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### 3. Law, aesthetics and copyright historiography: A critical reading of the genealogies of Martha Woodmansee and Mark Rose\*

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#### 1. INTRODUCTION

This chapter discusses the importance of Martha Woodmansee's *The Author, Art and the Market*<sup>1</sup> and Mark Rose's *Authors and Owners*<sup>2</sup> to the history of copyright. My ambition is to use these works as a springboard to open up a broader discussion about the disciplinary boundaries of copyright historiography in order to reflect upon some of the reasons for the limited disciplinary exchange between humanities and law in Anglo scholarship.

In detailing late eighteenth century refinements of German aesthetics that come to inform the notion of authorship, Woodmansee shows the importance of understanding the interplay between philosophy, materiality and the law. She shows how the conditions facing authors in literary markets in the late eighteenth century led to a disciplinary exchange that ultimately affected the character of the aesthetic project, the development of copyright law and the cultural reception of the idea of authorship. However Woodmansee's history does not detail how aesthetics came to life within the law.

Whereas Woodmansee offers a genealogy of aesthetics, Rose is interested in setting out the genealogy of the 'author as owner'. Rose chooses the literary property debates that culminate in the leading case of *Donaldson v Becket* (1774),<sup>3</sup> which he argues was key to establishing the notion of the author as proprietor. As philosophy is primarily addressed through the prism of the legal arguments and political advocacy Rose's work is, perhaps, an easier read than Woodmansee for legal scholars. However, using Rose's appropriation of Locke as an example, I argue that Rose's failure to delve more deeply into philosophy and related theories of property leads to an oversimplification of the authorship debate and the role of philosophy within it and the law. Further, notwithstanding that the notion of authorship was discussed so widely and in such detail in the

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<sup>1</sup> The full title is Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics* (Columbia UP 1994).

<sup>2</sup> Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard UP 1993). This book draws upon Mark Rose, 'The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship' (1988) 23 *Representations* 51.

<sup>3</sup> *Donaldson v Becket* (1774) 4 Burr 2408, 98 ER 257.

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British literary property debates that ‘its normative status was effectively rendered incontestable’,<sup>4</sup> *Donaldson v Becket* provided no definitive legal construction of authorship. Nor did it advance legal methodologies that authoritatively relate law and philosophy. This gap remains in place in the twenty-first century.

Woodmansee and Rose were both inspired by Foucault and his observation that ‘the coming into being of the notion of the author constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences’.<sup>5</sup> Both authors have made major contributions that work to demystify authorship by revealing the particular philosophical, historical and material conditions that supported the emergence of copyright. Woodmansee’s history reminds us that it was not just the eighteenth and nineteenth century development of aesthetic ideas that supported the development of copyright. There were also cultural and political strategies devised to support reception of the idea of authorship. Yet Anglo copyright history, largely based upon consideration of the significance of the Statute of Anne (1710),<sup>6</sup> as well as related case law and subsequent statutory revision, remains uncomfortable about engaging with the nuances of the philosophical ideas that support new legal claims. There has been comparatively little discussion of the role of strategies and methods that inform and sustain the interplay between law, philosophy and culture or consideration of the way the notion of authorship continued to develop as the marketplace for cultural products matured and copyright was extended to encompass far more than books. Though it is well understood today that copyright is both a legal and a cultural category, the relationship between law and philosophy remains very sketchy in the writing of Anglo copyright history. This chapter concludes with a discussion about why this problem needs to be overcome and why we need to think more productively about copyright’s essential connection with philosophy and aesthetics.

## 2. A GENEALOGY OF AESTHETICS

The full title of Woodmansee’s work, *The Author, Art and the Market. Rereading the History of Aesthetics*, simply, if elliptically, defines the scope of her inquiry. The book is first and foremost a contribution to the history of ideas, a critical reading of the genealogy of aesthetics. Woodmansee engages in a contextual reading of eighteenth century German writers, exploring shifts and permeations in metaphysical constructs that came to inform the meaning of authorship and artistic creation. Importantly, she connects the rise of ideas about the nature and significance of art, and the bifurcation of cultural production into high and low art, with discussion of the cultural politics and economics of artistic production associated with the growth of literature markets in the eighteenth century. She highlights the close but problematic relationship between art,

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<sup>4</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience 1760–1911* (CUP 1999) 40.

<sup>5</sup> Both works cite as inspiration, Michel Foucault, ‘What is an Author?’ in Josué V Harari (ed), *Textual Strategies* (Cornell UP 1979) 141–60.

<sup>6</sup> Statute of Anne 1710 (8 Anne c 19).

literature and audiences. In so doing she provides insights into the relatively unexplored slippage familiar to copyright scholars whereby the terms ‘author’ and ‘artist’ become somewhat jumbled and used interchangeably, and reminds us that the rise of the author did not necessarily require the relegation of the reader to the status of passive consumer.

A lengthy, descriptive treatment of Woodmansee’s book follows. In my experience most legal readers have not read the entire book. Rather, the focus is only on the copyright chapter, first published as a stand-alone article.<sup>7</sup> However it is only by reading the insights into copyright in relation to the other chapters that the full significance of the work, and the philosophical and political ambition of German aesthetic thinkers, can be appreciated.

Chapter One, ‘The Interests of Disinterestedness’, begins by tracing the arrival and critical reception of the idea of fine art as a coherent category that is defined by the character of the pursuit and the artist’s relationship with the world. The basis for the discussion is an original translation of Karl Philipp Moritz’s essay, *Toward a Unification of all the Fine Arts and letters under the Concept of Self-Sufficiency* (1785). In seeking to ‘unify’ the arts Moritz was advocating the radical view that all fine art – poetry, painting, sculpture, architecture, eloquence, dance and music – shared common qualities. This challenged the orthodoxy that art should be appreciated and judged in terms of the utility of a particular medium for imparting distinctive lessons about the human condition, our faculties and our relation to the exterior world, through imitation of nature or God. Moritz argues that fine art, as a distinctive kind of human endeavour, has intrinsic rather than extrinsic worth. Art is defined by its abstract relationship to the world. Art is ‘self-sufficient’ because it communicates beauty and excellence by offering insights into an interior world. As Moritz put it, fine art is contemplated ‘for its own sake’, that is, ‘disinterestedly’. Achievement in art is where ‘we seem to lose ourselves in the beautiful object; and precisely this loss, this forgetfulness of ourselves, is the highest degree of pure and disinterested pleasure which beauty grants us’.<sup>8</sup>

Woodmansee relates the arrival of this modern theorisation of art to developments in late eighteenth century book markets:

The middle-class reading public in Germany had developed by the last quarter of the century, a voracious appetite for the entire spectrum of light entertainment – from sentimental love stories and novels of education, to tales of ghost-seers and exorcists, and an aggressively escapist literature of adventure and intrigue ... Literary entertainment was becoming an industry.<sup>9</sup>

Yet according to the new aesthetics, the appropriate attitude of the artist toward audiences is one of ‘indifference’, to sever valuation of a work from consideration of its popular reception. A public that is merely ‘diverted’, ‘moved’ or ‘stimulated’ is suggestive of artistic failure. As Woodmansee explains, Moritz ‘inspired a new theory of art in which, as it were, a virtue is made of necessity, and the relative ineffectuality

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<sup>7</sup> Martha Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’ (1984) 17 *Eighteenth Century Studies* 425.

<sup>8</sup> Woodmansee, *The Author, Art and the Market* (n 1) 19.

<sup>9</sup> *Ibid* 25.

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of beautiful art, instead of rendering its value problematic, can be construed as evidence of its very excellence'.<sup>10</sup> This aesthetics sets in train a fractious relationship between the artist and the external world – between art, the market and the reader. And, most relevantly to copyright historians, Woodmansee argues that this tension is further worked out through development of the notion of 'the author' and consideration of the education of the reader.

The construction of authorship is the primary subject of Chapter Two, 'Genius and the Copyright'. Mirroring the previous discussion of the changing status of the artist, this chapter explores how author and text come to be read through appreciation of the genius that forms the work. However in taking up Foucault's challenge of understanding how the modern invention of the author came into being, of 'how the author became individualized in a culture like ours',<sup>11</sup> Woodmansee includes a consideration of the role of law. She argues that German theorists were particularly interested in new theories of authorship including works of English writers, such as Edward Young's *Conjectures on Original Composition* (1759), because of relations in the book publishing industry in Germany. There was an extraordinary demand for reading material that supported the growth of late eighteenth century book markets. This encouraged the adoption of writing as a profession. However there was no legal infrastructure in Germany that recognised a private property right in texts. Texts, like all ideas, were perceived as an embodiment of truth that belonged to the public. Honorariums to authors, like aristocratic patronage, provided symbolic recognition of the importance of particular contributions, but any such fees were discretionary and did not reflect the market value of the works or authorial distinction in creating the work per se. While German book privileges existed, these were merely a right against reprinting and described by Johann Gottlieb Fichte as an 'exception to natural law'.<sup>12</sup> That is, ideas, according to natural law, belonged to the public. There was also an additional limitation with the role of privilege related to the geopolitical nature of Germany at this time. Whereas the United Kingdom had created a common market across England and Scotland subject to the same trade regulations in 1707<sup>13</sup> (around the same time as the passage of the Statute of Anne), eighteenth century Germany was comprised of three hundred independent states. Privileges were limited to the town or municipality in which they were awarded. Thus Woodmansee points out that book privilege lacked both a clear philosophical foundation and the legal institutional support that was present in other jurisdictions such as Great Britain and France<sup>14</sup> in the eighteenth century. In Germany, book privilege was 'not really a law at all but, as the

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<sup>10</sup> Ibid 22.

<sup>11</sup> Ibid 35.

<sup>12</sup> Ibid 45.

<sup>13</sup> Union with Scotland Act 1706 (6 Anne c 11); Union with England Act 1707 (6 Anne c 7) art iv. See also Allan I Macinnes, *Union and Empire: The Making of the United Kingdom in 1707* (CUP 2007).

<sup>14</sup> French legal recognition of the author is dated by Hesse from six decrees in 1777. Ginsburg also cites decrees of 1791 and 1793. See Carla Hesse, 'Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793' (1990) 30 *Representations* 109; Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tul L Rev* 991.

word itself suggests, a special concession or dispensation conditionally granted to printers or publishers who enjoyed the favour of the court'.<sup>15</sup> Woodmansee argues that the lack of an equivalent to the Statute of Anne stifled the development of the book industry in Germany compared to Britain:

[E]ighteenth century Germany found itself in a transitional phase between the limited patronage of an aristocratic age and the democratic patronage of the marketplace. With the growth of a middle class, demand for reading material increased steadily, enticing writers to try to earn a livelihood from the sale of their writings to a buying public. But most were doomed to be disappointed for the requisite legal, economic and political arrangements and institutions were not yet in place to support the large number of writers who came forward.<sup>16</sup>

The analysis stresses the importance of linking the success of philosophical developments in aesthetics to engagement with legal, political and social realms: '[I]t is this interplay between legal, economic, and social questions on the one hand and philosophical and aesthetic ones on the other that critical concepts and principles as fundamental as that of authorship received their modern form.'<sup>17</sup> She argues that aesthetics do not develop in disciplinary isolation; theories are not simply a consequence of the autonomous development of philosophical thought; ideas also stem from an 'interplay' with the historical and material conditions of the time. Here philosophical discourse is historicised through relating developments in philosophy with the market and to the law. The author has a presence in all three realms and is a product of the exchange, rather than represented as a philosophical idea developed in disciplinary isolation. Woodmansee argues that the need to improve the material conditions of authors and publishers provided a particular impetus in Germany to carefully re-theorise the properties of 'books'. Numerous theories of authorship were advanced by publishers, lawyers, philosophers and poets. And consequently 'the nature of writing ... [was] completely rethought'.<sup>18</sup>

Ideas of authorship stressed that the text could not be effectively reduced or contained by its physical manifestation. The book communicates to readers more than the ideas it presents or re-presents to the public. For instance, Fichte, developing Young's observations about the nature of genius, argued the printed paper and the content are conceptually distinct. The book can be divided into related parts: 'the *material* [materiell] aspect, the content of the book, the ideas it presents; and ... the *form* of these ideas, the way in which, the combination in which, the phrasing and wording in which they are presented'.<sup>19</sup> Whilst the material aspect, the book as a physical object, is owned by the purchaser and the thoughts or content passes to the reader, 'the *form* in which these ideas are presented, However remains the property of the author eternally'.<sup>20</sup> The author is the creator and owner of 'the form' of thought.

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<sup>15</sup> Woodmansee, *The Author, Art and the Market* (n 1) 45.

<sup>16</sup> *Ibid* 41–42.

<sup>17</sup> *Ibid* 47.

<sup>18</sup> *Ibid* 49.

<sup>19</sup> *Ibid* 51.

<sup>20</sup> *Ibid*.

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Fichte's work connects an older tradition of the public domain of ideas with a radical new notion of creation. The idea that *form* is capable of being defined with reference to its creator produces a new kind of intangible property with potentially major ramifications for the respective claims of authors, publishers and the reprint trade. As was commonly acknowledged, the author will draw upon known ideas. Aspects of a published work may already be with the public – effectively beyond private ownership. However, the author needs to consent to the recirculation of the form of his ideas. With a voracious appetite for reading and an interest in education of the emerging middle class, reprints were a major part of the book trade. The development of the notion of authorship provided a foundation for the expansion of the notion of piracy. Unauthorised reprints do not involve theft of the material aspect of the book or the thoughts, but they involve a theft of 'an intellectual creation that owes its individuality solely and exclusively to [the author]'.<sup>21</sup> Accordingly authorial permission is required to print and to reprint, notwithstanding that the ideas expressed within the work may already be circulating in public.

Woodmansee briefly sketches how an idea of individualised authorship creeps into ensuing German literary property regulations helping establish the concept of authorship that is familiar to us today. She argues that the new literary property right led to little change in the financial situation for authors. What it did lead to is a significant reconceptualization of the act of reading. The act of reading, in permitting 'a revelation of the personality of the author', becomes 'the exploration of the Other'.<sup>22</sup> Buying a book involves the purchase of a right of access to the form of the author's expression – permission to take pleasure and interrogate the text and, through that, connect with the author.

In laying out late eighteenth century German refinements to the concept of authorship, Woodmansee demonstrates how the notion entailed complex metaphysics. It is important for lawyers to grasp that recognition of the genius in authorship is not just about the author and the text. Aesthetics activates a particular theory of cognition – a hierarchical construction that seeks to privilege the 'experience' of the writer over other paths of interpretation of the text, which diminishes consideration of the reader. Woodmansee argues that this development will transform the reading of texts, but not without facing a number of philosophical, cultural and political challenges. The remaining chapters explore broader dissemination and the development of aesthetic theory, the cultural and political ramifications for German society and the take-up of these ideas by the leading English Romantic poets, Wordsworth and Coleridge.

In her elaboration of the development of aesthetic thought, Woodmansee provides little detail about the literary regulations, the nature of the legal order and legal reasoning at this time – the capacity of the law to absorb new thought. Thus whilst her work suggests to copyright readers a path that provides law with a solution to the dilemma of settling the boundaries to the work important to the development of literary property rights, there is no elaboration of how this opportunity is taken up within the

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<sup>21</sup> Ibid 52.

<sup>22</sup> Ibid 55.

law, and in turn whether the legal elaboration of authorship also then impacts on developments in aesthetics.<sup>23</sup>

Chapter Three, 'Aesthetic Autonomy as a Weapon in Cultural Politics', considers in depth Johann Christoph Friedrich Schiller's *Aesthetic Letters* (c 1790) in the context of wider German debates about the power of poetry, inspired by concern for the terror of post-revolutionary France and the challenge of writing for a society marked by radical divisions between the elite and the masses: 'To Schiller the violent turn of events in France signifies that men are not ready for the freedom they are demanding.'<sup>24</sup> In turn this leads to significant debate about the nature and function of poetry, which is sketched in terms of the critical reception and debate that followed the success of Gottfried August Bürger's popular ballad *Lenore*. There was agreement that simply appealing to a small intellectual elite will do little to impact or improve the education of the masses. Aesthetics needs a broader audience. However as Schiller saw it, in expanding the audience for poetry Bürger 'threatened to render [poetry] even more marginal than it had already become in modern society. ... The immaturity, the deficiency of spirit, the enthusiasm, and the vulgarity that endear Bürger's verse to common readers cannot but "repel" the elite'.<sup>25</sup> Schiller argues that Bürger's egalitarian orientation threatens the 'cause of art'.<sup>26</sup> A solution settled on, to build a bridge between high and low art, was to address the education of readers with Schiller seeking to lead by example.

Broader strategies for improving the art of reading are carefully elaborated in Chapter Four, 'Aesthetics and the Policing of Reading'. So important was the task of educating the middle class and improving their discrimination and taste that some argued for the trade to be regulated to restrict the flow of literature, even though it was the freedom of the press that had helped Luther and Calvin free Germany from 'the scepter of the clerisy'. Nationalising lending libraries was also considered so that appropriate civil servants could be placed in charge of acquisition, in particular with a view to influencing women's reading.<sup>27</sup> It was argued that reading should be taught to the middle classes as an active and reflexive act, rather than left as a form of passive consumption, leading to the production of manuals for instruction in the art of reading. Johann Adam Bergk's *Die Kunst, Bücher zu lesen* (The Art of Reading Books) (1799) addresses the need to instruct the masses in literary taste. It imparts lessons designed 'to make reading a kind of creation in reverse, the object of which is to re-experience what an author originally thought and felt'. His reading strategies 'oppose the "passive receptivity" of the new novel readers'.<sup>28</sup> Drawing upon Immanuel Kant's *Critique of Judgment* (1790) Bergk argues that the author needs to cultivate 'all human faculties and modes of operation – sense, fantasy and imagination, understanding, reason (both

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<sup>23</sup> There is some take up of this agenda in Martin Kretschmer and Friedemann Kawohl, 'Johann Gottlieb Fichte, and The Trap of Inhalt (Content) and Form: An Information Perspective on Music Copyright' (2009) 12 *Information, Communication & Society* 41.

<sup>24</sup> Woodmansee, *The Author, Art and the Market* (n 1) 58.

<sup>25</sup> *Ibid* 73–74.

<sup>26</sup> *Ibid* 79.

<sup>27</sup> *Ibid* 91–92.

<sup>28</sup> *Ibid* 100.

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speculative and practical), and judgment (teleological and aesthetic).<sup>29</sup> In doing so, reading can provide the knowledge and intellectual skills required so that man can ‘fulfill his responsibilities as a human being and citizen’.

In addressing the broader cultural politics of authorship in Chapters Three and Four, Woodmansee reminds copyright scholars that this aesthetics is not about transforming the writer into the author for self-centred reasons. Nor was a transformation sought to benefit publishers. It was not about property or the economic benefits of private rights in a narrow sense, where economy is constructed as a largely self-regulating sphere of private pursuit. There was a much larger social and cultural project in train. The cultural politics of authorship justified a new form of literary property with the hope that, coupled with a broader education about literature and reading, it could resolve the ‘literary philandering’ of the reading public and, through contributing to a broad education of the middle class, improve the social and political conditions of society. In reading past Chapter Two we learn that authorial rights were simply one part of a much larger ambition, accompanied by other strategies designed to effect a kind of social engineering of the masses designed to discipline consumer taste and ensure that the market better supports ‘cultural’ products.

Chapter Five, ‘Engendering Art’, considers the publication, translation and critical reception of Sophie von La Roche’s *Fräulein von Sternheim* (1771) to explore the gendered nature of genius. Woodmansee shows how despite the success of women writers in terms of print runs, translations, piracies and fame, women are excluded from the status of genius. Discomfort with the notion of women’s full participation in the literary world is indicated by the work being published anonymously, ostensibly without her permission at the instigation of her friend, the writer Christoph Martin Wieland, ‘as he could not “resist the urge to present to all the virtuous mothers and charming young daughters of our nation” a work that seemed to him so well designed to foster wisdom and virtue ‘among [their] sex, and even among [his] own’.<sup>30</sup> For her to seek to publish in her own name ‘of right’ would alienate potential readers. As editor of the volume his preface stresses her personal motivations in writing. She only circulated it to him in order to obtain his opinion on her manner of judging human experience to assist her to refine her wisdom and virtue. He draws attention to perceived ‘defects’ that one might expect from an amateur production and constructs the book as primarily suited for women readers. Women writers are constructed as ‘Other’ to genius and their works are relegated to the special category of ‘women’s literature’, clearly constructed as marginal and utilitarian productions rather than works of art. Nonetheless as La Roche’s correspondence with her friend Juliet Bondeli reveals, it is worth noting that women did conceive of themselves as authors and discuss claims to genius, well aware that the prescription of gender would prejudice any such recognition. Woodmansee concludes that in terms of broader significance, the gendered construct of genius means that women are erased from the literary canon altogether, failing to be noted in subsequent literature on significant works.

In reminding readers of the gendered qualifications of authorship, this chapter reinforces the importance of considering not just the rationale for authorship, but also

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<sup>29</sup> Ibid 93.

<sup>30</sup> Ibid 106–07.

its morality<sup>31</sup> and its application and rationalisation in practice. Authorship is more than an aesthetic, but also a cultural and political practice that impacts on our understanding of art and accomplishment across the ages.

The final Chapter Six, 'The Uses of Kant in England', discusses the influence of German aesthetics on William Wordsworth and Samuel Taylor Coleridge, exploring how the English poets faced the challenge of creating works of art for an ill-educated audience. Woodmansee traces shifts in Wordsworth's appraisal of Bürger's *Lenore*. His poem 'overran all Europe, helping more than any other German work of the period ... to call the Romantic movement to life'.<sup>32</sup> Wordsworth initially praises Bürger's sensational 'manner of relating'.<sup>33</sup> Yet after having experienced a frustrating reception for his *Lyrical Ballads*, Wordsworth later shifts to a critique of Bürger and his appeal to the public. By 1815 Wordsworth suggests that the value of significant poetry has no direct or immediate relation to its reception, drawing a distinction between the reading public for whom contempt is shown and 'the PEOPLE, philosophically characterized and to the embodied spirit of their knowledge, so far as it exists and moves, at the present, faithfully supported by its two wings, the past and the future, [to whom] his devout respect, his reverence, is due'.<sup>34</sup> She argues that Wordsworth 'tells a reassuring history of English poetry in which it turns out that all of the great poets from Spenser to Percy met with similar fates during their lifetimes while lesser talents flourished'.<sup>35</sup> Genius will not be recognised by the reading public and the value assigned to a work in the marketplace is not a reflection of artistic worth but grounds to suspect a work's corruption. Woodmansee thus links Wordsworth's journey with Bürger with that of Schiller's, discussed in Chapter Three. Serious writers will struggle 'to compete effectively with an ever growing literature of diversion'.<sup>36</sup>

Coleridge's *On the Principles of Genial Criticism Concerning the Fine Arts* (1814) is similarly compared to Bergk's *Art of Reading* as a manual designed to address the taste of the reading public – to create an audience for 'true art'. However in execution, Coleridge borrows 'surreptitiously, from [Kant's] *Critique of Judgment*'.<sup>37</sup> He also seeks to discount what was then the dominant theory of art in Britain – associationist aesthetics,<sup>38</sup> which constructed the viewer of art empirically, so that 'as their situations differ, so too will the ideas individuals associate with a given object, and hence also will its effect, which is to say, its meaning and value to them. There is thus bound to be an individual element in every act of reception'.<sup>39</sup> To Coleridge, 'a work's associations with things external to it cannot be relevant to appreciation of it as art, for it is the

<sup>31</sup> For example, middle class women's reading and writing is conceived of in terms of improving her personal virtue, to benefit her in nurturing her father, husband and children.

<sup>32</sup> Woodmansee, *The Author, Art and the Market* (n 1) 63.

<sup>33</sup> Ibid 113.

<sup>34</sup> Ibid 118.

<sup>35</sup> Ibid 117.

<sup>36</sup> Ibid 118.

<sup>37</sup> Ibid 119.

<sup>38</sup> For a discussion of associationist aesthetics and its connection to romantic thought, see Timothy M Costelloe, *The British Aesthetic Tradition. From Shaftesbury to Wittgenstein* (CUP 2013).

<sup>39</sup> Woodmansee, *The Author, Art and the Market* (n 1) 126–31.

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function of art, as Coleridge defines it, to provide ‘*immediate* pleasure, through the medium of beauty’.<sup>40</sup> Rather than produce practical guidance for reading art,

[T]he philosophical project that evolves ... places demands on readers that [they] are not equipped to meet. To follow Coleridge down the metaphysical path he pursues there one needs to be versed in philosophy, in particular in the philosophy of art that was being generated in England and on the continent at the beginning of the nineteenth century.<sup>41</sup>

Thus Wordsworth and Coleridge both alienate, rather than satisfactorily relate, the new philosophical insights to the audiences they seek to educate.

Woodmansee concludes with a consideration of Wordsworth’s efforts to secure a perpetual copyright for authors to ease the situation for ‘*difficult* authors’<sup>42</sup> and his rebuttal of strong political and trade opposition to a term extension: ‘what we want in these times, and are likely to want still more, is not the circulation of books, but of good books, and above all, the production of works, the authors of which look beyond the passing day, and are desirous of pleasing and instructing future generations’.<sup>43</sup> She argues this was a far more successful political operationalization of the theory he had advanced in his *Essay* of 1815. The legislative compromise was for a term of 42 years from first publication or, if the author survived that term, the author’s life plus seven years.<sup>44</sup> In leaving off at this point Woodmansee makes no comment on the significance of a shift from a philosophical project of winning over an intellectual reading public to one of winning parliamentary votes.<sup>45</sup>

Whilst demonstrating the impact of German aesthetics on key English romantic figures, the book does not seek to advance a genealogy of British authorship or law. This work is left to others to accomplish. Yet it is important for copyright scholars to consider what is given up when legislative solutions are sought without the support of broader social and political strategies to effect the reception of ideas. As Woodmansee explains, the German romantics understood that it was not enough to simply elaborate a new rationality. Effecting social change required attention to the audience and to how they might be led into a sustained engagement with new thought in order to affect prevailing attitudes and behaviours. One of the existing problems with copyright historiography today is the presumption that when ideas are posited by cultural elites and come to circulate in the broader culture they are magically ‘taken up’ by the public and the law. How does this occur? And how are the ‘philosophical’ ideas transformed through this engagement? As modern society increasingly pays heed to the rational construction of key public institutions, and in particular, the law, the ability to import aesthetic traditions into the legal order becomes a much more complex problem. This

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<sup>40</sup> Ibid 139.

<sup>41</sup> Ibid 122.

<sup>42</sup> Ibid 146.

<sup>43</sup> Ibid.

<sup>44</sup> *Copyright Amendment Act 1842* (5 & 6 Vict c 45).

<sup>45</sup> This is explored in Martha Woodmansee, ‘The Cultural Work of Copyright: Legislating Authorship in Britain 1837–1842’ in Austin Sarat and Thomas R Kearns (eds), *Law in the Domains of Culture* (Michigan UP 1998) 65–96.

concern is taken up further below in relation to seminal work on English literary property advanced by Mark Rose.

### 3. A GENEALOGY OF AUTHORSHIP

In his 1988 article Mark Rose notes the influence of Woodmansee's work. However whereas Woodmansee's book centres on explication of developments in aesthetics, Rose is primarily interested in the legal-cultural conception of authorship. As such, his work is not primarily an exposition on romantic authorship, but on the genesis of a far more abstract, legally informed construct: the author as proprietor.

The literary property debates of the late eighteenth century form the basis from which he argues this modern notion of the author emerges. The cases<sup>46</sup> settled on the question whether there was a perpetual, common law right of authors and if so, whether this right survived beyond the creation of statutorily limited rights in the Statute of Anne. The ensuing popular debate in the courts and in the surrounding public discourse led to major refinements in the philosophical tenets that, Rose argues, come to support the Anglo idea of authorship. In his 1988 article, Rose defines the notion of the author as proprietor. He argues that 'the author' and 'the literary work' are 'orbiting concepts at the heart of the modern literary system'.<sup>47</sup> There is 'a twin birth' whereby authorship comes to be inextricably tied to the notion of the literary work, each informed and bounded by reference back to the other.

Rose unearths an impressive array of literature that he argues contributes to the invention of the modern idea of authorship. However, in terms of advancing this construct, Rose's article prioritises three main sources that are central to the development of the author as proprietor: the political philosopher, John Locke's *Two Treatises on Government* (1689) and the works of two barristers, William Blackstone's *Commentaries on the Laws of England* (1765–69) and Francis Hargrave's *Argument in Defence of Literary Property* (1774). The book includes a much wider range of cultural references that inform the same idea of authorship, but stripped bare, the argument in the article and the book is essentially the same.

Rose argues that from Locke we come to appreciate 'the axiom that an individual's "person" was his own property. From this it could be demonstrated that through labour an individual might convert the goods of nature into private property'.<sup>48</sup> The statutory limitation on copyright in the Statute of Anne directly undermined the London booksellers' established practice of assigning perpetual copyrights in texts and recognising shares in texts. Accordingly the London booksellers soon attempted to read down the impact of the legislation by establishing an alternate prior right to literary property in the courts. The booksellers championed themselves as the time honoured guardians of the author, whom, it was claimed, had always 'owned' the text:

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<sup>46</sup> Most notably *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201; *Donaldson v Becket* (1774) 4 Burr 2408, 98 ER 257.

<sup>47</sup> Rose, 'The Author as Proprietor' (n 2) 72.

<sup>48</sup> *Ibid* 56.

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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.<sup>49</sup>

Rose argues that the Stationers adapted the Lockean discourse for real property to the literary property issue:

Every man was entitled to the fruits of his labor, they argued, and therefore it was self-evident that authors had an absolute property in their own works. This property was transferred to the bookseller when the copyright was purchased and thereafter it continued perpetually just like any other property right.<sup>50</sup>

He notes Blackstone, counsel in support of perpetual literary property in *Tonson v Collins*<sup>51</sup> and *Millar v Taylor*, further advances the idea that the author has a natural right to his creation. To clarify that the author is not claiming any right to own ideas Rose argues that Blackstone drew upon a reworking of Edward Young's influential *Conjectures on Original Composition* (1759) to introduce the notion that it is the 'style and sentiment are the essentials of a literary composition'.<sup>52</sup> Blackstone then sought to further reinforce this new ownership claim by linking literary property to a right of real property based on occupancy.<sup>53</sup> Blackstone argued that a right to property based on occupancy was supported by Locke's theory and also by the principles of Roman law.<sup>54</sup>

From Hargrave, Rose argues there is a further refinement of Blackstonian authorship that helps determine the boundaries around the authorial right. Readers may form different views about how one identifies style and sentiment. Hargrave creates certainty in the definition of the right by displacing consideration of the literary merits of the work altogether: rather than defining what is owned with reference to the literary

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<sup>49</sup> Ibid 57.

<sup>50</sup> Ibid.

<sup>51</sup> *Tonson v Collins* (1761) 1 Bl R 321, 96 ER 169.

<sup>52</sup> Rose, 'The Author as Proprietor' (n 2) 63.

<sup>53</sup> Ibid 64.

<sup>54</sup> Blackstone wrote:

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

William Blackstone, 'Chapter 26: Of Title to Things Personal by Occupancy' in *Commentaries on the Laws of England, Book 2: The Rights of Things* (Clarendon 1773) s 8.

composition itself, one can determine the distinctiveness of the work with reference to the identity that occupies it. Hargrave:

Collapse[s] the category of the work into that of the author and his personality ... He has shown the individuality of the work to be identical to that of the author, and in the process the category of the work has dissolved. Interestingly, this action traces in reverse the Lockean notion of the creation of property in which property originates when an individual's person – already understood as a kind of possession – is impressed upon the world through labour.<sup>55</sup>

Compared to Fichte's careful differentiation of the public and private properties of the text, this formulation collapses the need to distinguish ownership of ideas from the expression by focusing more abstractly on the labour and personality presumed to be attendant in the expression of ideas. The author and work are thus as one, and concern for the free circulation of ideas and the reader is displaced.

In focusing on authorship as an outcome of a discourse on property rights Rose follows the legal development of philosophical ideas. However there is little discussion of the way the literary property advocates he selects cherry-pick from a much larger range of traditions, philosophical sources and social influences. In *Authors and Owners* Rose partly justifies some inattentiveness to philosophy by arguing that whilst interested in understanding the relationship between law and aesthetics, he is not interested, in a philosophical sense, in exploring the subjectivity or consciousness of the author. His focus is more narrowly confined to the rise of authorial discourse based on notions of property, originality and personality.<sup>56</sup> Thus his author is neither a philosophical or legal subject but a hybrid.

In pursuit of this end, other relationships with the text that complicate the claim to the necessity of any such authorial property right or connection are quickly moved over. For example, seventeenth century patents, guild regulation of stationers and printers and, with respect to Milton's assertion of rights to his text, 'propriety' are analysed as pre-modern for lacking the individualised assertion of rights that marks modern authorship. Here he shows that authorship is not a timeless or constant idea. To the genealogy sketched in the article the book adds some earlier sources as the rights of authors and concern for piracy featured in debates about press licensing and censorship around the time of the passage of the Statute of Anne. For example, there is reference to Defoe's thoughts on the paternity of the text: *A Book is the Author's Property, 'tis the Child of his Invention* (1710).<sup>57</sup> Rose argues the rhetoric of paternity helps distance authorial rights from the mechanical rights awarded in patent. He also includes Locke's advocacy in favour of a limited term of literary property, with Locke's intervention in the debate presented as an anti-printer, anti-monopoly advocacy, presumed to be more generally supportive of the development of author as proprietor.

Rose argues that the circulation of these ideas about author's rights around the time of the passing of the Statute of Anne shows that the act was not simply regulation of the printer's right to the copy. Thus whilst it may be true that British (authorial) discourse 'could not have been derived from Romanticism, not least because the latter

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<sup>55</sup> Rose, 'The Author as Proprietor' (n 2) 73.

<sup>56</sup> Rose, *Authors and Owners* (n 2) 7.

<sup>57</sup> *Ibid.*

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would not emerge as a coherent movement for the best part of a century',<sup>58</sup> Rose argues that at the time of the passage of 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned', there was already a nascent right of authors, as argued by Defoe, Addison and Locke.<sup>59</sup> His most important insights relate to how this idea of authorship is more fully developed in litigation pursued by authors in the courts in the eighteenth century in Chancery and in the common law courts. Rose argues that the case of *Pope v Curl* (1741)<sup>60</sup> was especially significant because it extended the scope of literary property beyond 'books' to personal letters, where a distinction was made between owning the tangible property in the physical letter and the literary content as a form of intangible property: 'The discourse of literary property was moving away from its old foundation in the materiality of the author's manuscript. In this decision ... not ink and paper but pure signs, separated from any material support, have become the protected property.'<sup>61</sup>

Rose sees legal forums as providing foundational opportunities to advance new ideas that resonate far beyond the walls of the court. Law is thus recognised as a creative force that transforms philosophical ideas. Though he does not discuss it, this observation is perhaps especially apt for a time when law itself is not conceived of as a discrete form of expert knowledge. Lawyers draw upon an array of sources, forms of argument and rhetorical traditions. But as Lobban notes specifically in relation to literary property:

[E]ach judge often had a different conception of what the common law was about. Probably the best-known example of this in the eighteenth century occurred with *Millar v Taylor* where the judges in turn argued that the law was based on justice, natural law, custom, and convenience. ... [T]his case proved that law was not the simple uncontentious application of doctrine, the articulation of answers from within the law. It showed, rather, that 'the most considerable portion of the whole is composed of determinations and resolutions of the judges, proceeding upon analogy, public policy and natural justice'.<sup>62</sup>

The eighteenth century was also a time for inventing legal ideas of property and exchange to further commercial opportunities in order to free the law from the weight of tradition: 'English jurists were interested in the philosophical investigation of economic change; they were influenced by new insights into the nature of human

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<sup>58</sup> Anne Barron, 'Copyright Law's Musical Work' (2006) 15 *Social and Legal Studies* 101, 108.

<sup>59</sup> See also Joseph Loewenstein, *The Author's Due* (Chicago UP 2002) 209–12, 230–32.

<sup>60</sup> *Pope v Curl* (1741) 2 Atk 342, 26 ER 608.

<sup>61</sup> Rose, *Authors and Owners* (n 2) 65.

<sup>62</sup> The quotation is from John Miller, *An Inquiry into the Present State of the Civil Law of England* (John Murray 1825) in Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Clarendon 1991) 81. See also Michael Lobban, 'Custom, Nature and Authority' in David Lemming (ed), *The British and Their Laws in the Eighteenth Century* (Boydell & Brewer 2005) 27–58.

passion, and new arguments about its impact on the social order. Ideas about sentiment, desire and civility informed eighteenth century legal disputes and legal theory.<sup>63</sup>

It should also be noted that this was a time when law reporting was relatively limited, disorganised and available reports were unreliable.<sup>64</sup> Pamphleteering about the significance of litigation was itself a form of legal education, advancing ideas of the rights of subjects. Ideas about what the law was, and what it should be, were advanced in litigation and in pamphlets about injustices with a view to winning over both lawyerly and broader public opinion. It is thus not surprising that this was a time when new authorial claims could be fruitfully advanced.

However in pursuing his narrative, Rose, an English Professor, glosses over much of the complexity of law and the legal order that complicates the ability to make any certain claims about the impact of new ideas on the trajectory of the law: the different jurisdictions of equity and common law until the late eighteenth century, the importance of procedural rules, particular forms of pleading, imprecise legal categorisations, diverse styles of legal reasoning based on various sources of law and restrictions in available remedies. While new definitions and defences of common law were developed, ‘innovations in commercial law, were now, in turn subject to a mounting insistence on the applicability (and desirability) of stable common law procedures and remedies’.<sup>65</sup> A combination of dynamic variables, moving the law to innovation as well as toward establishing certainty and order, complicates both the expression of legal argument and the conclusions that can be drawn about the development of new principles throughout the entire eighteenth century.

My point here is not that fertile exchanges leading to new ideas about the properties in texts were not occurring or that the law was unreceptive to these. Rather the problem is that it is very difficult to make large claims about an isolated case and its role in developing particular ‘new’ legal precepts given the general messiness of the jurisprudence at this time. And more generally with common law, it is only by subsequent citation as authority that the significance of the decision can be understood, and even then, what the decision stands for often remains subject to much conjecture as the principle is broadened or narrowed or the case distinguished by the facts. Thus *Pope v Curl* may ‘advance’ a particular idea of an abstract intangible property in a literary text in a loose sense, but it not clear how this idea sat among other possible interpretations of the issue before the court, such as the court was protecting the confidentiality of the letter writer; that is, protecting the privacy of the person rather than the thing, or as is more likely in the early eighteenth century, that a distinction between the right of persons, property and a notion of propriety was very hard to distinguish.<sup>66</sup>

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<sup>63</sup> Julia Rudolph, *Common Law and Enlightenment in England, 1689–1750* (Boydell 2013) 259.

<sup>64</sup> See generally Chantal Stebbings (ed), *Law Reporting in Britain: Proceedings of the Eleventh British Legal History Conference* (Hambledon 1995).

<sup>65</sup> Rudolph (n 63) 269.

<sup>66</sup> See Margaret M Radin, *Property and Persuasion. Essays on the History, Theory and Rhetoric of Ownership* (Westview 1994) 58–61.

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Similar legal dynamics complicate analysis of *Donaldson v Becket* and its claim to a landmark status in terms of developing the legal foundation of copyright.<sup>67</sup> In failing to identify the fluidity of the legal order and reason, Rose fudges the significance of the events that are claimed to develop the idea of copyright. He argues that although '[t]he 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'.<sup>68</sup> He goes on to note that, '[T]he Lords' decision did not touch the basic contention that the author had a property in the product of his labour. Neither the representation of the author as a proprietor, nor the representation of the literary work as an object of property was discredited.'<sup>69</sup>

I think this overstates the significance of *Donaldson v Becket* as a legal event, notwithstanding the discourse may have a larger cultural significance. That an idea of the author as proprietor broadly circulates in political and cultural discourse as a consequence of a case does not necessarily advance it ahead of other ideas also in circulation that contest these foundations. As Deazley shows one needs to take care not to be too dismissive of enlightenment ideas and their enduring relevance.<sup>70</sup> Further while Rose's analysis shows the initial interaction between aesthetics and law, he leaves off from how this legal-cultural hybrid notion of authorship is then disseminated and taken up, played with, rejected or transformed within the life of the law. Of necessity his work is confined to a limited time-frame, but if Woodmansee is correct and the English romantics broke with the Germans in seeking to win over the hearts and minds of the reading public at large, settling instead for pressuring Parliament, Rose's work leaves us with the challenge of understanding why a particular idea of the author as proprietor succeeded in the cultural domain over others.

For me the problem with citing *Donaldson v Becket* as 'authority' is that it arrived at a negative definition of literary property. Property did not attach to his 'style and sentiment' in the way Blackstone or Hargrave had suggested because as Lord Camden claimed, the author 'let [the words] fly out in private or public discourse'.<sup>71</sup> But if so, what did the authorial right relate to? The difficulty with this case is that there was no progress in distinguishing what it was in the text that the author legally owned or assigned to another as separate from the paper and print. Indeed, while numerous philosophical conceptions were called upon as 'common sense' by advocates for and against literary property,<sup>72</sup> the collision of ideas was chaotic, with proponents largely talking past each other. *Donaldson v Becket* failed to produce a leading judgment from

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<sup>67</sup> See Kathy Bowrey and Natalie Fowell, 'Digging up Fragments and Building IP Franchises' (2009) 31 Syd LR 185, 197–200.

<sup>68</sup> Rose, 'The Author as Proprietor' (n 2) 69.

<sup>69</sup> Ibid.

<sup>70</sup> Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar 2006) 6.

<sup>71</sup> 'The Pleadings of the Counsel before the House of Lords in the Great Cause concerning Literary Property' in Stephen Parks (ed), *The Literary Property Debate: Six Tracts 1764–1774* (Garland 1975) F32.

<sup>72</sup> See generally Kathy Bowrey, 'Chapter Three. Speculative reportings of literary property in the eighteenth and nineteenth centuries', in 'Don't Fence Me In. The Many Histories of Copyright' (SJD Thesis, University of Sydney 1994); Ronan Deazley, *On the Origin of the Right*

which one can derive with any certainty what the term ‘author’, referred to in the Statute of Anne, meant.<sup>73</sup> As the 1878 Copyright Commission noted:

The common law principles which lie at the root of the law have never been settled. The well known cases of *Millar v Taylor*, *Donaldson v Becket*, and *Jeffries v Boosey*, ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the Bench.<sup>74</sup>

The common law left us with the notion of authors as proprietors but without any universal legal endorsement of philosophical criteria by which the nature or limits to which this authorial property could be discerned.

#### 4. THE ABSTRACTION THESIS

For most copyright historians the lack of normative clarity underpinning the late eighteenth century legal construction of authorship does not pose a problem. The current orthodoxy is to say, as Rose more or less does, that British law ultimately resolved the problem in the nineteenth century by recourse to an abstraction. That is to say, historians advance the notion that mental labour could give rise to private property, that the literary work was a thing capable of being privately owned, and thus that there was no need to clarify its precise nature or origins further.<sup>75</sup> This leaves us with a copyright that need not refer to art (in the broad sense) with respect to its function or place in society, the practices and traditions of that form of expression, the genre, kinds of readers etc. Instead copyright simply refers to the author as owner and the copyrighted work (rather than a particular distinctive form of expression) is defined with reference to the fact of authorial creation. Further, it is clear that this circular dynamic worked to support a large number of analogous claims. All kinds of cultural expressions and thus previously distinct rights, such as those awarded to engravings and sculptures, could be seen to be related with painting. But by the mid-nineteenth century the new copyright category of ‘fine art’ is also more abstract-legal than a romantic concept, and thus also able to incorporate new mediums such as photography even though there remained dispute as to the artistic credentials of the photographer.<sup>76</sup>

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to *Copy. Charting the Movement of Copyright Law in Eighteenth Century Britain, 1695–1775* (Hart Publishing 2004); Barron (n 58) 110–15.

<sup>73</sup> See also Tomás Gómez-Arostegui, ‘Copyright at Common Law in 1774’ (2014) 47 *Conn L Rev* 1.

<sup>74</sup> Copyright Commission, *Laws and Regulations relating to Home, Colonial and Foreign Copyrights* (1878) vii.

<sup>75</sup> In addition to Rose, Barron (n 58), Kretschmer and Kawohl (n 23) and Sherman and Bently (n 4) take this view. It is worth noting that Sherman and Bently argue that the resulting confusion in the law that flowed from the inability of the judges to settle the law’s normative foundation was later addressed by a jurisprudential shift to consequential thinking, concern for the costs of not protecting an ownership claim rather than with justifying the grant of the right.

<sup>76</sup> *Fine Arts Copyright Act 1862* (5 & 26 Vict c 68). See generally Ronan Deazley, (2008) ‘Commentary on *Fine Arts Copyright Act 1862*’ in L Bently and M Kretschmer (eds) *Primary Sources on Copyright (1450–1900)*, www.copyrighthistory.org; Kathy Bowrey, ‘The World

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However, the orthodox view engages in some significant fudging of its own. There are scant details about how the ‘abstraction’ operates within the body of literary property and related copyright-like laws in the nineteenth century. In other words, the abstraction thesis remains a rather ‘abstract’ construct itself, entailing another circularity – the abstract notion of the author as proprietor supports an abstract connection with legal rationality. This removes from clear view the reality that there remains a problem with the state of British jurisprudence and the historic disorder of this legal subject matter. It should be remembered that, despite his subsequent influence (especially in the colonies), Blackstone’s historicist attempt to produce an order to the law was most soundly criticised in the nineteenth century.<sup>77</sup> And the ‘solution’ of legal positivism – a legal philosophy designed to overcome history by pretending one can insulate legal rationality from social influence and unwelcome aspects of tradition by reducing consideration to the singular and limited task of tracing an authoritative and narrow line of legal authority – fumbles when the ‘leading case’ and rather bare copyright legislation endorses no useful criteria to help determine the logic of the right awarded.

Just as importantly, settling on the ‘abstraction thesis’ distracts our attention from building upon the insights from the humanities that can be drawn from scholars like Woodmansee – that copyright needs to relate to philosophy (amongst other things) – because any sophisticated determination of a copyright claim draws upon ideas about cognition, circulation of knowledge, reception of meaning, the scope for creativity and imagination and identity. Because this ‘pre-modern’ sensibility is now so far removed from the law the dimension of the problem may be hard for us to grasp.

The following section returns to Locke and offers a reappraisal of the significance of Locke to the authorship debate. In his own time Locke was not recognised as a supporter of a natural right of authors based upon a labour theory of property. This was a later invention. However Blackstone’s and others’ appropriation of Locke’s philosophy is rarely commented on in intellectual property history.<sup>78</sup> Perhaps this is because it is hard to avoid some familiarity with Locke’s labour theory of property and his broader political philosophy as part of a liberal education, while today it is far rarer to come across his works on education and philosophy. It is common to reduce Locke’s concerns about literary property to his anti-publisher and anti-monopoly views.<sup>79</sup> Though Rose recognises later that Locke was an empiricist philosopher ‘who challenged tradition and located personal identity in consciousness’ in his *Essay on Human Understanding* (1789),<sup>80</sup> in wanting to avoid discussion of subjectivity he avoids

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Daguerreotyped – What a Spectacle!’ Copyright law, photography and the economic mission of Empire’ in Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Kluwer 2013) 11.

<sup>77</sup> Bentham described him as ‘everything as-it-should-be Blackstone, a muddled and shallow apologist for the status quo’. Wilfrid Prest, *William Blackstone* (OUP 2008) 9. See also Wilfrid Prest, ‘Legal History in Australian Law Schools: 1982 and 2005’ (2006) 27 *Adel L Rev* 267.

<sup>78</sup> For example, it is not noted in Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate 1996) 28; Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988) 77 *Geo LJ* 287. Barron is a notable exception, Barron (n 58) 111.

<sup>79</sup> Rose, *Authors and Owners* (n 2) 33.

<sup>80</sup> *Ibid* 127.

consideration of the significance of Locke's enlightenment views on the nature of his support for 'author's property' altogether. This ensures little disruption to his singular push toward a particular construction of authorial property and leads to an oversimplification of the philosophical difficulties being confronted in literary property discourse.

The point of this detour into Locke is not to try to 'reclaim' Locke's rightful place in the history of copyright or to dispute the currency and influence of labour theories of property in the late eighteenth century that supported a range of 'property-like' claims. A reconsideration of the nature of Locke's misgivings about literary property is undertaken in order to remind us of the complexity that sits within the subject matter of copyright that is lost by not taking up more closely the reasons the notion of the author as proprietor was once so controversial – by sitting too comfortably today with the abstract notion of the author as proprietor and ignoring some of the historical reasons 'abstraction' was required. Abstraction is a legal strategy that seeks to paper over conceptual difficulty, to shift the view to a neater 'solution' by selectively retreating from engagement with the larger context of the inquiry.

Locke's theorisation of the problem of literary property reveals a complex enlightenment position that is both supportive of the public domain of ideas and an instrumental (limited) right of authors. However like the judges in *Donaldson v Becket*, Locke too, was unable to create clear boundaries around this authorial property. His empiricism disrupted ascription of a form of subject-hood that could support a natural property right of authors. And the 'pragmatism' commonly ascribed to Anglo copyright, compared to Continental law, could also be attributed in part to this Enlightenment legacy – to a real and genuine epistemological disputation about the nature of the human intelligence, language and identity, as much as to a preference for 'humble', culturally unambitious laws.<sup>81</sup>

## 5. THE PROPERTIES OF LOCKE'S SELF

According to Locke's episteme the labour theory of property as expounded in his *Two Treatises on Government* cannot be easily transposed to the case for literary property because one does not *labour* on ideas that exist in a literary common. In locating identity in consciousness<sup>82</sup> Locke viewed our knowledge of self as really limited to our self-interested capacity:

*Self* is that conscious thinking thing (whatever Substance, made up of ... it matters not) which is sensible, or conscious of Pleasure and Pain, capable of Happiness or Misery, and is concern'd for it *self*, as far as that consciousness extends.<sup>83</sup>

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<sup>81</sup> This is discussed in Sherman and Bentley (n 4) 216.

<sup>82</sup> '[The] *self* is not determined by Identity ... of Substance ... but only by Identity of consciousness'. John Locke, *An Essay on Human Understanding*, as quoted in Christopher Fox, *Locke and the Scribblers: Identity and Consciousness in Early Eighteenth Century Britain* (California UP 1988) 12.

<sup>83</sup> Locke, *An Essay on Human Understanding*, as quoted in Fox (ibid) 12 ('*An Essay*').

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According to Joseph Butler's analysis of 1736:

[Locke's] hasty observations ... when traced and examined to the bottom, amounts, I think, to this: '*That personality is not a permanent, but a transitory thing*': that it lives and dies, begins and ends continually; that no one can any more remain one and the same person for two moments together, than two successive moments can be one and the same moment: that our substance is continually changing; but whether this be so or not, is, it seems, nothing to the purpose; *since it is not substance, but consciousness alone, which constitutes personality*; which consciousness, being successive, cannot be the same in any two moments, nor consequently the personality constituted by it.<sup>84</sup>

This kind of concern led many to inquire whether this meant that one's soul was divisible, or whether two men could then share the one soul, whether the one man could be different persons, or how the 'same consciousness' survived when a man forgot or fell asleep.<sup>85</sup> Locke's *An Essay* was the source of great confusion and was the subject of much amusement.<sup>86</sup>

## 6. THE PROPERTY OF LOCKE'S TEXT

Locke's emphasis on the importance of consciousness very much complicates the case for an author's property in the text. Whilst, as Rose claims, it is true Locke was a strong supporter of an author's literary property, he was not at all concerned with defining what it is that the author 'owns' in the text and justifying that as a 'right' with a view to facilitating commodification of literary works. Locke suggested that language does not attest to a common social heritage at all. He argued that language began when Man, with a great variety of thoughts 'all within his own breast, invisible and hidden from others', tried to communicate his ideas to others:

[I]t was necessary that man should find out some external signs whereby those invisible ideas, which his thoughts were made up of, might be made known to others. For this purpose nothing was so fit, either for plenty or quickness, as those articulate sounds which with so much ease and variety he found himself able to make. Thus we may conceive how words, which were by nature so well adapted to that purpose, came to be made use of by men as the signs of their ideas. ... The use, then, of words is to be sensible marks of ideas, and the ideas they stand for are their proper and immediate signification.<sup>87</sup>

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<sup>84</sup> As quoted *ibid* 10.

<sup>85</sup> The theological implications led to Locke being 'almost unanimously condemned in pulpit and pamphlet'. In 1703 there was also meeting of the heads of Oxford to censure Locke's *Essay on Human Understanding* (1689) and to forbid the reading of it. See *ibid* 124 and 138.

<sup>86</sup> For instance he argued that two men could not have the same soul, because they only had consciousness of their own actions, and ultimately he argued that we would be judged by God on the state of our consciousness, and not on the state of our soul. For further examples, see *ibid* 29–37.

<sup>87</sup> Locke, *An Essay* as quoted in A Rosen, 'Reconsidering the Idea/Expression Dichotomy' (1992) 26 UBC Law Rev 263, 271.

But as words are signs for invisible ideas that are already formed in the privacy of the mind, this raises the question as to how our nominal descriptions can be comprehended with any accuracy by other members of the linguistic community, all of whom have different consciousnesses based upon different experiences:<sup>88</sup>

The names of Substances would be much more useful, and Propositions made in them much more certain, were the real Essences of Substances the Ideas of our Minds, which those words signified. [But the real Essences are beyond our perception.] And 'tis for want of those real Essences, that our Words convey so little Knowledge or Certainty in our Discourses about them.<sup>89</sup>

As Jackson explains:

Under these circumstances, it would seem more accurate to describe a playing child as chasing 'the rolling circle's speed' (choosing two primary qualities: shape and motion), as Gray does in his 'Ode on a Distant Prospect at Eton College,' than to name the inscrutable 'hoop' – and more useful to specify 'the rapid Greek', like Samuel Johnson in 'The Vanity of Human Wishes,' than to identify Alexander the Great.<sup>90</sup>

Locke did not outright reject poetry as engaging in deception and illusion. However, Abrams suggests that in his *Thoughts Concerning Education* he 'does not disguise his contempt for the unprofitableness of a poetic career, either to the poet himself or (by implication) to others'.<sup>91</sup> Locke thought that it was not productive to seek pleasure and delight (ornaments) when information and improvement could be pursued. However, he did not discriminate between kinds of works and kinds of knowledge in the sense that all works merely bring forth signs of phenomenal data:

The mind in Locke's *Essay* is said to resemble a mirror which fixes the objects it reflects. Or (suggesting the *ut pictura poesis* of the aesthetics of that period) it is a *tabula rasa* on which sensations write or paint themselves. Or (employing the analogy of the *camera obscura*, in which the light, entering through a small aperture, throws an image of the external scene of the wall) external and internal sense are said to be 'the windows by which light is let into this dark room'. ... Alternatively, the mind is a 'waxed tablet' into which sensations, like seals, impress themselves.<sup>92</sup>

<sup>88</sup> As Rosen puts it 'In Locke's theory, each person creates his or her own language, with no way of knowing whether or to what extent it coincides with the language spoken by anyone else. This is a Babel of ideolects, not a community of persons speaking the same language'. Ibid 272.

<sup>89</sup> Locke, *An Essay*, as quoted in G Jackson, 'From Essence to Accident: Locke and the Language of Poetry in the Eighteenth Century' in R Ashcraft (ed), *John Locke: Critical Assessments* (Routledge 1991) 254.

<sup>90</sup> Ibid.

<sup>91</sup> MH Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (WW Norton & Co 1953) 300.

<sup>92</sup> Ibid 57. Abrams goes on to note the similarities between Locke's expression and that of Plato and Aristotle. Plato compared sense perception to reflecting images in a mirror, as well as to paintings, the writing of characters in the pages of a book, and the stamping of impressions into a wax plate. Aristotle suggested that the receptions of sense 'must be conceived of as taking place in the way in which a piece of wax takes on the impress of a signet ring without the iron or gold'. Ibid 57.

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Thus Locke responds to his friend Molyneux's question whether a man, blind from birth, on regaining his sight would be able to distinguish a cube from a sphere without touching. Locke claims he could not because he would need the tactile experience to understand the corresponding visual imagery.<sup>93</sup> Locke's theory thus challenges claims to the universality of perception.

Locke frequently uses sight as a favoured example and as a metaphor, but unlike the German philosophers that follow him, he does not mean for poetry to become a visual art in the sense that his emphasis is not on pictures of whole objects, but on component ideas.<sup>94</sup> The mind is inertly receptive and to the extent that it orders the sensations it receives, it relies upon common sense. The author does not 'clothe' the idea and deliver its essence into another's mind. The author cannot 'clothe' it and in this way ground an individual right to an expression in his episteme. For this reason attempts to use Locke's theory to justify an author's right with reference to an idea/expression dichotomy in a work, differentiating what it is that is held in common (the idea) and what it is that is private (the author's expression) mistakes his project.<sup>95</sup> The author is incapable of bringing forth any essential meaning – the author can only suggest to us a nominal essence. But we, the reader, are incapable of discerning where the authorial expression starts and ends, or appreciating its meaning in the same way it was understood by the writer.

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

So what does Locke's author have a right to?

In the debates concerning the renewal of the licensing laws in the 1690s Locke, along with Addison and Defoe, advocated for the inclusion of a clause stipulating that anyone who printed an author's name on a publication without his permission should be liable to forfeit to the author all copies he had printed.<sup>96</sup> His interest in the question of attribution of authorship was not motivated by a concern that the author be acknowledged – that her/his name be made public. Rather he was more interested in attribution as a question of privacy – one should have a right to control the exposure of what may be understood as her/his consciousness.<sup>97</sup> Thus Locke did not support a perpetual right of authors in a work. The reason for limiting one's rights and relating them to specific editions, leading to the need for permission for reprints, is clear from his own musings on the appropriateness of a second edition of the *Essay*. He wrote to William Molyneux:

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<sup>93</sup> Jacqueline Lichtenstein, *The Blind Spot: An Essay on the Relations between Painting and Sculpture in the Modern Age* (Chris Miller tr, Getty Research Institute 2008) 45.

<sup>94</sup> Jackson (n 89) 255.

<sup>95</sup> This is discussed in Rosen (n 87) 270–73.

<sup>96</sup> See Raymond Astbury, 'The Renewal of the Licensing Act of 1693 and its Lapse in 1695' (1978) Ser 5, 33 *The Library* 296, 313.

<sup>97</sup> For his alarm at being attributed as the author of an anonymous work, see Letters No 1268 and 1288 in ES De Beer (ed), *The Correspondence of John Locke*, vol 4 (Clarendon Press 1979) 38, 65.

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But now that my notions are got into the world, and have in some measure bustled through the opposition and difficulty they were like to meet with from the receiv'd opinion, and that prepossession which might hinder them from being understood upon a short proposal; I ask you whether it would not be better now to pare off, in a second edition, a great part of that which cannot but appear superfluous to an intelligent and attentive reader. If you are of that mind, I shall beg you to mark to me those passages which you would think fittest to be left out. If there be any thing wherein you think me mistaken, I beg you to deal freely with me, that either I may clear it up for you, or reform it in the next edition. For I flatter myself that I am so sincere a lover of truth, that it is very indifferent to me, so I am possess'd of it, whether it be by my own, or any other's discovery.<sup>98</sup>

Publication was valued by Locke as an agent in the pursuit of truth rather than as a personal or commercial pursuit. In this sense Lord Camden was correct to note in *Donaldson v Becket*, that '[i]t was not for gain, that Bacon, Newton, Milton, Locke instructed and delighted the world.'<sup>99</sup>

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

This liberty to any one of printing them is certainly the way to have cheaper and better and tis this which in Holland has produced soe many fair and excellent editions of them. Whilst the printers all strive to out doe an other which has also brought great sums to the trade in Holland. Whilst our Company of Stationers haveing the monopoly here by this act and their patents slubber them over as they can cheapest, soe that there is not a book of them vended beyond seas both for their badness and dearness nor will Schollers beyond seas look upon a book of them now printed in London soe ill and false are they ...<sup>100</sup>

He suggested that the protection of contemporary works should be limited to 50 or 70 years after the first printing of the book or the death of the author.<sup>101</sup> But it is always the pursuit of universal truth that Locke celebrates and not the sanctity of any private literary property.

The writer had a right to the profit that accrues from the mass circulation of the work, but this private interest is justified as serving the common interest – by facilitating the pursuit of truth. Or as Locke put it, 'For I count any parcel of this gold not the less to be valued, nor not the less enriching, because I wrought it not out of mine self. I think every one ought to contribute to the common stock.'<sup>102</sup>

The author's property right is instrumental to the cause of enlightenment. And whatever fundamental claim exists to the expression of one's consciousness, this is a matter we cannot identify with any exactness at all. Because of this shadowiness, the value or meaning of the work to the individual author has to be put to one side and any fundamental right to authorial property is correspondingly compromised.

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<sup>98</sup> Ibid 523.

<sup>99</sup> 'The Pleadings of the Counsel before the House of Lords in the Great Cause concerning Literary Property' in Stephen Parks (ed), *The Literary Property Debate: Six Tracts 1764–1774* (Garland 1975) F34.

<sup>100</sup> 'Documents relating to the termination of the Licensing Act, 1695' in ES De Beer (ed), *The Correspondence of John Locke*, vol 5 (Clarendon Press 1979) 786.

<sup>101</sup> Ibid 791.

<sup>102</sup> Astbury (n 96) 307.

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In summing this up, Locke's problem with literary property is based in philosophical objections that confound identification of an author who can communicate meaning to others. Without certainty as to the true nature of knowledge it is difficult to ascribe a text with sufficient stable meaning so that its meaning can be transferred to readers in a transactional sense. Another way of putting this is that we are all readers of the text, which we interpret according to our own experience.<sup>103</sup> But there is simply not a property relation inherent in a text that connects an author to a reader (separable from the material aspects – ink and paper). Additionally whilst seeing the necessity of a market for books, Locke simply has no real interest in the nature of market transactions and in understanding how the economy for books is sustained. His epistemology directs him to far loftier concerns and, again, away from theorising the property *in* books, even though *An Essay* is somewhat obsessively concerned with theorising the properties *of* books and the value of their wider distribution to humanity.

As noted above, Locke's particular contribution to a theory of knowledge caused alarm and amusement in its own time. Contemporary readers may well feel the same. However moving away from the distinctiveness of Locke's philosophical conclusions to consider the broader parameters of his problem with literary property, his work shows that 'settling' the property in the text, defining the boundaries to a private claim, so copyright can then rationally discuss competing claims to own knowledge, requires a theory of cognition and a consideration of the conditions for exchange of knowledge between the writer, the text as object and the reader. If one moves beyond Locke's prioritisation of the value of 'useful' knowledge over other kinds of human capacities and expressions and also includes insights from aesthetics, this detour into philosophy suggests that copyright jurisprudence also requires a way of appreciating the importance of imagination, humour and a wide range of sensual experience, and has to accommodate divergent manners of judging these things.

## 7. A FOUNDATION ON INTELLECTUAL QUICKSAND?

The orthodoxy remains that the 'author as proprietor' notion/abstraction thesis is the foundation of Anglo copyright. However, it is also generally accepted in copyright scholarship that the legal form that supported the individualisation of ideas is intellectually unstable and essentially bankrupt. It justifies ownership claims with reference to the author in historical and social isolation when ideas (such as authorship) and cultural works more generally generate meaning and value from their mode and manner of circulation and broader engagement with them.

The strength of the author as proprietor idea was that it was especially well suited to the transactional nature of the market. The contract allows for an exchange of 'intangible property' without requiring precision as to its parameters or limits, or in fact without concern for the specifics of copyright law at all.<sup>104</sup> But contract is a remarkably

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<sup>103</sup> There are similarities here with some of the concerns of post-modern scholarship.

<sup>104</sup> It is not uncommon to find contracts that assign rights that where there is uncertainty that the assignor owns any such right. For an historical example, see Jose Bellido and Kathy Bowrey, 'From An Author's To A Proprietor's Right: Newspaper Copyright & *The Times* (1842–1956)'

crude mechanism that lacks transparency in managing the complex cultural context that this area of law must, of necessity, engage with.

It needs to be recalled that the early German romantic notion of property imagined that literary property law might complicate, rather than advance, the commodification of culture. While one would not suggest adoption of either Locke's or the German romantic formulation of the right as appropriate for today, this earlier period did at least appreciate the broader implications of creating such a right, relating it to a vision of the kind of society and culture they wanted to live in. One may reject the subject position of romantic aesthetics as the foundation for copyright and still reconsider the importance of eighteenth century cultural concerns about art and the market. Complaint about the lack of financial support for the production of 'serious' work, about the cultural knowledge, education and taste of 'users', and questioning if conditions support innovation and creativity or public support for the arts is needed to supplement market dynamics, are core copyright concerns that resonate.

Humanities scholars such as Woodmansee and Rose made a significant contribution to copyright history by linking the law to the larger cultural dialogue that informed it. A consideration of the early history of copyright matters to us today because it shows some of the complexity that was involved in the commodification of ideas for society and the law. Fleshing out the boundaries of the property right with any particular certainty required reference to some kind of philosophy of subject-hood, whilst at the same time still managing some way of determining what is in fact not protected. Woodmansee's work shows that this was exactly what was anticipated as required by the German romantics. Rose's and other's works uncover no comparative British strategizing to effect social and political change through the take up of a particular world view and vision of property on the broader society, even though ideas were effectively disseminated through the publicity related to the literary property litigation in pamphleteering and through lobbying of Parliamentarians.

Rose concludes his book with the claim that Anglo authorship is an 'institution built on intellectual quicksand: the essentially religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air'.<sup>105</sup> However, without there being a coherent order to the law itself in the eighteenth and early nineteenth century, such an 'institution' could not fully come into being. In other words, for the notion of the author as proprietor to succeed in this form, it would have required fidelity to a romantic construct as well as a corresponding legal subjectivity to be integrated into a much larger holistic philosophical and cultural system. Instead what transpired was the legal formulation of the author as proprietor simpliciter, the abstraction. Thus it is no surprise that when the law was challenged to consider the consequence of ownership, that is, what the exclusive right extended to, the law subsequently struggled throughout the nineteenth century with determining what was

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(2014) 6 JML 180. For a contemporary example, see Kathy Bowrey and Michael Handler, 'Instituting Copyright: Reconciling Copyright Law and Industry Practice in the Buying and Selling of TV Formats' in Kathy Bowrey and Michael Handler (eds), *Law and Creativity in the Age of the Entertainment Franchise* (CUP 2014) 140–69.

<sup>105</sup> Rose, *Authors and Owners* (n 2) 142.

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infringement and what was fair use, whether authorship supported rights of dramatization (adaptation), abridgment or translation and, in the twentieth century, with the meaning of 'originality'.

A problem for the law remains. Lacking unequivocal authoritative reference to any particular philosophical concepts, Anglo law is left with a vague celebration of copyright as private property, disconnected from any development of: discourse about why culture matters; material support for artists; the social value of art; the distinctiveness of particular cultural productions and markets; empirical knowledge of trade practice; and the need for linkages between cultural and legal education. We are left with a naked law that struggles to demarcate intelligently infringement, fair dealing, justify distinctions between different kinds of productions and limits to ownership. Woodmansee's and Rose's histories do not celebrate romanticism as the foundation for copyright, but in deconstructing the story of authorship they reveal how copyright law, art and economy were seen as intimately inter-related and how the interplay between these factors affects the kind of society that develops.

In their wake, contemporary critiques – commonly 'cultural readings' from humanities scholars – consider the law contextually and how intellectual property laws affect particular cultural and business practices.<sup>106</sup> In copyright there are also calls for a more 'relational' reading of texts, considering the essential connectedness of the subject positions of author-user-pirate.<sup>107</sup> However, a significant historical challenge remains for any humanities scholarship to impact upon the law because, as a matter of copyright jurisprudence, law's capacity to engage with new ways of thinking is now severely constrained by centuries old disengagement from aesthetics and from a critical awareness of broader philosophies that explore our ways of knowing, our capacity for judging and the reception of ideas. In reading existing genealogies of aesthetics and of authorship we need to consider far more than what was taken up into the law. We also need to reflect upon what it was that we have lost along the way because it is from here that we will come to better understand some of the major obstacles that now disrupt the capacity for humanities to impact on the law, and that stop the law benefitting from a deeper understanding of the context in which it operates.

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<sup>106</sup> See for example, Laura J Murray, S Tina Piper and Kirsty Robertson (eds), *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (OUP 2014).

<sup>107</sup> Adrian Johns, *Piracy. The Intellectual Property Wars from Gutenberg to Gates* (Chicago UP 2009); Carys J Craig, *Copyright. Communication & Culture. Toward a Relational Theory of Copyright Law* (Edward Elgar 2011).