

[Introductory chapter to R. Deazley, M. Kretschmer, L. Bently (2010), *Privilege and Property: Essays on the History of Copyright* (2010), Cambridge: OpenBook]

## Introduction: The History of Copyright History

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### 1. What is Copyright History?

History has normative force. There was no history of colonialism, gender, fashion or crime until there were contemporary demands to explain and justify certain values. During much of the twentieth century, ‘copyright’ history (the history of legal, particularly proprietary, mechanisms for the regulation of the reproduction and distribution of cultural products – as opposed to the history of art, literature, music, or the history of publishers and art-sellers) was not thought of as a coherent, or even necessary field of inquiry. It was a pursuit of individual often rather isolated scholars, not an urgent contribution to knowledge.<sup>1</sup>

This was not always so. Copyright history had been the subject of intense and sustained study during several periods in the past, in the sense that there was a common set of questions, a community of scholars who read and responded to each other’s concerns, and an audience to which this history mattered. Between around 1740 and 1790 copyright history was elevated to an academic sub-discipline under this (sociological) definition in at least Britain, France and the German-speaking countries. William Blackstone (1723-1780), Denis Diderot (1712-1784) and Johann Stephan Pütter (1725-1807) all searched in different ways for the historical sources of a law prescribing norms of copying. Copyright history is also present in virtually every nineteenth-century jurisprudential treatment of literary property, author’s rights, publisher’s rights or copyright law.

Following the adoption of an international framework of treaties, most prominently with the Berne Convention of 1886, interest in copyright history appeared to wane. As Martti Koskeniemi remarks in the context of international law: ‘For a functionally oriented generation, the past offered mainly problems, and few solutions.’<sup>2</sup> Lawyers for most of the twentieth century were functionalists, oriented towards the future.

Several fields of legal scholarship experienced a new historical turn towards the end of the twentieth century. Why did the need to understand how we got to where we are arise? For international law, the changing world order after the fall of the Berlin Wall has been suggested as an obvious stimulus. For copyright law, the renewed interest in history may be traced to the translation of Michel Foucault’s 1969 essay *Qu’est-ce qu’un auteur?*

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<sup>1</sup> Examples include: L. Gieseke, *Die geschichtliche Entwicklung des deutschen Urheberrechts* [The historical development of German author right law] (Göttingen: Schwartz, 1957); Marie-Claude Dock, *Contribution historique à l’étude des droits d’auteur* (Paris: LGD), 1962); L.R. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968).

<sup>2</sup> M. Koskeniemi, ‘The History of International Law Today’, 4 *Rechtsgeschichte* (2004), pp. 61-6.

which first appeared in English in the mid-seventies.<sup>3</sup> Poststructuralist author theory influenced literary scholars profoundly, just at a time when digitization began to pose questions of authorship and ownership. In the Anglo-American context, the landmark texts of recent copyright history are perhaps Martha Woodmansee's 'The Genius and the Copyright' (1984), turning her gaze on the aesthetic, economic and legal conditions which made enlightenment thinkers frame copyright law in the first place, and Mark Rose's 1988 article 'The Author as Proprietor', developing an argument from the case of *Donaldson v. Becket* (1774) that, historically, there was no necessary connection between author and text. Many of the questions raised by Rose and Woodmansee still pervade this volume.<sup>4</sup>

Given the burgeoning interest in copyright history over the last 25 years, of which the digital archive motivating this edited collection is one of several indicators,<sup>5</sup> this is a timely opportunity for a more fundamental historiographical challenge.<sup>6</sup> Historiography is meta-history, the philosophy of science of historical scholarship. As the field is maturing, how do copyright historians identify their objects of inquiry, the primary sources that matter? How do scholars offer explanations, conceptual explications, and narratives of causes and effects in the evolution of the norms of copying? Which justificatory goals are served by historical investigation?

In the funding application for the digital archive project,<sup>7</sup> we confidently claimed that we knew which jurisdictions, and what kind of materials mattered: 'The focus is on five countries that have shaped the modern concepts of copyright law: Italy (20 documents), France (50), the UK (50), Germany (50), and the US (20). The documents will

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<sup>3</sup> M. Foucault, 'Qu'est-ce qu'un auteur?', *Bulletin de la Société française de philosophie*, 63/3, juillet-septembre (1969), pp. 73-104; M. Foucault, 'What is an author?' (translated by James Venit), *Partisan Review*, 42:4 (1975), pp. 603-14; and pp. 113-38 in D. Bouchard (ed.), D. Bouchard and S. Simon (trans.), *Language, Counter-Memory, Practice* (Ithaca, NY: Cornell University Press, 1977).

<sup>4</sup> M. Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"', *Eighteenth-Century Studies*, 17:4 (1984), pp. 425-48; M. Rose, 'The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship', *Representations*, 23 (1988). Copyright history was then consolidated as a law and literature field of inquiry at a 1991 conference whose proceedings were published in 1992 as a special issue of the *Cardozo Art & Entertainment Law Journal*, and then as a much cited edited volume: M. Woodmansee and P. Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994).

<sup>5</sup> In March 2008, the digital archive *Primary Sources on Copyright (1450-1900)* was launched with a two-day conference at Stationers' Hall, London. The edited resource comprises over 550 documents / 10,000 pages, and is available at <<http://www.copyrighthistory.org>> (hereafter: *Primary Sources*). All contributors to this edited volume spoke at the conference, which also initiated an international scholarly society for the History and Theory of Intellectual Property (ISHTIP).

<sup>6</sup> Kathy Bowrey had already posed the question in 1996: 'Who's writing copyright's history?', *European Intellectual Property Review*, 18(6), pp. 322-29.

<sup>7</sup> Lionel Bently and Martin Kretschmer, 'Primary Sources on Copyright (1450-1900)', application for a digital resource enhancement grant to the UK Arts & Humanities Research Council AHRC (2004).

include statutes, materials relating to legislative history, case law, tracts, and commentaries.’

Not only did we claim to know where copyright history took place, we also expressed confidence in the historical inflections that had provided the sources for the modern framework of copyright law: ‘There is considerable consensus among legal scholars as to the key points in the intellectual history of copyright law: Invention of printing press (ca1450); Feudal regime of printing privileges (Venice late 15th century; imperial fairs c15-c17); Stationers’ companies (Basel 1531; London 1557); First Statutes (England 1710; US 1790); Author Rights (France 1791/1793; Prussia 1837; UK 1842); Berne Convention (1886).’

The backward projection of modern nation states into historical jurisdictions (while also omitting important regional centres such as the Netherlands) may be excused by the need to explain the project to potential funders.<sup>8</sup> We had to convey at least confidence in the possibility of copyright history.

Our methodology then aimed to select documents for the digital archive according to three criteria:<sup>9</sup>

(1) Documents that open up alternative interpretations of copyright history

Particular national copyright laws have come to be associated with distinct philosophical traditions: the US and UK are said to be ‘public interest’-oriented, or utilitarian; France and Germany are regarded as author-centric, reflecting deontological philosophical ideas (personality, natural rights). We are interested in documents that affirm, and contradict, these presentations. For the editorial comments on such documents, we are particularly interested in bibliographic references that evidence early occurrences of particular interpretations.

[...]

(2) Documents that illustrate interaction of copyright laws with commercial and aesthetic developments

We are interested in documents that say something about the way in which the law reacted to, and also affected, social circumstances and practices (including technological change, commercial practices and aesthetic practices).

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<sup>8</sup> Several essays in this collection offer a corrective here: Alastair Mann examines the distinct tradition of Scots Law before and after the Union with England of 1707; Stef van Gompel gives voice to the Dutch influence on the evolution of copyright formalities during the nineteenth century; Friedemann Kawohl is careful to distinguish the many principalities of the Holy Roman Empire of the German Nation; and, Maurizio Borghi discusses eighteenth-century copyright reforms within the context of the Venetian jurisdiction (Germany and Italy did not exist as unified states until 1861 (Italy) and 1871 (Germany)). The *Primary Sources* archive will be extended in the near future to other countries, such as Spain and the Netherlands.

<sup>9</sup> Cited from the methodology section at <http://www.copyrighthistory.org/htdocs/method.html>

### (3) Documents that evidence influences across jurisdictions

Copyright histories are often told as if national systems remained hermetically sealed from one another. So we have a British history, a French history, etc. We are interested in documents that indicate influence from outside the particular nations. For example, we are interested in evidence that the Venetian privileges constituted a model for licensing systems in France, Germany, England, etc., or evidence that suggests there was no such influence (each country independently coming up with the same idea of regulation). Assuming that there was influence, we are interested in documents which tell us about how certain legal systems became models for others.

We are also interested in documents that indicate the development of national self-consciousness, or national images of copyright. When, where, and how did French, US, German, Italian and UK commentators start to articulate their national laws as different from those of other nations (with different histories, philosophies, functions, concepts, etc.)?

From a historiographical perspective, it appears that our main thrust was to investigate the construction of narratives around the reference points of copyright history (taken as given), but we did not confront the orthodoxy that views copyright history as the history of laws. Although we recognized that history is more than an accumulation of legal materials within the context of national jurisdictions, politics and perhaps diplomacy, we did not systematically address how inquiry could reach beyond the documents of government.<sup>10</sup> This is a rather fundamental methodological point, so it may be useful to illustrate the implications with an example taken from Deazley's paper in this volume.<sup>11</sup>

From a legal perspective, the UK's Fine Art Copyright Act of 1862 introduced copyright protection for three types of artistic work – original drawings, paintings, and photographs. Prior to the 1862 Act, only engravings were protected under the Engravers' Act of 1735. Thus, a gap persisted for almost 130 years in which engravings but not paintings and drawings were covered under UK law. As Lord Mansfield remarked (*obiter*) in *Sayre v. Moore* (1785): '[I]n the case of prints, no doubt different men may take engravings from the same picture, but one cannot copy the engravings of another.' In 1853, Robertson Blaine commented that it was still dangerous to exhibit pictures 'before they are engraved'.<sup>12</sup> Yet there was a lively market for works of art, and painters did command substantial reproduction fees in relation to their works.

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<sup>10</sup> In the wider historical academy, the methodological turn toward documents of ordinary people ('everyday life') is associated with the French journal *Annales: économies, sociétés, civilisations* under the leadership of Fernand Braudel after 1945 [thanks to Thomas Knubben for the reference]. The empirical reality of societies (rather than their leaders and documented rules) becomes the focus of historical study.

<sup>11</sup> Ronan Deazley, 'Breaking the Mould? The Radical Nature of the Fine Arts Copyright Bill 1862', Chapter 11 in this volume.

<sup>12</sup> R. Blaine, *On the Laws of Artistic Copyright* (London: John Murray, 1853), p. 26; also in *Primary Sources*.

For the empirical reality of the arts market, what should the historian identify as the relevant norm under investigation? As Deazley puts it [p. 000]:

When painters purported to realise payment on the right to engrave their works, upon what basis did they do so? Did it turn upon negotiating physical access to a painting to ensure a faithful reproduction of the same? Was it simply a recognised and accepted commercial convention of the printsellers' market? Or did the status of an engraving right rest upon some other legally significant construct that predated (and perhaps rendered redundant) the need for statutory protection in 1862?

In historiographical terms, the legal construction of works of art in the UK pre-1862 does not appear to match the commercial and aesthetic practices of the period. Norms and practices of copying arguably superseded the legal framework. This indicates the limits of orthodox method. Establishing forensically the meaning of concepts, within a closed circle of legal reasoning that finds persuasive authority in historical sources of law, does not suffice. 'Copyright law' needs to be understood as having been only one mechanism for the articulation of proprietary relationships: other legal norms (personal property, contract, bailment), and, more interestingly, other social norms, allowed for systems of ascription and control, flows of money, as well as the transfer and sharing of ideas and expression. Copyright history is not just another branch of positive law.<sup>13</sup>

In this introduction, we invite readers to take a historiographical perspective on copyright history as a discipline. We do this by suggesting a number of meta-narratives, i.e. narratives about the construction of history at various periods. We then evaluate the essays in this volume in that methodological light: how do the scholars in this collection convert sources into explanations?

## **2. A Brief Historiography of Copyright**

Historical narratives of copyright were first prominently mobilized during the eighteenth century. As one would expect, this occurred when norms of reprinting and copying were contested in the context of political, economic and aesthetic shifts.

In Britain, the seminal debate interweaving strands of historical and legal argument sought to establish, or refute an author's right 'at common law' that may survive the limited copyright term of the Statute of Anne (1710). For example, in the so-called 'battle of the booksellers' between Scottish and London publishers, the Tonson family of publishers used a contract under which Simmons had acquired Milton's *Paradise Lost* in 1667 to seek an injunction against the Scottish printer Walker in 1739 (when the 21-year term for books already in print under the Statute of Anne had clearly expired).<sup>14</sup>

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<sup>13</sup> An important proviso: Had the 1862 Fine Art Copyright Act not occurred, the historian would not have treated painter-engraver relations as a matter of copyright. Thus, copyright law offers a lens for viewing practices that may not have resulted in law – perhaps a paradoxical outcome for a copyright historian.

<sup>14</sup> Peter Lindenbaum, 'Milton's Contract', pp. 175-190 in Woodmansee and Jaszi (eds), p. 189: 'Simmons's copy of the contract [the original publisher of *Paradise Lost*, contract of April 27, 1667] seems to have been passed on to the bookseller Jacob Tonson when that marketing genius acquired the full copyright to *Paradise Lost* (in two separate steps, in 1683 and 1691). Thereafter, the contract remained, no doubt as proof of possession of the

Under the influence of Lord Mansfield (as William Murray the counsel for Tonson in *Tonson v. Walker*), the common law historiography developed more fully in the cases of *Tonson v. Collins* (1762) and *Millar v. Taylor* (1769). As Deazley<sup>15</sup> suggests in his commentary on *Tonson v. Collins*: In the first extended pre-history of English copyright, Wedderburn and Blackstone (counsels for the plaintiff) ‘took the judges back through the bye-laws of the Company of Stationers, the printing patent cases of the late seventeenth century, and the Licensing Act 1662; back through the various decrees of the Star Chamber, the incorporation of the Stationers, and the origins of the prerogative right to grant printing privileges; back to the very introduction of printing itself by Caxton in 1471’. In return, Thurlow and Yates (counsels for the defendant) characterized the stationers’ bye-laws as ‘private regulations’, the letters patent were ‘merely privileges’, the King’s prerogative had nothing to do with the present case, and the decrees of the Star Chamber were dismissed as being merely political in scope and intent.

At about the same time, Denis Diderot (commissioned by the Paris Guild) gave himself the task of ‘tracing the establishment of our laws on privileges in the book trade from their origin to the present day’ (p. 15).<sup>16</sup> The first third of Diderot’s extensive 1763 pamphlet *Lettre historique et politique sur le commerce de la librairie* narrates the numerous conflicts between the provincial booksellers and the Paris Guild, and various attempts by the French Parliament and Council to circumscribe the guild’s monopoly.

Seventeenth-century regulations, from the incorporation of the Paris Guild in 1618 to the book trade relations of 1649 and 1665,<sup>17</sup> had eventually confirmed that unlimited

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copyright, in the hands of the Tonson family until 1768, along with the manuscript of Book I of the poem. The third generation Jacob Tonson even used it as evidence in a court action to frighten off a prospective publisher of Milton’s poem in 1739, well after the Copyright Act’s prescribed twenty-one years had elapsed.’ See injunction in *Tonson v. Walker* (5 May 1739) c 33 1753/208.

<sup>15</sup> R. Deazley (2008), ‘Commentary on *Tonson v. Collins* (1762)’, in *Primary Sources*. Cf. R. Deazley, *On the Origin of the Right to Copy* (Oxford: Hart, 2004), pp. 138ff.

<sup>16</sup> Denis Diderot (1763), *Lettre historique et politique adressée à un magistrat sur le commerce de la librairie* (A historical and political letter to a magistrate on the book trade, its former and current state, its regulations, privileges, tacit permissions, censors, pedlars, the expansion of trade across the river and other subjects relating to literary laws), in *Primary Sources*; with commentary by F. Rideau. Page numbers refer to the English translation of the manuscript (trans. by Lydia Mulholland).

<sup>17</sup> Book trade regulations and incorporation of the Parisian book trade (1618); Book trade regulations (1649); Book trade regulation (1665); all in *Primary Sources*. For the level of detail of Diderot’s narrative, see his account of the 1649 regulations (p. 10): ‘To suppress these disputes between publishers which were wearying the Council and the chancellery, the magistrate verbally prohibited the guild from printing anything without letters of privilege stamped with the great seal. The guild, that is to say, the destitute party, protested; but the magistrate held firm; he even extended his verbal order to old books, and the Council, ruling, as a consequence of this order, on privileges and their continuation by letters patent of 20 December 1649, prohibited the printing of any book without a royal privilege, gave preference to the bookseller who had obtained the first letter of continuation if several had been granted, banned pirate editions, postponed requests for continuations on the expiry of privileges, restricted these requests to those to whom the privileges had originally been granted, permitted these same people to have

extensions could be obtained to privileges for ‘new’ books, as well as through renewals of privileges for ‘ancient’ works. However, during the eighteenth century, persuasive arguments were made that any privilege, as a temporary monopoly, must eventually expire. In this context, Diderot’s historical excursions aim to show that the privilege system should be simply understood as a system of state approval for publication (or censorship), and that the prior right lay with the author who dealt with this as a matter of contract. Diderot claims that ‘the possessors of manuscripts purchased from authors may obtain permission to publish, and seek as many continuations of this permission as they wish; they may transmit their rights to others by selling them, passing them on to their heirs or abandoning them’ (p. 12) – in effect a justification for a perpetual transferable copyright.

In other words, ‘[t]he agreement between the bookseller and the contemporary author worked in the same way then as it does now: the author approached the bookseller and offered him his work; they agreed on a price, format and other conditions. These conditions and this price were stipulated in a private agreement, in which the author permanently and irreversibly ceded his work to the bookseller and to his successors in titles’ (p. 8).

The leading eighteenth-century German jurisprudential commentary by Johann Stephan Pütter, *Der Büchernachdruck nach ächten Grundsätzen des Rechts* (1774),<sup>18</sup> devotes about two thirds of this 206-page treatise to the historical sources of the principles that should govern the issue of reprinting. The argument contains a potted history of the book trade, an account of the early privileges (Venetian, Papal, French, and Imperial, back to 1494), a discussion of the governance of the imperial trade fairs in Frankfurt and Leipzig (such as the Frankfurt *Büchercommission* of 1579), and the views of earlier thinkers. It is Pütter who elevates Martin Luther’s 1525 preface admonishing unauthorized reprinters to a foundational text of German copyright discourse.<sup>19</sup> Pütter aimed to legitimate printing privileges provided by both the Empire and the confederate states as reaching beyond Germany’s many internal borders. Pütter’s justification of copyright has its roots not in Roman or Canon (church) law, but in European wide practice [*Europäische Gebräuche*].<sup>20</sup>

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them renewed when it seemed fit to them, and required that all letters of privilege and continuations be recorded in the guild’s register, which the syndic would be obliged to present whenever it was required, so that in future one could not plead ignorance, and so that there would be no fraudulent or unforeseen competition on the obtaining of a single permission.’

<sup>18</sup> *The Reprinting of Books Examined in the Light of True Principles of Law* (Göttingen, 1774), in *Primary Sources*; with commentary by F. Kawohl.

<sup>19</sup> Pütter (1774, p. 125) cites almost in full Luther’s preface to the 1525 edition of ‘Interpretation of the Epistles and Gospels from Advent to Easter’ [*Auslegung der Episteln und Evangelien*]. The original version is available in *Primary Sources*, with commentary by F. Kawohl. Luther characterizes unauthorized reprints as both fraud [Betrug] because they spread errors, and from economic damage with respect to labour and costs [Arbeiten und Kost].

<sup>20</sup> Citing Adrian Beier (1634-1712), a law professor at Jena university: ‘It does not follow: where there is no privilege, there is no law, no help, no sin, no punishment.’ [Folgt darum nicht: wo kein Privilegium, da sey kein Recht, keine Hülfe, keine Sünde, keine Strafe. Das natürliche Recht, die Vernunft **correct?** weiset einen jeden an, liegen zu lassen, was nicht sein ist.] (Pütter, 1774, p. 127).

As in the British common law debate, we have an attempt to lend support to systematic reasoning from a historical perspective, although Pütter (1774, p. 118) concedes that the past may be ‘darkened by prejudice’ [durch Vorurtheile verdunkelt], and at variance with what he calls the ‘true principles of law’ [den ächten Rechtsgrundsätzen].

Diderot’s letter is more overtly a political intervention, with rhetorical flourishes dominating the argument. However, the debates in Britain, France and Germany all evidence narratives that combine, in a typically eighteenth-century manner, historical explanation with justificatory concerns. The early copyright historians in Britain, France and Germany argue as if past rules, practices, statutes or court decisions may serve as normative precedents in a doctrinal sense.

Within the constraints of this introduction, we cannot offer a historiography of 250 years of copyright historical writing since Wedderburn and Blackstone’s plea in *Tonson v. Collins* (1762). The history of copyright history is yet to be written. However, we would like to invite such future research with some observations on the use of copyright history in nineteenth-century jurisprudential commentaries, and on the revival of copyright history since Foucault’s intervention in 1969.

Robert Maugham (1788-1862), the first Secretary of the Law Society of England and Wales, published the first substantive explication of British copyright law in 1828.<sup>21</sup> In many respects, his treatment of the subject is orthodox in that he provides a reasonably exhaustive doctrinal account of the current state of the law, not just for works of literature, but also with respect to dramatic works, lectures and artistic works (engravings and sculpture). However, two of Maugham’s *bête noires* dominated and shaped the structure and tenor of his treatise: the duration of copyright in literary works,<sup>22</sup> and the library deposit provisions.<sup>23</sup> Respectively, Maugham considered that limiting the duration of copyright to the statutory periods of protection was a ‘monstrous injustice’,<sup>24</sup> whereas the library deposit provisions were ‘iniquitous’, a ‘disgrace to the country’, and obnoxious to ‘[e]very principle of political economy’. On both issues, Maugham’s ‘historical view’ of the law – ‘from the invention of printing, to the Statute 8 Anne 1710’ – was marshalled to present ‘a striking proof of the injustice of their nature’.<sup>25</sup>

Whereas Maugham engaged a range of historical sources in mapping out an agenda for copyright reform, John Lowndes, who published the first treatise (within Britain at

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<sup>21</sup> R. Maugham, *A Treatise on the Laws of Literary Property* (London: Longman, 1828), also in *Primary Sources*. Prior to Maugham, Richard Godson had published *A Practical Treatise on the Law of Patents for Inventions and of Copyright* (London, 1823). However, Maugham’s treatise was the first that was concerned only with the law of copyright.

<sup>22</sup> The term of protection for literary works was twenty-eight years from the point of publication and, if the author was alive at the end of that period, then for the residue of his natural life; *Copyright Act*, 1814, 54 Geo.III, c.156, s.4.

<sup>23</sup> *Copyright Act*, 1814, ss.2-3, 5-7.

<sup>24</sup> Maugham, p. 196.

<sup>25</sup> *Ibid.*, x. Indeed, Maugham concluded his treatise with an appendix containing a selection of ‘authorities regarding the limitation of copyright and the library tax, arranged chronologically’. For example, quotations and commentary from John Milton, Thomas Carte, William Warburton, Sir Thomas Clarke, Lords Mansfield and Monboddo, Francis Hargrave, Catherine Macaulay, and others, were presented as ‘statements and reasonings’ confirming Maugham’s arguments for extending the copyright term.

least) specifically concerned with the history of copyright, wrote his work in support of Thomas Noon Talfourd's attempts to overhaul the copyright regime between 1837 and 1841, which efforts eventually lead to the passing of the Copyright Act in 1842.<sup>26</sup> Two editions of the work were published in 1840 and 1842, both of which were dedicated to Talfourd '[f]or his generous advocacy of the rights of authors'. Like Wedderburn and Blackstone, Lowndes was convinced that the concept of an author's natural right of literary property was one of long standing, and that copyright existed at common law predating the interventions of the legislature in the guise of the Statute of Anne; his treatise was an exercise in demonstrating the same. As for his 'motive in laying it before the public', he hoped 'to remove the misapprehensions which prevail with regard to this species of property, both as to its former existence, and as to the effect and the expediency of the measure proposed by Sergeant Talfourd'.<sup>27</sup> In this regard, Lowndes's work was overtly propagandist in both nature and intent.

The Swiss jurist Johann Caspar Bluntschli (1808-1881) included a section on the history and nature of author's rights in his 1854 treatise on German private law (*Deutsches Privatrecht*).<sup>28</sup> Bluntschli constructs a sequence of four historical stages, ascending 'to ever greater perfection' in the recognition of author's rights [bildete sich zu höherer Vollendung aus] (pp. 186-190):

a) the point of view of a *privilege* [der Standpunkt des *Privilegiums*]. Whilst the latter had before been conferred in individual cases, it was now granted universally. However, the form of a preferential concession [*Vergünstigung*] and a special right [*Ausnahmerecht*] was nevertheless retained, even though what was actually being protected was a universal right. That is, the need for protection of these rights was felt, but there was no understanding as yet of their nature.

b) the point of view of a *publishing right* [der Standpunkt des *Verlagrechts*], which was often tied to the aforementioned privilege. In this consideration the interests of the publishers were uppermost and their publishing right was to be safeguarded. However, this was a most unsatisfactory approach because it failed to take into account that the authorised publisher and the unauthorised reprinter have a different right only by virtue of their different relationship to the author, and that a monopoly granted to the former without consideration for the author, merely for the sake of the priority of the commercial enterprise, lacks any proper foundation.

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<sup>26</sup> For further commentary see R. Maugham, *A Treatise on the Laws of Literary Property* (1828, facsimile edition) with a new Introduction by R. Deazley (New Jersey: Law Book Exchange, 2008), iii-xxi.

<sup>27</sup> Lowndes, vii. In the preface to the first edition of his work, Lowndes wrote that 'more time and study than have been in my power to bestow, are necessary to do justice to this subject, but if, by the perusal of the following pages, the reader is convinced that such a right as that known by the name of Copyright did formerly exist at common-law, and was only taken away by a mistaken interpretation of the effect of the statute of Anne, and that the state of the present law is such as imperatively demands alteration; I shall not consider the few leisure hours I have appropriated to their composition from the severer duties of my profession, as either misspent or unprofitably employed.'

<sup>28</sup> Johann Caspar Bluntschli, Chapter 'On Author's Rights' [Vom Autorrecht], in *Deutsches Privatrecht* (München: 1853), in *Primary Sources* (trans. by Luis Sundkvist).

c) the point of view of intellectual or *literary property* [der Standpunkt des *litterarischen Eigenthums*], which is championed above all by writers, but is of no use juristically. For common parlance, which calls a person's control over his nerves, his hands, or his thoughts, ownership and applies this term to anything which belongs to the person and is peculiar to him, certainly makes sense, but it simply covers too many different kinds of circumstances for it to be of use in civil law. [...] Moreover, the author's right is also different from ownership in the sense that the former always refers back to the author as a specific individual person, from which it can never dissociate itself completely, as long as it exists as such, whereas ownership is not concerned with the individual person of the owner. [...]

d) the fourth point of view, according to which *the author's right* is seen not as a property right, but, rather, as a *personal right of the author*, as *the right of the originator* [der vierte Standpunkt, von welchem das *Autorrecht* nicht als Sachen-, sondern als ein *persönliches* Recht des Autors betrachtet wird, als *Recht des Urhebers*]. It is to the philosopher Kant<sup>29</sup> that the merit belongs of having been the first to clearly point to the personal nature of author's rights. In other respects, though, his exposition of the matter is immature. The French jurist Renouard,<sup>30</sup> in an excellent treatise on author's rights, has greatly furthered our understanding of this question, although even he concentrates too much on the property right aspect of author's rights and thus ends up describing these as a kind of privileged monopoly, albeit one that is fully deserved by the author and holds universally. This means that he too overlooks the personal nature of the author's right.

Bluntschli chastises legislators and judges, with reference to the 1774 decision of the English House of Lords (i.e. *Donaldson v. Becket*), who until recently failed to understand the historical logic in the development of author's rights.

In the French context, Laurent Pfister, in his essay in this volume, points out several examples of the instrumentalization of history: 'In 1859, with the controversies about the duration of *droit d'auteur* in full swing, the lawyer Édouard René de Laboulaye published a number of historical sources all of which tended to affirm his particular theory of perpetual literary property.<sup>31</sup> Similarly, in the decades that followed, a number of French lawyers

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<sup>29</sup> Editors' note: Immanuel Kant, 'Von der Unrechtmäßigkeit des Büchernachdrucks', *Berliner Monatszeitschrift* (1785), pp. 403-17; also in *Primary Sources*. Cf. F. Kawohl and M. Kretschmer, 'Johann Gottlieb Fichte, and the Trap of *Inhalt* (Content) and *Form*', in M. Kretschmer and A. Pratt (eds), *Copyright and the Production of Music*, special issue *Information, Communication and Society*, 12/2 (March 2009), pp. 41-64.

<sup>30</sup> Editors' note: A.-C. Renouard, *Traité des droits d'auteur dans la littérature, les sciences et les Beaux-Arts*, vol. 1 (Paris: Jules Renouard & Co., 1838).

<sup>31</sup> Édouard Laboulaye et Georges Guiffrey, *La propriété littéraire au XVIII<sup>e</sup> siècle: Recueil de pièces et de documents* (Paris, 1859). In contrast, some years later François Malapert published an historical study to refute Laboulaye's thesis of perpetual property: 'Histoire abrégée de la législation sur la propriété littéraire avant 1789', *Journal des économistes*, 1880, p. 252, and 1881, p. 437.

tried to consolidate the moral right by asserting that it was not only a natural right but one that had existed since the dawn of time.<sup>32</sup>

A cross-jurisdictional study of the spread of the teleological story of copyright during the nineteenth century – from the dark beginnings of privileges to the full recognition of author's rights – is yet to be written.<sup>33</sup> Why did the ideological emphasis on authorial works coincide with an increasing industrialized mode of exploitation? One answer stems from Marxist theory that understands law as a representation of the conditions of production in capitalism. For the specific case of photography, Bernard Edelman has argued that the French courts recognized during the nineteenth century a creative, authorial contribution in photographic activity in order to enable the operation of a property logic that served the interests of capital.<sup>34</sup>

Edelman's Marxist conception of law influenced Anglo-American writers in the Critical Legal Studies movement but has had little influence on the recent trajectory of copyright history as a discipline. As we suggested earlier, for much of the twentieth century copyright discourse was dominated by positive law in a climate where the basic settlement of the Berne Convention (that the author should have exclusive control over the full value of the works created) was applied and extended to new forms of exploitation (such as radio, television and reprography). The law looked forward to solutions, in which the proprietary model held central place,<sup>35</sup> not backwards to history.

Research on material which we would now consider to be an integral part of copyright history continued outside the discipline of legal scholarship: an important strand

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<sup>32</sup> See, for example, Pierre Masse, *Le droit moral de l'auteur sur son œuvre littéraire ou artistique* (Paris, 1906), p. 35: 'le droit moral (...) a existé de tout temps. A Athènes et à Rome, alors que les auteurs étaient sans droit pécuniaire, le droit moral était reconnu et sanctionné, sinon par une disposition expresse de la loi, du moins par la conscience publique'. See also André Morillot, *De la protection accordée aux œuvres d'art, aux photographies aux dessins et modèles industriels et aux brevets d'invention dans l'Empire d'Allemagne* (Paris & Berlin, 1878), p. 117.

<sup>33</sup> In the United States, copyright law resisted the continental story of non-utilitarian author's rights well into the twentieth century. Yet, here too doctrine developed that combined (in Oren Bracha's words) 'a metaphysical concept of the copyrighted work as an intellectual essence that could take many specific forms and a dominant concern for protecting the work's commercial value in all secondary markets that could be traced to it.' O. Bracha, 'Commentary on *Folsom v. Marsh* (1841)', in *Primary Sources*. Bracha traces this ideology in George Ticknor Curtis, *A Treatise on the Law of Copyright in Books, Dramatic, and Musical Compositions, Letters, and other Manuscripts, Engravings, and Sculpture as Enacted and Administered in England and America* (Boston: C.C. Little and J. Brown, 1847), p. 293; and Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States: Embracing Copyright in Works of Literature and Art, and Playwright in Dramatic and Musical Compositions* (Boston: Little, Brown 1879), pp. 97-98.

<sup>34</sup> B. Edelman, *Ownership of the Image, Elements of a Marxist Theory of Law* (London: Routledge, 1977 [1973]). Edelman locates the reclassification in legal doctrine (making photography capable of attracting the protection of authorship) to investments in the embryonic moving picture industry.

<sup>35</sup> Even if copyright practice witnessed increasing levels of collective management.

being contributions to publishing history, and in particularly the history of the Stationers' Company published on the pages of the journal *The Library*. Contributions were made by scholars of journalism (such as Frederick Siebert), librarians and bibliographers (such as Gordon Duff and Graham Pollard),<sup>36</sup> as well as publishers themselves, such as Edward Arber<sup>37</sup> and Cyprian Blagden, probably the two most significant historians of the Company.<sup>38</sup> Some of this historical work focused on 'copyright' as such: literary historian Harry Ransom published his influential work on the origins of the Statute of Anne,<sup>39</sup> while librarian Simon Nowell-Smith and historian James J. Barnes produced important work exploring the politics of international copyright relations between the United States and Great Britain in the nineteenth century.<sup>40</sup> The existence of this painstaking research was crucial groundwork on which recent scholars from a range of disciplines have been able to draw.<sup>41</sup>

In the Marxist and poststructuralist intellectual debates of 1960s France, it was the concept of authorship (in the analysis of Roland Barthes and Michel Foucault) that became the subject of historical study. In English-speaking discourse, Foucaultian arguments about the 'author function' as a set of beliefs governing the production, circulation and consumption of texts gained wide currency among literary scholars. Foucault's concern was with the genealogy of 'authorship', understood as an ideological construction through which responsibility for texts had come to be allocated, culture organized, and the proliferation of meaning controlled. Foucault's key observation was that, historically speaking, the attribution of authors to texts/ascription of texts to authors was a relatively recent phenomenon, and one on which practices had (and continued) to vary as between 'scientific' and 'non-scientific' texts. In an attempt to explain this, Foucault not only linked the genealogy of authorship historically to the legal system of censorship, but also identified an important shift in the history of authorship, that from responsibility to ownership.<sup>42</sup> From around 1800, he claimed, a new conception of authorship emerged, that

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<sup>36</sup> Edward Gordon Duff received a small obituary in *The Times*, October 1, 1924; for Pollard's obituary, see *The Times*, November 16, 1976.

<sup>37</sup> Arber was not only involved in the reprinting of old texts, but also lectured at UCL and in Birmingham. For Arber's obituary, see *The Times*, November 25, 1912.

<sup>38</sup> Blagden spent much of his career at Longman's and was a liveryman of the Stationers' Company. For Blagden's obituary, see *The Times*, December 4, 1962, p. 15.

<sup>39</sup> Ransom's PhD focused on the literary property debates, and in 1956 he published *The First Copyright Statute* (Austin: University of Texas Press).

<sup>40</sup> Simon Nowell-Smith, *International Copyright Law and the Publisher in the Reign of Queen Victoria* (Oxford, 1968); James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854* (London: Routledge & Kegan Paul, 1974).

<sup>41</sup> In Germany, the trade body of publishers and booksellers (*Börsenverein*, founded in 1825) sponsored a project on the history of the book trade since 1876. Its historical committee published between 1886 and 1913 Friedrich Kapp's and Johann Goldfriedrich's influential four-volume *Geschichte des Deutschen Buchhandels*.

<sup>42</sup> Foucault (1969). Kathy Bowrey points out, amusingly, that during the 1980s and 1990s, it became almost *de rigueur* to cite Foucault in the opening lines of academic essays on copyright theory, as if to confirm the Foucaultian ideological compulsion to identify authorship (Bowrey, 1996, p. 323).

of the 'author-as-proprietor'. It was this insight that led (it seems) Woodmansee and Rose to begin their seminal studies of copyright history in eighteenth- and early nineteenth-century England and Germany.<sup>43</sup>

For copyright lawyers, it was probably the advent of digitization that motivated a turn to history as a strategy for understanding what copyright was intended to do, how it has functioned, and for paths that we could now take. Simultaneously, expansion in higher education, and burgeoning interest in the field of 'intellectual property' (fed by assumptions of its growing economic importance in the developed world), led to the appointment of a new generation of (copyright) scholars looking for research projects. Computer programming,<sup>44</sup> digital sampling,<sup>45</sup> and the production of databases,<sup>46</sup> prompted interrogation of legal notions of 'authorship', 'originality' and 'work', and raised doubts about the appropriateness of proprietary models of regulation. Foucault's genealogy of authorship offered a vital pointer towards understanding the underlying logics and epistemic underpinnings of the institutions and practices of copyright that legal commentators during the twentieth century had pretty much taken for granted.<sup>47</sup>

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<sup>43</sup> Woodmansee (1984); Rose (1988).

<sup>44</sup> Richard Stallman pioneered an open approach to software development and distribution in the GNU Project, launched in 1984 in order to develop a complete Unix-like operating system (GNU is a recursive acronym for 'GNU's Not Unix'). In 1988, Stallman issued the first version of the General Public License (GPL) forcing derivatives of GNU software to keep their source code free from proprietary claims. The GPL has been described as the constitution of the Free Software/Open Source movement, and is probably the single most important expression of discomfort with proprietary understandings of authorship in the field of computer programming. M. Kretschmer, 'Software as Text and Machine', *The Journal of Information, Law and Technology (JILT)*, 1 (2003), pp. 1-24:

<[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003\\_1/kretschmer/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/kretschmer/)>

<sup>45</sup> G. Born and D. Hesmondhalgh (eds), *Western Music and Its Others: Difference, Appropriation and Representation in Music* (Berkeley: University of California Press, 2000); K. McLeod (2002) 'How copyright law changed Hip Hop: an interview with Public Enemy's Chuck D and Hanks Shoklee', *Stay Free Magazine*.

<sup>46</sup> Jane Ginsburg's historical exploration of copyright law in revolutionary France and the United States was published almost simultaneously with her examination of the legal protection of compilations, a year before the United States Supreme Court decision in *Feist Publications v. Rural Telephone Service Co.* 499 US 340 (1991). The *Feist* decision, and the authorial ideology that the decision expressed, were a key focus for US copyright scholarship. J. Ginsburg, 'A tale of two copyrights: literary property in revolutionary France and America', *Tulane Law Review* 64 (1990), pp. 991-1031; J. Ginsburg, 'Creation and Commercial Value: Copyright Protection of Works of Information', *Columbia Law Review*, 90/7 (1990), pp. 1865-1938.

<sup>47</sup> Peter Jaszi excavated the legal refractions of the 'romantic' ideology of authorship further into the nineteenth and twentieth centuries ('Toward a Theory of Copyright: The Metamorphoses of Authorship', *Duke Law Journal* (1991), pp. 455-502); James Boyle explored how that same ideology informed legal fields beyond copyright – such as blackmail, traditional knowledge, and genetic material (*Shamans, Software, and Spleens: Law and the Construction of the Information Society*, Cambridge, MA: Harvard University Press, 1996); Brad Sherman and Lionel Bently sought to highlight how conceptions of

Of course, not all contributions to the new copyright history sprang from the appropriation of poststructuralist ideas (in translation). Foucault had little influence on the work of certain English and Continental scholars, such as Feather, Cornish, Seville, Kawohl or Pfister.<sup>48</sup> Reviewing the range of contributors to this volume and their methodological base offers an opportunity to examine the state of the discipline.

### 3. Methodology in this volume

The historical treatises of the eighteenth century analysed the legal character of privileges as antecedents of a general law regulating reprinting: Were privileges an encroachment on common rights or liberties, were they necessarily limited in term, could they extend across borders, did they permit or rely on certain rights of the author? As we have seen during our brief historiographical sketch, many jurisprudential commentaries have continued to view privileges as part of a continuous line that eventually led to the recognition of authorship and copyright law proper.

In the first essay of this collection ('From Gunpowder to Print: The Common Origins of Copyright and Patent'), Joanna Kostylo, a cultural historian, steps out of this trajectory. Kostylo explores the instruments of Renaissance letter patents on their own terms, locating them in the 'very material world of craftsmanship and mechanical inventions' [p. 000]. According to Kostylo, the history of copyright 'must be explored from a wider perspective of contemporary arts, crafts, music, painting and print making, as well as the aesthetic theories of Italian humanism that influenced these various disciplines' (ibid.). It follows that the primary source material that concerns the historian may be as much rich social material (for example about the transmission of knowledge in guilds) as proto-legal material (such as the Venetian printing privilege for Johannes of Spyer of 1469). Here the historiography of copyright is at its most fluent.

The subsequent essays mostly return again to law (and its immediate context) as the object of study, although there are certain exceptions, such as Mark Rose's ambitious reading of Habermas's theory of the public sphere into a single English seventeenth-century

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creativity were implicated in the categories and structures of intellectual property that 'crystallized' in the mid-nineteenth century (in Britain) and drew attention to a range of different narratives in copyright history, such as those of national tradition, and colonialism, which warranted further investigation (*The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999)). Other examples of the early infiltration of copyright law academe by authorship theory can be found in B. Sherman and A. Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Oxford: Clarendon Press, 1994).

<sup>48</sup> John Feather, 'The Book Trade in Politics: The Making of the Copyright Act of 1710', *Publishing History*, 8 (1980), pp. 19-44; W.R. Cornish, 'Authors in Law', *Modern Law Review*, Vol. 58, No. 1 (1995), pp. 1-16; Catherine Seville, *Literary Copyright Reform in Early Victorian England* (Cambridge: Cambridge University Press, 1999); Laurent Pfister, *L'auteur, propriétaire de son œuvre?: La formation du droit d'auteur du XVI<sup>e</sup> siècle à la loi de 1957* (Strasbourg PhD thesis, 1999); Friedemann Kawohl, *Urheberrecht der Musik in Preußen 1820-1840* (Tutzing: Hans Schneider, 2002). In the German-speaking countries, a historical society of copyright jurists *Arbeitskreis Geschichte des Urheberrechts* (drawing on the research of Gieseke, Rehbindner, Vogel and Wadle) has held regular bi-annual meetings for several decades.

text (Milton's *Areopagitica*), or Katie Scott's account of the contribution of the visual arts, and in particular maps, to establishing property claims in seventeenth- and eighteenth-century France.

It is not surprising that the focus of investigation tends to narrow as the analysis progresses through time, and a body of jurisprudence is becoming known as copyright law in its various incarnations – such as literary property, *droit d'auteur* or *Verlagsrecht* (publishers' right). This steers the historian's selection of primary sources towards decisions by courts and documents of the legislature.

It is important to note that this is not necessarily a disciplinary choice. Legal historians, cultural historians, economic historians, art historians, book and literary historians, music historians, or intellectual historians may, or may not, differ in their selection of objects. The same materials may serve different explanations, depending on explanatory goals and methods used.

The type of objects covered in this collection include specific narrow legal interventions, for example, on performing rights in the UK (Alexander), publishing contracts in Prussia (Kawohl), perpetual copyright in Venice (Borghi), artistic property in France (Rideau) and the UK (Deazley), as well as wider surveys on the customs of the publishing trade (Feather), freedom of commercial exploitation under Scots law (Mann), the regulation of the printing press in the North American colonies (Bracha), the concept of the author in the French privilege system (Pfister), or formalities in nineteenth-century Europe (van Gompel). Some essays even attempt to spin threads through several centuries, for example on the personality interests of the author (Peifer), and on the political economy hidden in metaphors of intellectual property (St Clair).

Following an identification of the *objects* of investigation, a second set of observations relate to the *goals* of historical analysis. Here we may distinguish among the contributions to this volume:

(i) Papers making claims about national identity and influence:

Peifer (dislodging the Anglo-American influence on recent scholarship in favour of a pre-eminent and preferable German tradition); Mann (making the case for Scotland's importance and influence within British copyright's 'pre-history'); Kawohl (making the case for a particularly German jurisprudence that pre-empts/disrupts the significance of the 1791 and 1793 French decrees within the civil law tradition);

(ii) Papers making claims about disciplinary relevance:

Scott (the contribution that visual art made in the formulation of contemporary copyright, which itself makes claims about the importance of being able to 'read' the visual); Feather (locating copyright history within a broader (more important?) history of publishing);

(iii) Papers seeking to challenge existing (dominant) narratives:

Kostylo (on the significance of industrial privileges in the formation of the authorial ego and the intangible work); Bracha (on the typical presumptions about 'copyright' in colonial America, and in turn problematizing the role of the author – and author-ideology – in the formation of early American copyright jurisprudence); Pfister (presenting a more nuanced historical account of conceptions of the author and the work – as well as the relationship between the two – than has typically been the case in existing scholarship about the history of copyright in France);

(iv) Papers drawing upon history with a view to interrogating contemporary policy:

St Clair (a critical understanding of the use of metaphor in obfuscating historical and current debates); Alexander (the importance of exploring mistakes that may have been

made in the past with a view to future policy, and invoking history to unsettle current perceptions about the naturalness or inevitability of the contemporary regime); Pfister (the instrumentalization of history, and its continuing relevance for contemporary debate); Borghi (on the importance and value of evidence-based policy); van Gompel (in seeking to ameliorate the perceived conflict between the existence of certain copyright formalities and the *droit d'auteur* tradition).

Lastly, and perhaps most controversially, we would like to offer an interpretation of the *methods* used in the essays. How are primary sources converted into explanations? A 'legal positivist' analysis of copyright law as part of an institutionalized system of social recognition will seek explanations immanent to law.<sup>49</sup> At the other end of spectrum, copyright law may be explained by technological, economic, political, social or aesthetic factors, i.e. explanations outside law.

In this collection, grand theories, such as the 'romantic author hypothesis' (explaining the rise of author's rights at the end of the eighteenth century from an aesthetics of genius), theories about the 'public domain' (conceiving of copyright as a regulatory mechanism for the benefits of learning), or teleological stories about the ascent of copyright laws from privileges to authorial consciousness are being challenged by micro-studies that bring a wider range of methods to bear on a wider range of sources. This is a sign of disciplinary evolution. There may be no grand pattern that explains the development of copyright laws across all societies, yet carefully sustained work on primary materials may discover new narratives for new social conditions, aware of one of the central paradoxes of legal theory: that law is both a set of rules and a discourse about what these rules should be.

John Milton, in his 1644 *Areopagitica* speech *For the Liberty of Unlicensed Printing*, accuses parliament of having been deceived by the 'fraud of some old patentees and monopolizers in the trade of bookselling' (i.e. the Stationers' Company): 'Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broadcloth and our woolpacks.'<sup>50</sup> Today, we still struggle to relate norms of communication and norms of transaction (as copyright law forces us to do). That is why copyright history matters.

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<sup>49</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994 [1961]).

<sup>50</sup> Cited in Mark Rose's essay in this volume. Rose makes a complex causal argument about the role of a bourgeois public sphere in the collapse of traditional press controls, enabling the recognition of authorship in the Statute of Anne (1710). The public sphere (in the sense of Habermas) is an early modern political force that emanated in new civic institutions of conversation and exchange, such as coffee houses, newspapers and clubs: Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger (Cambridge, MA: The MIT Press, 1991 [*Strukturwandel der Öffentlichkeit*, 1962]).