*<sup>45</sup> jointly incorporate a virtual

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<sup>43</sup> An archive comprising many articles about the clipper chip can be found at <http://www.eff.org/pub/privacy/clipper/>

<sup>44</sup> Martha Woodmansee & Peter Jaszi (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Durham, London: Duke University Press, 1994). This book republishes the collection of essays from *Cardozo Arts & Entertainment Law Journal*, Vol 10 No 2 (1992).

“who’s who” of current work that touches on copyright’s history, particularly within the postmodern tradition and in some important ways extending beyond it.<sup>46</sup> Here writings from lawyers sits alongside that of non-lawyers- historians, cultural theorists and philologists. Comparative analyses of English and continental approaches to the subject can be found. Further the book edited by Sherman and Strowel moves beyond a preoccupation with copyright and text, including works discussing cinema, photography and aboriginal art.

Independently and together the two books suggest thematic connections that are important to those interested in understanding copyright’s history. However, given the many different sites of historical study, the various kinds of conclusions made about copyright, and the currency of the publication of the works, the books remain more multi-disciplinary, than interdisciplinary. That is, the essays work independently and, as parts in a collection, they also add something to each other. But generally there has not yet been sufficient cross-fertilisation of ideas to show a sophisticated interaction of the different perspectives. Nevertheless, apart from the scholarship of the individual writers, what is most promising about these books is the evidence they show of increasing contact amongst a diverse range of scholars across different continents. This leads to the expectation of many stimulating, more interdisciplinary works in the near future.

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<sup>45</sup> Brad Sherman & Alain Strowel, *supra* n.11.

<sup>46</sup> Of writers mentioned above, essays by John Feather, Martha Woodmansee, Mark Rose and Rosemary Coombe appear in *The Construction of Authorship*, *supra* n. 44. Works by Mark Rose and David Saunders appear in *Of Authors and Owners*, *supra* n. 11.