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## **The History and Philosophy of Copyright<sup>i</sup>**

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### **Introduction**

In modern legal parlance, copyright has become subsumed under a concept of Intellectual Property. This appears to evoke the justificatory package of individual property rights that has shaped Western societies since John Locke's *Second Treatise of Government* (1690). Legitimising private ownership in the wake of the Glorious Revolution of 1688, Locke proposed that by 'mixing' labour with previously common goods a new 'private dominion' would be created.

Characteristic of the property approach are exclusivity, i.e. the right to deny use by third parties of the intellectual territory claimed, and transferability, i.e. the right to transfer title of the intellectual territory freely to third parties.<sup>ii</sup> Trespassing on intellectual territory (unauthorised copying) has been condemned with the property term 'piracy' since the 18th century.<sup>iii</sup> The Eighth Commandment 'Thou shalt not steal' is still cited as a 'sacred principle' behind the provisions of modern copyright law (Laddie 1997, p. 2).<sup>iv</sup>

In this chapter, we suggest that the concept of property is not very helpful in determining the appropriate regulatory policy for the creation and distribution of

culture. Property is that to which protection is afforded, not *vice versa*. In the case of copyright, it has been said that without the artificial scarcity introduced by property concepts, the costs of production of creative works will remain above the costs of copying. Creative production therefore would not take place.<sup>v</sup> This argument from the utility of property provisions is certainly implausible for a copyright term that is calculated from the life of the author (plus 50-70 years), and for a copyright scope that prevents desirable cultural engagement for example in adaptation and sampling.

If there is another, independent (non-regulatory) moral argument for copyright, it is problematic. We shall argue that norms of authorship do not support claims to a private, exclusive, transferable domain of intellectual property; rather they justify an informational link between creator and creative products, and perhaps a claim to rewards from unauthorised exploitation of such products.

The chapter is structured around the key evolutionary phases of the modern copyright paradigm: (1) the proto-copyright of crown privileges and letter patents, responding to the invention of the printing press since the late 1400s; (2) the 18th century Battle of the Booksellers, eventually asserting copyright as a limited incentive in the production and dissemination of cultural products; (3) the parallel development of author norm towards the end of the 18th century, associated primarily with the philosophers of German Idealism; (4) the 19th century statutory construction of abstract works to which all acts of exploitations refer, fusing the property concept of utilitarian incentives with restrictions derived from the author (culminating in the Berne Convention).

The justificatory arguments for music copyright are generally similar to those for other literary or artistic creations. Initially copyright mechanisms evolved for the predominant technology of book printing, with music being denied statutory protection until 1777. This changed with the early 19th century, when music became a trend setter in defining abstract work identity through the newly restricted acts of public performance and adaptation. The focus of the chapter is on the four jurisdictions that have shaped modern copyright: Britain, Germany, France and the United States.

### **Proto-copyright: crown privileges and letter patents**

During the period dubbed *the Renaissance* by historians in the 19<sup>th</sup> century, several factors combined to turn copyright into a legal issue. The first factor was the emergence of a sense of individualism (realised in the art of Italian painters and sculptors). The second factor was a period of rapid economic expansion carried by a new class of international merchants. Commerce became organised around annual trade fairs which created an efficient distribution structure for new ideas (Epstein 1998). In turn, the merchants themselves created a market of people with surplus income and demand for leisure goods. The third factor was the invention (around 1450) of a technology enabling the fast and efficient reproduction of ideas: Gutenberg's printing press. These elements were in place by the end of the 15th century, when an estimated 20 million books were circulating in Europe (Eisenstein 1979).

Reprints of popular books were soon pervasive, but the late medieval states had a ready made device for controlling the dissemination of new ideas while solving the profitability problem of some printers: the crown privilege. Awarding monopoly rights against a fee was the defining economic instrument of late feudalism (cf. North

and Thomas 1973). Early printing privileges are documented in Venice (1469), Milan (1480s), Germany (1501) and France (1507) (Pohlmann 1962). In England, the first book printed with a privilege from the sovereign was published in 1518 (Patterson 1968). The earliest known privilege for exclusive rights to print and sell music was granted on 25 May 1498 by the Venetian signoria to Ottaviano dei Petrucci for a term of 20 years (Püttlingen 2001, 141).

Typically, crown privileges were issued to printers, either individually or collectively, mostly for a limited period of time, sometimes for specific books only. There are also many examples of privileges obtained by individual creators with court connections. The two systems operated in parallel.

In Germany, we find letter patents protecting the work of authors and composers on a common law basis from around 1500. The first known imperial patent to a composer was Maximilian's privilege for Arnold Schlick (1511). A prominent example was the protection afforded to Orlande de Lassus (1532-1594) who collected privileges in various jurisdictions (France 1575; Germany 1581). Privileges were influential at the Frankfurt book fairs which took place under imperial legislation. Emperor Rudolf II even issued a *Mandat* (1596) that gave preference to the protection of authors over publishers. Injunctions and substantial penalties were regularly enforced through the courts. This tradition disappeared with the religious wars in central Europe 1618-48 (Pohlmann 1962).

In London, the Stationers were a minor London guild of writers, illuminators, bookbinders and booksellers, established since 1403. With the arrival of the printing press, booksellers and printers became the two dominant groups. Stationers obtained

the right to print a new book by stating their claim before the Stationers' Company Warden. Because of the monopolistic control of the London printers, this amounted to a safeguard of the right to copy, though the practice had its roots (as in France) in censorship: registering a book at Stationers' Hall was necessary to legalize publishing.<sup>vi</sup> The Stationers' Company royal charter of 5 May 1557 was an attempt by the catholic Queen Mary to control the spread of heretical material:

'No person within this our realm of England or the dominions of the same shall practise or exercise by himself, or by his ministers, his servants or by any other person the art or mistery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid printing is or shall be one of the community of the foresaid mistery or art of Stationary of the foresaid City, or has therefore license of us or the heirs or successors of us the foresaid Queen by the letters patent of us or the heirs or successors of us the foresaid Queen.' (Patterson 1968, p. 32)

In Saxony, central to the German book trade because of the annual Leipzig trade fair, a *Bücherkommission* governed by the Lutheran church formally controlled the trade after 1687. Like the London Stationers, the Leipzig Books Commission had to provide a body for both censorship and regulation of reprint. It was composed of a councillor, a professor, a Books Inspector (i.e. a policeman), and a clerk all working under surveillance of the Kirchenrat, the local Lutheran Church board. The Books Commission had the power to order bans, confiscations or further investigations (Curtius 1831, p. 204f. §1505; cited in Kawohl 2002a, p. 276).

Until the end of the 18th century, authors (and composers) typically handed over their manuscript against one single payment. John Dowland's wife, for example, received £20 from George Eastland for ownership of the manuscript and half the dedication reward of Dowland's *Second Booke of Songs or Ayres* (1600) (Dowling 1932). The Stationers' *Hall Book* or Leipzig's *Eintragsrolle* provided a safeguard for publishers against other publishers; it provided no institutional recognition of author's rights. In fact, when selling on manuscripts (which was soon commonplace: a significant trade had developed by 1700) publishers were utterly unconcerned about the authors.

A few exceptions are documented where authors started to assert themselves. Either, they came to some written agreement, such as Thomas Ford who upon registration of *Musicke of Sundrie Kindes* obtained the right (13 March 1607) 'that this cotype shall never hereafter be printed agayne without the consent of master fford the Auctor' (Hunter 1986, p. 271). Alternatively, authors with access to the Crown could obtain a letter patent of monopoly protection, much like the earlier imperial practices of central Europe. In 1575, Elizabeth I granted 21 year monopolies to Thomas Tallis (1505-1585) and his pupil William Byrd (1543-1623) which coincided with the publication of their celebrated collection of 34 *Cantiones sacrae* in the same year. Crown privileges sometimes conflicted with the interests of publishers, as in the case of George Withers who, after obtaining a letter patent for his *Hymns and Songs of the Church* (1623), took the Stationers' Company to court (Carlson 1966). Prominent beneficiaries of English Crown privileges include Handel, J. C. Bach and Thomas Arne; in France François Couperin and Marin Marais; in Saxony, Bavaria, Prussia and Hesse-Darmstadt, Carl Maria von Weber (as late as 1826) and in Prussia, Johann Strauß the Elder, even in 1834 (Wadle 1998).<sup>vii</sup> While some composers succeeded in exploiting these early institutional mechanisms, others remained firmly locked into

restrictive relationships. Joseph Haydn's contract of employment with Prince Esterházy in 1761 still contained a clause forbidding the publication of his works (Tschmuck 2002, p. 214).

The old system of printing privileges and letter patents has been identified as a progenitor of modern copyright (Pohlmann 1962; Patterson 1968; Feather 1994). There are indeed striking similarities between privileges and copyright: both are granted by the legislator and serve as a means to protect printers, and sometimes authors, against competitors or unauthorised exploitation. However, there are important differences in practice, as well as in underlying rationale: unlike copyrights, privileges were not automatic and could be revoked; they could be granted both to printers of original books and to reprinters; and privileges would not extend past a state's border (cf. Dölemeyer and Klippel 1991, p. 191)

Apart from their role in censorship and raising revenue, crown privileges were also an aspect of protectionist economic policies. While occasionally recognising individual creativity, they remained part of an absolutist and mercantilist framework. Thus their legitimation waned with the decline of these economic and political systems: in England at the end of the 1600s, on the European continent half a century later.

### **From the Statute of Anne to the US Constitution**

In 1690, John Locke proposed what would become known as the 'labour theory' of property. For our purposes Locke's theory may be summarised thus: in a state of nature, goods are held in common through a grant from God. 'Being given for the use of men, there must of necessity be a means to appropriate them some way or other,

before they can be of any use or at all beneficial.’ Every man has property in his own person. ‘This nobody has a right to but himself. The “labour” of his body and “work” of his hands, we may say, is properly his.’ If he ‘mixed his labour’ with a common good, it is converted into an exclusive ‘private dominion’. Private appropriation however is limited by a proviso: one may take as long as one leaves ‘enough and as good’ for others, and does not appropriate so much that goods ‘waste or spoil’. The first condition is akin to an equal opportunities provision; the second condition condemns waste as a diminution of the common stock of potential property.<sup>viii</sup>

Lockean property thoughts have become part of the fabric of Western political expression. There are obvious resonances with contemporary corporate lobbying for intellectual property protection. We are familiar with the argument that ‘creative effort’ and/or ‘investments’ justify ‘exclusive control’ of the ‘value added’. Natural rights are supposed to function as a constraint on political decision making. They cannot be overruled or amended to achieve desirable social outcomes. Intellectual property as a Lockean right may remain outside the scope of regulation.

It is therefore remarkable that the first statutory copyright law conceived in a Lockean environment, expressly refused to grant copyright as a natural right.<sup>ix</sup> The so-called Statute of Anne came into force on 10 April 1710<sup>x</sup> and protected ‘Books and other Writings’ against reprints for 14 years from first publication, renewable once.

Politically, the Statute of Anne was a response to the lapse on 3 May 1695 of the Licensing Act of 1662, a censorship law introduced by the restoration king Charles II. The Licensing Act had been announced as ‘An Act for Preventing Abuses in Printing



Seditious, Treasonable and Unlicensed Books and Pamphlets, and for Regulating of Printing and Printing Presses’, granting the Stationers’ Company the power to seize, destroy and levy fines with the effect of consolidating the monopoly of the London Stationers as the only legitimate publisher of printed materials. By the 1690s, parliament had noticed that stationers ‘are impowered to hinder the printing [of] all innocent and useful Books’, and that scholars were forced to buy classics and foreign books from the stationers ‘at the extravagant Price they demand, but must content with their ill and incorrect Editions’. (XI H. C. JOUR. 305-306; quoted in Patterson, 1968, p. 139f)

The Statute of Anne replaced the Stationers’ Company’s perpetual prerogative with a statutory but limited monopoly open to all ‘Authors or Purchasers’. The Act was constructed as a regulation of the book trade for the public interest, and the original Lockean preamble, referring to ‘the undoubted property’ that authors had in their books as ‘the product of their learning and labour’ was scrapped during parliamentary reading (Rose 1993, p. 45). The new preamble suggests ‘An Act for the Encouragement of Learning’. ‘Learned Men’ would now be encouraged to compose and write useful Books’ because the consent of ‘Authors or Proprietors’ would be required for the printing, reprinting, sale and publication of their work (sec. 1). The wording remains ambiguous as to where the incentive should bite precisely: at the point of creation (author) or investment in publication and distribution (proprietor).

**[Insert Table 1: Statute of Anne]**

Music was not thought to be protected under the Act of Anne but although unauthorized publication of a composer’s work was therefore not illegal, accusations

of piracy still flew between music publishers. For example, three editions of Corelli's *Twelve Sonatas Op. 5* were available in London around 1700: the Rome edition imported by Banister and King, Roger's Amsterdam edition sold by Francis Vaillant, and Walsh's, copied from the Rome edition. Roger and Walsh tried to compete on authenticity, citing corrections by various Italian musicians associated with Corelli. The composer would not have seen any financial benefits from these activities (Hunter 1986; Rasch 2002). Interestingly 18th century music publishers, unlike their book selling colleagues, did not lobby for statutory protection. 'For music publishers, the maintenance of copyright protection over 14 or 28 years was unnecessary, as most musical works would not remain in fashion that long' (Hunter 1986, p. 276). It appears that the control of distribution channels and predatory pricing against new entrants was as effective a means of market dominance as statutory protection. Copyright law cannot be evaluated independently of economic behaviour.<sup>xi</sup>

The two most important copyright cases of the 18th century were the King's Bench decision in *Millar v. Taylor* (1769), in which an author's perpetual right in common law was asserted on the basis of Lockean arguments; and *Donaldson v. Becket* (1774), in which the House of Lords upheld the public interest aims of the Statute of Anne. Overturning *Millar v. Taylor*, *Donaldson v. Becket* exposed copyright as created and limited by statute. As Lord Chief Justice De Grey remarked critically in the *Donaldson* case: 'The truth is, the idea of a common-law right in perpetuity was not taken up till after that failure (of the booksellers) in procuring a new statute for the enlargement of term. If (say the parties concerned) the legislature will not do it for us, we will do it without their assistance; and then we begin to hear of this new doctrine, the common-law right ...' (17 Cobbett's Parliamentary History 953, at 992; quoted in Patterson 1968, p. 178). These cases influenced the development of both

American and European copyright law, articulating many of the concepts in which copyright is still discussed today. They warrant a closer look.

In *Millar v. Taylor* (1769, 98 *English Reports* 92; also Burrow 1773), Robert Taylor, a printer from Berwick, had published an edition of *The Seasons* by James Thomson which Andrew Millar, a London bookseller, had purchased from the author in 1729. Thomson died in 1748, and it was evident that the (once renewable) 14 year term of the Act of Anne must have expired when the case was brought in 1767. Millar argued that there existed a perpetual author right under common law, independently of the statutory provisions of the Act of Anne. The King's Bench court, dominated by the eminent jurist William Murray (Lord Mansfield) who was involved in many of the early copyright cases, supported Millar's claim from first principles of property:

'Because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions; with other reasonings of the same effect.' (98 *English Reports*, p. 252)

Strangely, the court did not even consider why such an author right should be structured as property, transferable to a London bookseller in perpetuity? After all, Mansfield appears to argue for two kinds of author rights: (1) reward for labour; and (2) the right to protect an author's reputation by preserving the integrity and source of

a work. These rights could have been provided independently of property interests (see final section below). Lyman Patterson has argued that Lord Mansfield's opinion in *Millar v. Taylor* prevented the development of a doctrine of author rights under common law independently of a publisher's exclusive property control. (Patterson 1968, ch. 8; see also Patterson 1987) In doing so, Mansfield sowed the seeds for the modern misery of copyright, *pace* the Lords' decision in *Donaldson*.

*Donaldson v. Becket* (1774, 2 *Brown's Prerogative Cases* 129, 1 *English Reports* 837; also Burrow, 1774) is probably the most celebrated of all copyright cases. Reasserting the 14 year term of the Statute of Anne, and perhaps abolishing the author's common law copyright, the case was eventually decided by a simple vote in the House of Lords. 'Thus the peers gave an answer to the literary-property question, but they did not provide a rationale.' (Rose 1993, p. 103). Unsurprisingly, *Donaldson v. Becket* has been interpreted and reinterpreted ever since. Debate is still raging today about which Lord Judge meant what (cf. Deazleay 2003). The case was uniquely dramatic, enthralling the contemporary literary scene. People queued for admittance to the final hearing.

Alexander Donaldson was an Edinburgh bookseller who specialised in reprints of literary standards. In 1763, he had set up a shop in London where he sold his books at 30-50 percent less than London prices (Rose 1993, p. 93). In 1768, Donaldson deliberately and provocatively brought out another edition of Thomson's *The Seasons* (the subject of the litigation in *Miller v. Taylor*). Upon Andrew Millar's death in 1768, Thomas Becket and fourteen stationers purchased the copyrights of Millar's estate at auction for £505 (13 June 1769). Donaldson was excluded from the sale. In

November 1772, Becket and his partners obtained an injunction against Donaldson who was said to have sold several thousand copies of *The Seasons* printed in Edinburgh. Donaldson appealed to the House of Lords where the case was heard on 22 February 1774. Five questions were directed to the Lord Judges (98 *English Reports* 257-258):

1. Whether an author of a book or literary composition had at common law 'the sole right of first printing and publishing the same for sale,' and a right of action against a person printing, publishing, and selling without his consent. Held, yes by a vote of 10 to 1.
2. If the author had such a right, did the law take it away upon his publishing the book or literary composition; and might any person thereafter be free to reprint and sell the work? Held, no by a vote of 7 to 4.
3. Assuming the right of common law, was it taken away by the Statute of Anne, and is an author limited to the terms and conditions of that statute for his remedy? Held, yes by a vote 6 to 5.
4. Whether an author of any literary composition and his assigns have the sole right of printing and publishing the same in perpetuity by the common law? Held, yes by a vote of 7 to 4.
5. Whether this right was restrained or taken away by the Statute of Anne? Held, yes by a vote of 6 to 5.

The first three questions refer to the rights of the author, the latter two were phrased in terms of ‘the author and his assigns’, the language of the Statute of Anne and, in practice, the rights of the booksellers. Following the decision in *Donaldson*, copyright was again a right created and limited by statute, not a source of income for the London stationers under the veil of perpetual author interests exercised by assigned proprietors.

The notion of copyright as a regulation for the benefit of the public, incentivising creative production, was most emphatically adopted by the United States. The US Constitutional Convention convened from May until September 1787. On September 5, the Copyright clause was agreed without debate. Congress should be empowered ‘To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.’ (Art. I, Sec. 8, Cl. 8)

The first federal Copyright Act was passed in 1790: ‘An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.’ It was closely modelled on the Statute of Anne in its utilitarian rationale, limited 14 year term (renewable once), registration requirement, and the restriction of specified acts of ‘printing, reprinting, publishing and vending’.<sup>xii</sup> Particularly interesting is section 5 which encourages pirating of foreign works, as ‘nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.’ The public interest is clearly articulated as the

national interest of a young nation, benefiting from the quick and cheap dissemination of the latest foreign advances in scientific and cultural thinking. The 1831 Copyright Act extends this prescription: one may import from abroad any kind of work without exception.

In *Wheaton v. Peters* (1832, 29 Fed. Cas. 863), the leading case of early American copyright law, the US Supreme Court denied that there was any author's right in common law (after publication) independent of the copyright statute. In the language of the court, copyright is a limited statutory grant of a monopoly which benefits the author in order to satisfy the public interest in learning. US copyright law remained steadfastly utilitarian until well into the 20th century. The Congress Report accompanying the 1909 Copyright Act still argues that the legislation 'is not based upon any natural right that the author has in his writings, ... but upon the ground that the welfare of the public will be served'.<sup>xiii</sup>

Most contemporary observers believed that the House of Lords in *Donaldson* had taken away the author's common law right upon publication, and replaced it with a limited copyright granted by statute for the public's benefit. As we shall see, though, it was later thought that *Donaldson* did admit an underlying natural common law right (cf. Rose 1993; Deazley 2003). Copyright's utilitarian rationale was thus replaced with a broader concept, whose term and scope was derived from arguments about the author. The following section argues that this 19th century reinterpretation owes much to philosophical developments in German Idealism.

### **Kant – Fichte – Hegel: The author arrives**

Early print regulations--the statutes of bookseller's guilds, crown privileges--were underpinned by collective structures. Copyright, on the other hand, is based on claims of individuals. Within 18th and 19th century discussions, those individual claims were most easily justified via the concept of property. As an English pamphlet of 1747 claimed (William Warburton, *A Letter from an Author to a Member of Parliament Concerning Literary Property*, quoted in Rose 1993, p. 72):

'For that the Product of the *Mind* is as well capable of becoming Property, as that of the *Hand*, is evident from hence, that it hath in it those two essential Conditions, which, by the allowance of all Writers of Law, make things susceptible of Property; namely common *Utility*, and a Capacity of having its Possession *ascertained*.'

Despite Warburton's optimism, it was not straightforward to support copyright as a form of property under the then prevailing Roman Law tradition of absolute ownership of land and movable things. The Roman Law obsession with occupancy as the source of all property claims is still reflected in Locke's approach where the undoubted possession of one's own labour is converted into individual ownership of previously common goods.

In France, Denis Diderot experimented with a non-labour, genius based theory of literary creation, ironically in a pamphlet commissioned by the Paris Guild which--in the Stationers' tradition--sought to establish a property title for printers via contracts with authors (1763, *Lettre historique et politique adressée à un magistrat sur le commerce de la librairies*). Diderot (who had translated some of John Locke's writings) rejected the Lockean notion that intellectual territory could be appropriated like land. For Diderot, an author's bond with a work is inviolable not because of the



conversion of common into private goods but because of an act of first creation: 'what form of wealth could belong to a man, if not a work of the mind ... if not his own thoughts ... the most precious part of him, that will never perish, that will immortalize him.' (quoted in Marshall 2001, p. 24)

Immanuel Kant's discussion *Von der Unrechtmäßigkeit des Büchernachdrucks* ('of the illegality of reprinting', 1781) similarly derives copyright from the natural right of self-expression rather than from a property right of authors or publishers. According to Kant, 'in a book, conceived as a writing, the author speaks to his reader'. Thus the book as a physical entity is a mere 'tool to transfer a speech to the audience.' Following Kant, the Idealist philosopher, Johann Gottlieb Fichte, advanced what he deemed to be a proof that ascertaining intellectual possession was in fact possible via the concept of Form. In his 1792 article *Beweis von der Unrechtmäßigkeit des Büchernachdrucks* ('proof of the illegality of reprinting') Fichte identified the permanent feature of a book as 'the form of the thoughts', the result of a twofold abstraction: The intellectual part ('das Geistige') is abstracted from the physical part ('printed paper'); and within the intellectual part 'the form of the thoughts' is abstracted from the ideas. Hence there are three types of property in a book. The physical book as full property is completely at the owner's disposal. The ideas after being shared with the readers become a common property of the author and his readers. But the abstracted Form necessarily remains the author's property, because it was 'physically impossible' to be appropriated by another person.

There is a tension in Fichte's theory between Form as a property (*proprium*) of the work from which it is abstracted, and Form referring to the process of formation rather than its result. This was addressed by Georg Wilhelm Friedrich Hegel.

Property for Hegel connects a person to his freedom; it is ‘the manifestation of a personality’ (‘das Dasein der Persönlichkeit’, Hegel 1828, § 51). Property becomes the foundation of a *Philosophy of Right* since, without property, a person is not conceivable at all. Hegel employed a twin concept of form (on the objective side) and formation (on the subjective side). Neither mere physical seizure nor mere symbolic marking of the property is an appropriate way to acquire property, but ‘formation’ is. Thus formation has in Hegel’s theory a similar function as labour in Locke’s. With respect to intellectual property, Hegel distinguishes between disposable things of ‘external nature’ and inalienable ‘inner’ capabilities. An author may sell but the right to use a ‘single production’ of his intellectual capabilities for a ‘restricted period’. After buying and reading a book, its ideas are indeed the property of the buyer. The buyer is in possession of the ‘capability to express himself in exactly this way’. But this capability can never be his *property*, since it remains with the author.

The perpetual bond between an author and his work in Fichte’s and Hegel’s theories was combined with the Kantian ‘right of expression’ in Eduard Gans’ justification of performance rights. Gans, a Hegel follower and professor of Law at Berlin University, was referring to theatre plays when he wrote in 1832:

In performances the author exposes himself to the risk of disapproval and thus the dramatic author should be able to decide every time anew to which public he presents his work. The opinion according to which a play once published may be performed on every stage, is wrong for two reasons, first, it allows someone to enrich oneself at another’s expense and, secondly, it exposes someone to a danger, to which he possibly does not want to be exposed. (Gans 1832, p. 381).

Since that time to use a work means not only to accept the authorship of a dramatist or a composer but also to recognise that *everything* ever done with the work is associated with the author's personality. Copyright concepts in German Idealism thus deviate from property concepts in the exclusive, transferable sense that Anglo-American liberalism derived via Locke from Roman law. Kant's concept of copyright was based on a person's right to express himself. In Fichte's and Hegel's theories, while an author's ownership of his intellectual creation provides the justification for copyright, this property is inalienable and thus, in an Anglo-American legal sense, not property at all.

#### **Abstract works: The road from Paris to Berne**

We have so far identified the main justificatory avenues for individual copyrights developed during the 18th century: (1) the labour theory of property initiated by John Locke, expressed in the debates around the author's common law rights; (2) the utilitarian incentive to creative production, implicit in the Act of Anne, reasserted in *Donaldson v. Becket*, and canonised in the Constitution of the United States; (3) the personality theory advanced within German Idealism.

The early 19th century sees a paradigm shift towards the concepts that characterise modern copyright law. Three features appear in seminal legislation such as the French revolutionary laws of 1791 and 1793; the Prussian Law of 1837; and Talfourd's Act (1842) in the UK:

- (1) The author becomes the source of protection. The term calculation shifted from the date of publication to the life of the author

(including a *post mortem* allowance to cover the author's dependants).

(2) Protected subject matter extends beyond printed books to literary and artistic creations in a wide sense (including music). A threshold criterion of merit (i.e. originality) is introduced.

(3) Restricted acts refer to an abstract work identity rather than printed matter. Performing rights are introduced for dramatic and musical works; adaptations, such as excerpts or instrumental arrangement, and transcriptions of sermons and lectures become restricted as unauthorised derivatives.

This new conception of copyright has been recognised by many academic commentators as a crucial moment. Sherman and Bentley (1999, pp. 2-6) date the transformation within the British tradition from what they call a 'pre-modern' to a 'modern' intellectual property law to 'the middle period of the 19th Century': Authors within critical literary theory (Woodmansee 1984; Woodmansee and Jaszi 1994; Boyle 1996) and the sociology of copyright (Marshall 2001) have associated this transformation with the emerging romantic conception of the author around the turn of the 19th century. We offer a different account, emphasising a process of abstraction that has an important source in Idealist philosophical thought which fused in the early 19th century with the exclusive, transferable property concept that had developed in the liberal tradition (drawing on both on labour and utilitarian justifications).<sup>xiv</sup>

The first copyright statutes that take their lead (in term and scope) from the author are the French revolutionary Acts of 1791 (regarding performances of theatre and musical drama) and 1793 (regarding the sale and dissemination of artistic works of any genre) which replaced the old system of publishers' rights. The Act of 19 January 1791 introduces for the first time a *post mortem* ownership of 5 years, while the famous decree of 19 July 1793 ('Declaration of the Rights of Genius') grants a general transferable life of author term (plus 10 years). The philosophical basis of the French laws, however, is somewhat uncertain. On the one hand, we have expression related justifications. As Le Chapelier put it in his famous speech introducing the decree (quoted in Davies 2002, p. 137): 'The most sacred, the most legislate, the most unassailable ... the most personal of properties, is a work which is the fruit of the imagination of a writer.' On the other hand, there is a strong public interest undercurrent suspicious of exclusive control. Condorcét had argued in the 1776 pamphlet *Fragments sur la liberté de la presse* that literary property was not a natural individual right but 'founded in society itself' (quoted in Hesse 1991, p. 103). According to Hesse, the revolutionary laws represented copyright as a reward to the author as public servant, not as the Lockean property right of liberal individualism. Ginsburg (1990) suggests that early French copyright was indeed very similar to the Anglo-American tradition, with the courts regularly balancing the rights of the authors with the needs of the public.<sup>xv</sup>

In the context of the argument advanced in this chapter, these early French author laws contain the first signs of rights granted without formalities (all privileges were abolished), and of rights granted for public performance. The imminent paradigm shift toward the protection of *all* instantiations of abstract works can be nicely illustrated with the changing protection afforded to music.

The Statute of Anne did not cater specifically for music, though case law developed classifying sheet music as ‘writings’ within the meaning of the Act. In the wake of *Millar v. Taylor* and *Donaldson v. Becket*, a test case was launched by Johann Christian Bach (the youngest son of J. S. Bach) and Carl Friedrich Abel, then at the height of their fame as organisers of a popular London concert series. The dispute concerned an unauthorized edition of a Bach lesson and sonata published by Longman & Lukey. On 18 March 1773, the case was brought in Chancery but it was only in 1777 that it was finally heard, again before Lord Chief Justice Mansfield. Cowper reported it thus (Small, 1985):

Lord Mansfield called on Mr. Wood [attorney for the defendant] to begin; and without hearing Mr. Robinson [attorney for the plaintiff] in answer, said, the case was so clear and the arguments such, that it was difficult to speak seriously upon it. The words of the Act of Parliament are very large: ‘books and other writings.’ It is not confined to language or letters. Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it, but it has no right to rob the author of the profit, by multiplying copies and disposing of them for his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the Act. Afterwards, on Monday, June 16th, the Court certified in these words, ‘Having heard counsel and considered the case, we are of the opinion, that a musical composition is a writing within the Statute of the 8th of Queen Anne’.

Note that protection was expressly confirmed only against ‘multiplying copies’ of printed material, while any ‘person may use the copy by playing it’. No protection for the work itself whose identity was still uncertain!<sup>xvi</sup>

A favourite argument of publishers remained that they had acquired a copy legitimately. They thus denied that a musical work could be owned independently of what they were actually selling (i.e. a copy of a manuscript of ostentatiously ‘uncertain’ authorship obtained from a third party). In J. C. Bach’s second law suite (also filed in 1773, but probably settled out of court), the defendants Longman & Lukey admitted ‘that the said three symphonys entitled as follows: Three symphonies in 8 parts for Violins Hoboys Horns Tenor and Bass were purchased from The Hague by [Dutch publisher] Hummell’, this being a ‘constant, uniform and well known custom and practice’ (Allen-Russell 2002, p. 27).

The emerging modern regime of copyright (as epitomised by the Berne Convention) employs a new concept of an *abstract* authored work to which all acts of exploitation are related, be they publication, engraving, reprinting, recital, translation or arrangement. Previously, each of these activities were subject to their own separate regulation (or non-regulation) according to specific policy circumstances. We can trace the formation of the new regime in two important statutes of the early 19th century.

Legal historians consider the Prussian Act of 1837 as the most influential Copyright Act in 19th century Germany, integrating for the first time the various regulations of the publishing industries into a comprehensive ‘Gesetz zum Schutze des Eigenthums

an Werken der Wissenschaft und der Kunst gegen Nachdruck und Nachbildung’ or ‘Law for the protection of property in works of science and the arts from reprint and imitation’. The Prussian Act came into force on 11 June 1837, and was the first copyright law in Germany to employ an extensive concept of art including literature, music and the fine arts. It figured as the model for Germany’s evolving federal laws.

Significantly, the drafters of the Prussian Copyright Act included the term ‘property’ in the title, referring to Fichte’s concept (albeit without citing his name): ‘The buyer of a book gets by the purchase the physical property in his copy and the right to use and to process the expressed thoughts in his particular manner. What inviolably remains the author’s and can be identified as the real intellectual property [*das eigentliche Geistes-Eigenthum*], is the particular form, in which he has expressed his thoughts. These principles are not new, they already have been laid down in the 90s of the last century by learned men who made an effort, to develop the particular matter of reprint out of its own nature.’ (Philipsborn, preliminary paper to the Act, quoted in Wadle 1988, p. 65)

The Act was influenced by a sustained campaign led by Adolph Martin Schlesinger, Carl Maria von Weber’s publisher and a leading figure in Prussia’s musical establishment. Schlesinger resented unauthorised arrangements, in particular of Weber’s blockbuster operas *Der Freischütz* (1821) and *Oberon* (1826), which were of great commercial value.<sup>xvii</sup>

In 1822, Schlesinger filed a complaint at the Berlin town court against a *Freischütz* piano arrangement of Viennese provenience that had been sold in Berlin book shops. The judge commissioned an expert opinion from the famous poet and composer



E.T.A. Hoffmann. Hoffmann, a lawyer by training and former Prussian civil servant, was asked whether the Viennese piano score was ‘arranged along’ Schlesinger’s piano score. The Prussian statute book of 1794 (*Allgemeines Landrecht*) explicitly had included ‘musical compositions’ under the subjects protected against reprinting. However, Hoffmann argued that the specific sections for arrangements should not be applied to musical composition, because

‘it is impossible to extract musical compositions in the same way, as it can be done with books. Reprint of a composition would only take place when an original would be ‘reengraved’ [*nachgestochen*] and reprinted identically with the original.’ (Kawohl 2002, p. 269)

According to Hoffmann, Schlesinger’s copyright did not involve the rights to an abstract work ‘Der Freischütz’; it was confined to the singular piano score version that he had published. The subject matter of copyright was a work of print – a copper engraving. Hoffmann drew a comparison to works of art. A copper engraving showing a painting was not infringing a copyright in this painting. Another engraving of the same painting was an infringing copy of the first copper plate only if it was a counterdraw, but not if it was modelled on the original painting.

The key point of Hoffmann’s argument was its denial of the abstraction which would soon be pervasive in European laws. Schlesinger’s claim for damages was refused. Between 1821 and 1837, Schlesinger filed at least six complaints in Prussian courts and made repeated applications for an amendment of the arrangement rules of the *Allgemeines Landrecht*. He eventually saw success with the new copyright law of 1837. Here is a summary of its provisions.

## [Insert Table 2: Prussian Act 1837]

In Britain, the key legislation fusing author and property norms is the Copyright Act of 1842. By the early 1800s, the utilitarian rationale implicit in English copyright law since the Act of Anne (1710), and sustained in the case of *Donaldson v. Becket* (1774) had become diluted. The House of Lords ruling in *Donaldson* was increasingly seen as a compromise between those who denied author's rights altogether and those who asserted a perpetual property in the produce of labour. It was argued that even if perpetual copyright had been rejected, the author still had a natural right to his work. In this reading, the natural or common law right of the author and the statute became merged. In 1814, a revised statute extended the copyright term for the first time to life of the author (or 28 years, whichever was longer).<sup>xviii</sup>

In 1837, the year of the new Prussian Act, a campaign was launched by Thomas Noon Talfourd, a member of parliament, lawyer, author and friend of leading figures of the romantic literary scene. Several draft bills were submitted to Parliament supported by letters and petitions from William Wordsworth, Robert Southey, Thomas Carlyle and Hartley Coleridge. Their main aim was an extension of the copyright term to author's lifetime plus 60 years (while existing copyrights would revert to the author after 28 years). The theoretical basis were new concepts of romantic theory as well as the more traditional Lockean labour arguments. As Talfourd put it in a speech to Parliament: why should literary property not 'last as long as the works which contain truth and beauty live?' (Talfourd 1837, p. 8; quoted

in Rose 1993, p. 111) Talfourd's disciple J.J. Lowndes wrote, in a supporting Treatise:

'For the object of the Bill is not to give greater value to the light and trivial productions of the day, which either reap a sufficient and quick reward from their admirers, or fall with well merited contempt into oblivion; but to secure to authors of genius and learning - whose works, although they become the classics of the country, often make their way but slowly into public favour - some slight pecuniary advantage, by extending their Copyright for a further period, at the very time it has commenced to be valuable, and to repay them for their long and unceasing labours. (Lowndes 1840, p. 101)

Talfourd's Bill reached the committee stage but not a final vote before the general election of 1841 in which Talfourd lost his seat. A revised copyright bill was passed early in the next parliament, compromising on the *post mortem* term (now seven years *pma*) while preserving Talfourd's structure. The Act of 1842 concentrates on books, but extends the right of 'representation or performance' to 'dramatic pieces' and 'musical compositions'. The abstraction of authored works of art remains tentative, as reflected in ambiguous wordings about abridgements, anthologies, translations and dramatizations. All rights were subject to entry in the Book of Registry at Stationers' Hall, revealing a tension in the law: if the new rationale of copyright derived from the character of abstract, original, authored works (as opposed to the earlier incentive to the creation or dissemination of useful products), then its legal protection should coincide with the moment of creation not publication (Kawohl and Kretschmer 2003, p. 221).

### [Insert Table 3: UK Act 1842]

The formation of modern copyright law was completed with the Berne Convention of 1886, elevating an international regime that took its term and scope from the creator, regardless of subsequent ownership or public policy implications. Led by Victor Hugo, a preliminary Congress on Literary and Artistic Property was held in Brussels in 1858 and adopted the following principles (quoted from Petri 2002, p. 116):

the author's ownership rights to his works of art and literature should be expressed in the laws of 'all civilised peoples';

all countries should recognise the same rights of non-nationals to their works as they did to works of their own citizens [the principle of national treatment];

copyright legislation in all countries should rest on a common foundation.

At the diplomatic conference in Berne in 1886, the principle of national treatment was established, but the minimum standards that should apply regardless of national traditions remained quite weak.<sup>xix</sup> Not until the Berlin conference of 1908 was it agreed that the rights granted under Berne should not be contingent on national formalities. The structure of the Berlin conference is still the bedrock of modern international copyright law. The US, for so long reluctant to follow the route to a *droit d'auteur*, eventually acceded to Berne in 1989 when the export interests of its copyright industries in Hollywood and Redmond had become paramount. In 1994, the TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights: Article 9.1) incorporated the Berne standards into the World Trade Organisation (WTO). Any country that wishes to participate in global trade (by the latest counts, the WTO

has more than 140 members) must now enact exclusive transferable copyrights for more than a generation.

The minimum term of Berne has remained at author's life plus 50 years while Europe (with the 1993 Directive on harmonising the term of copyright protection) and the United States (with the 1998 Sonny Bono Copyright Extension Act) have adopted an extended term of 70 years *post mortem auctoris*. At the insistence of the US, the *droit moral* introduced with the Rome revisions (1928) of the Berne Convention was omitted from TRIPS: Article 6bis of the Rome revisions provided for the right to claim first authorship of a work (paternity right) and the right to object to any distortion, mutilation or other modification which would be prejudicial to the honour or reputation of the author (integrity right). The *droit moral* is distinct from copyright as an economic property right in that it cannot be transferred or waived. We shall argue in the next section that this distinction may be the way forward.

Below is a table summarising the structure of rights under Berne:

**[Insert Table 4: Berne Convention 1886, Berlin Act 1908]**

**Whither now?**

Ever since the 18th century Battle of the Booksellers, when Stationers evoked an absolute author's right that they had acquired (so they argued) via contract, the justifications for copyright have been extremely confused. Samuel Johnson's comments in 1773 (as reported by Boswell) neatly illustrate the different arguments: 'There seems (he said) to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its

nature be perpetual; but the consent of nations is against it, and indeed reason and the interests of learning are against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain circulation.’<sup>xx</sup> The decision in *Donaldson v. Becket* (1774) did little to stem the tide that was transforming a sensible investment incentive into a generation long burden on cultural activity, ostensibly under the guise of the author’s original expression.

Private property can be defined negatively as the right to exclude. Access to property becomes conditional on the discretionary decision of the owner. Property entails the right to say NO. It is widely accepted in (utilitarian) economic theory that property rights are justified if they prevent a so-called ‘tragedy of the commons’ (Hardin 1968). For example, fish stocks held in common are liable to deplete because there is no individual owner who has an incentive in their preservation. (For further discussion of this argument see chapter 3 below.) From a public interest perspective, though, property rights should not be more far-reaching than needed to achieve this welfare purpose. In the case of intellectual property, in particular, they should not encroach on others’ ‘freedom of expression’ more than is necessary to give an incentive to creative expression and dissemination in the first place. Historically, however, this utilitarian perspective has been superseded by a second family of property justifications, stemming from John Locke’s notion of men’s ‘natural’ entitlement to the fruit of their labour, and from the Hegelian notion of rights as the ‘manifestation of a personality’. The form and scope of acceptable rights under these premises is somewhat elusive. In particular, it is not clear how far other people’s expression can be justifiably limited by such property claims.<sup>xxi</sup>

In this section, we shall finally unbundle the concepts of creator and investor which, as we have seen, have formed an unholy alliance in the formation of modern copyright law. The argument is presented from premises that attempt to capture widely held views in modern societies (which echo some of the justificatory strategies discussed earlier).

**Proposition 1:** There is no unified category of right owners, covering creators (authors) and investors (producers).

**Creators** have four main interests:

- to see their work widely reproduced and distributed
- to receive credit for it
- to earn a financial reward relative to the commercial value of the work
- to be able to engage creatively with other works (in adaptation, comment, sampling etc).

Regarding the structure of **author rights**, this leads to three conclusions:

The creator has little to gain from exclusivity (it prevents widest distribution; it prevents access to other works; it does not ensure financial reward)

The creator has little to gain from transferability (under normal contractual practices, particularly in the media, the creator will be bought out in a one-off commercial transaction)

The creator has a lot to gain from the so-called *droit moral* (a kind of creative trade mark, ensuring integrity of origin).

In the past, authors' interests could only be met with considerable economic inefficiencies (mainly caused by the costs of administering rights). Digital technology offers new possibilities of tracing use and rewarding the creator. Transforming collecting societies into regulatory bodies answering to society at large (not only to rights owners) may be the best way forward (cf. Kretschmer 2002).

**Proposition 2:**

**Investors** want exclusive and transferable property rights, to extract maximum returns from their investments. Exclusive rights, however, come at a cost to society.

Useful works become more expensive than they would have been (this is a direct consumer loss).

Works become available for creative engagement only on the terms of the right holder (this means in practice a loss of cultural diversity, innovation and critique).

Automatic returns from a back catalogue of works subsidise existing large right holders, creating an entry barrier to the creative industries (this is an anti-competitive effect).



Regarding the structure of copyright as a property right, this leads to one conclusion:

Investors should be granted exclusive terms of protection only as a response to market failure: i.e. where without the incentive of exclusivity, a work in the ‘useful arts’ would not be produced and distributed at all.

The normal exploitation cycle of cultural products suggests that a short exclusive term would be sufficient. If the first statutory copyright, the Statute of Anne, granted a term of 14 years (renewable once), the faster dissemination and exploitation environment of digital technologies would suggest an even shorter term. An extreme example of that rationale is the UK’s first design copyright, the 1787 ‘Act for the Encouragement of Designing and Printing of Linens, Cottons, Calicos and Muslins’. It provided a producer head start of less than one season by granting an exclusive right to print and reprint for 2 months; in 1794, the term was extended to 3 months (Sherman and Bently 1999, p. 63).

### **Star creators**

Many creators have demanded control over their artistic output which, they say, can only be ensured through exclusive rights. In commercial practice, however, artistic control is only available to a few star creators whose bargaining power is sufficient to benefit from the exclusivity and transferability of rights. (See chapter 4 below.) Only the interests of star creators are similar to investor interests. They benefit disproportionately from the current copyright system.

Figures provided in the 1996 UK Monopolies and Mergers Commission Report on the British Performing Right Society (PRS) show that 80% of author members earned less than £1000 from performance royalties for 1993; and that 10% of authors received 90% of the total distribution. Similarly, according to German music copyright society GEMA's yearbook for 1996/7, 5% of members received 60% of the total distribution. We have calculated that in Germany and the UK between 500 and 1500 composers can live substantially off copyright royalties. There are indications that such winner-take-all markets are prevalent in most cultural industries. For the US, Tebbel claimed in a 1976 study that only 300 self-employed writers could live off the copyright system (Tebbel 1976). For 90% of authors, the copyright system did not provide a sufficient reward. The creative base of a modern society is supported by other means.

Early in their careers, many creators wish to become known by all available means, including being copied without permission. Piracy is welcome if source credits are given. Once creators have become famous, they typically perform a U-turn. Their monetary interests suddenly compete with investors' interests, aligning both in their defence of exclusive rights. 'Take a stand for creativity. Take a stand for copyright.' implored a petition to the European Parliament signed by 400 recording artists in 1999. 'We make our living through our music. The music that we create touches the lives of millions of people all over the world. Our creativity and our success depend on strong copyright protection. We now need your help.'<sup>xxii</sup> This dubious harmony of interests remains the official industry line in its piracy campaign: 'Ultimately, if creators do not get paid, you will not get music' (John Kennedy, President and Chief Operating Officer, Universal Music International, Letter to the *Financial Times*, 23 January 2003).<sup>xxiii</sup>

We believe that despite such rhetoric we are reaching the end of the period of copyright expansion traced in this chapter. Within a generation, copyright laws will be unrecognisable, abandoning the Berne paradigm. The history of copyright supports arguments for a system in which short terms of exclusivity, encouraging fast exploitation, are followed by a remuneration right for the life time of the creator. As the following chapters in this book demonstrate copyright *practice* is already changing, as, in their various ways, bootleggers, DJs, samplers, consumers and performance artists invent new forms of cultural engagement. Copyright law must eventually follow.

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**Table 1: Statute of Anne (1709/10) for the Encouragement of Learning**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
'Books and other Writings' (s.1)	'Authors or Purchasers' (preamble & s.1)	[silent; s.1 suggests (emphasis added): 'for the Encouragement of learned Men to compose and write <i>useful</i> Books']	'print, reprint, or import, or cause to be printed, reprinted or imported' 'sell, publish or expose to Sale' (s.1)	14 years from publication date (s.1) after expiry of 'sole Right of printing or disposing of Copies' returns to author for second term of 14 years (s.11)	'Register Book of the Company of Stationers' kept at Stationers' Hall (s.2)

**Table 2: Prussian Act (1837) for the protection of property in works of scholarship and the arts from reprint and reproduction**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
<p>‘works of scholarship and art’ (preamble):</p> <p>writings (§1) incl. books, yet un-printed manuscripts, lectures &amp; sermons (§3) geographical topographical scientific &amp; architectural drawings (§18)</p> <p>musical compositions (§19)</p> <p>works of art (§§21-23)</p>	<p>author and ‘those who derive their authority from the author’ (§1, e.g. heir, publisher)</p> <p>transferable wholly or in part (§9)</p>	<p><i>eigen-thümlich</i> as criterion for non-infringing derivative works (§20 and §23)</p> <p>determined by committee of experts (§17)</p>	<p>reprinting (§2), publication, distribution (§9)</p> <p>public performance prior to publication of dramatic and musical works (§32)</p> <p>publication of transcribed lectures and sermons, (§3)</p> <p>adaptation of musical compositions, (§20)</p> <p>reproduction (‘Nachbildung’) of copper engravings, lithographs (of works of art, §29)</p>	<p><i>post mortem auctoris</i> life plus 30 years (§§5,6)</p> <p>works of arts 10 years <i>pma</i> (§27); public performance 10 years <i>pma</i>, (§32)</p>	<p>no formalities for works of literature and music</p> <p>works of art registered at the ministry for cultural affairs (§27)</p> <p>for translations: notice on title page for claim to produce within two years (§4)</p>

**Table 3: United Kingdom Copyright Act (1842)**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
<p>‘books’, incl. ‘every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published’ (s.2)</p> <p>dramatic pieces and musical compositions, incl. ‘every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment’ (s.2)</p>	<p>author or ‘assigns’ as personal property</p> <p>whether ‘derived from such author before or after the publication of any book’, by ‘sale, gift, bequest, or by operation of law’ (s.2)</p> <p>publisher (if ‘projector’ or ‘conductor’ of ‘encyclo-paedia, review, magazine, periodical work’ (s.18)</p>	<p>[silent, preamble suggests (emphasis added) ‘literary works of <i>lasting benefit</i> to the world’]</p>	<p>‘print or cause to be printed, either for sale or exportation’</p> <p>‘import for sale or hire’</p> <p>‘sell, publish, or expose to sale or hire, or cause to be sold, published, or expose to sale or hire, or shall have in his possession, for sale or hire’ (s.15)</p> <p>representing or performing musical and dramatic pieces (s.20)</p>	<p><i>post mortem auctoris</i> life plus 7 years, but at least 42 years from publication (s.3)</p>	<p>‘Book of Registry’ kept at Stationers’ Hall (s.11)</p> <p>‘proprietorship in the copyright of books, and assignments thereof, and dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright’</p> <p>for dramatic and musical pieces in manuscript: registration only of title, name and place of author, name and place of proprietor, and time and place of first performance (s.20)</p>

**Table 4: Berne Convention (1886), Berlin revision (1908)  
for the Protection of Literary and Artistic Works**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
literary and artistic works, including 'every production in the literary, scientific and artistic domain' (Art.2)	Author (Art.1) [silent on successor in title]	original intellectual creation (not 'news of the day' and 'miscellaneous information'; Art.9)	translation (Art.8) reproduction (Art.9) public performance (Art.11) indirect appropriations, incl. 'adaptations, musical arrangements, novelisations, dramatisations' (Art.12)	<i>post mortem auctoris</i> life plus 50 years (Art.7)	the enjoyment and exercise of rights in respect of works 'shall not be subject to any formality' (Art.4)

<sup>i</sup> This chapter draws on the following previously published research: Kretschmer (2000); Kawohl (2001); Kawohl (2002a); Kawohl and Kretschmer (2003); and Kretschmer (2003). Tables 1-4 are taken from Kawohl and Kretschmer (2003). The propositions of section 'Whither now?' are taken verbatim from Kretschmer (2003).

<sup>ii</sup> In the law and economics literature (Maughan 2001), two further features of property rights are identified: universality (i.e. a complete set of property relationships between all parties is specified) and enforceability (i.e. the rights are stable and can be reliably asserted).

<sup>iii</sup> 'Piracy' in its literal meaning asserts extraterritorial jurisdiction over robbery on the sea. The Oxford English Dictionary traces this use back to 1552. Piracy as 'infringement of right conferred by a patent or copyright' is first referenced in 1771. An early example of its use in court with reference to music is in *D'Almaine v. Boosey* (1834): 'To publish, in the form of quadrilles and waltzes, the airs of an opera of which there exists an exclusive copyright, is an act of piracy.' (quoted in McFarlane 1986)

<sup>iv</sup> It should be noted that the prescription that you should not appropriate what is not yours does *not* presuppose a conception of copyright as individual exclusive property. Unauthorised non-commercial use that acknowledges its source may be consistent with the Eighth Commandment.

<sup>v</sup> The orthodox expression of this argument is in Landes and Posner (1989).

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<sup>vi</sup> The first systematic regime of printing privileges as a means of censorship was installed in France in 1521. Under the 1723 *Code de la Librairie*, the book trade was still regulated via the Paris Guild, supporting perpetual monopolies (Hesse 1991).

<sup>vii</sup> Johann Wolfgang v. Goethe appears to hold the record, obtaining in 1825 39 privileges in different jurisdictions for the edition of his collected works.

<sup>viii</sup> The authoritative text of Locke's *Two Treatises of Government* is the third edition of 1698. The quotes are all from Chapter 5. In recent political philosophy, there has been much debate about the interpretation and scope of the Lockean proviso. For good discussions in the context of intellectual property, see Hughes (1988); Hettinger (1989); Drahos (1996); Shiffrin (2001); Fisher (2001).

<sup>ix</sup> Locke himself argued strongly against the Stationers' monopoly, intervening in the debates surrounding the renewal of the 1662 Licensing Act. In an open letter in 1694, Locke wrote that 'nobody should have any peculiar right in any book which has been in print fifty years, but any one as well as another might have the liberty to print it; for by such titles as these, which lie dormant, and hinder others, many good books come quite to be lost. [N]or can there be any reason in nature why I might not print [classical texts] as well as the Company of Stationers, if I thought fit. This liberty, to any one, of printing them, is certainly the way to have them the cheaper and the better.' (quoted in Shiffrin 2001, p. 154f)

<sup>x</sup> In the literature, the Statute of Anne is variously cited with the years 1709 (the year it was enacted: this is today the usual way of citing Statutes) and 1710 (the year it came into force). Note that English legislation at the time referred to the year of reign of the monarch ('The Statute of the 8th of Queen Anne'), which does not coincide with the modern calendar year.

<sup>xi</sup> A graphic illustration of the competitive practices of 18th century music publishing in England is provided in the autobiography (1803) of Charles Dibdin (1745-1814), a composer of highly successful popular songs. When Dibdin resorted to self-publishing in 1790 in order to increase the lowly returns offered by the established publishing houses, 'the music-shops discouraged their sale ... [and I] began, as usual, to feel their power, and my own incapacity to struggle against it... I had scarcely opened my shop, when the clamours, among the music-sellers, became universal... Some of these crotchet-mongers made an open declaration that they would not sell any article in my catalogue' (quoted in Hunter 1986, p. 243). Avoiding London's publishing oligopoly, Charles Dibdin toured the country with his music and survived. Here are contrasting figures of Dibdin's payments, before and after he opened his own business. In 1768, he received £45 for the music of *The Padlock*, the vocal score alone selling 10,000 copies in thirteen years. Another group of songs which Dibdin claims to have sold for £60, made the publisher £500. As self-publisher, Dibdin sold 10,750 copies of the song *Greenwich Pensioner*, yielding profits of more than £400.

In Germany, Georg Philipp Telemann (1681-1767) was the archetypal 18th century musical entrepreneur. At the outset of his career, he was still forced into a feudal contract (1717), preventing the communication of new compositions beyond his court employer. From 1721, as music director of the independent merchant city of Hamburg, he pioneered many new exploitation techniques. Since it was unseemly to



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charge for church concerts, he ‘ordered guards to the doors who prevented anybody from entering who had no printed copy of the Passion [performed]’ (from Telemann’s Autobiography in Mattheson, 1740). In order to prevent unauthorised reprints of his works, Telemann invented a music magazine, serialising his compositions, publishing one movement at a time (Schleuning 1984).

<sup>xii</sup> Not surprisingly ‘maps’ are mentioned in a prominent position. Unlike novels and scholarly books which were easily reprinted from imported English originals, maps of, say, West Virginia had to be supplied by domestic engravers and printers. In England maps had qualified as copyrightable subject matter only some years earlier, in the Engraving Copyright Act 1766. Since maps and sea charts necessarily resemble one another in form, the more so as they accurately represent the reality, a threshold of originality could not easily be defined. Lord Mansfield in *Sayre v. Moore* (1 East 351, K.B. 1785) admitted, ‘whoever has it in his intention to publish a chart may take advantage of all prior publications’, but acknowledged the claimant’s correction of some soundings and (new) application of the Mercator principle. Copyright in maps could only be justified within a utilitarian rather than a natural author’s rights framework. Thus the turn from a utilitarian towards a author’s right based copyright can be identified in a ‘shift of categories’: As Lord Justice Sir W. M. James, L.J. clarified in *Stannard v. Lee* (6 Ch App 346, 21, 22 March 1871): ‘Formerly maps had been considered artistic works, now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does.’ (see Kawohl 2002c)

<sup>xiii</sup> By the late 20th century, the utilitarian rationale of US copyright had succumbed to the lobbying efforts of increasingly powerful multinational right holders, most dramatically with the 1998 Sonny Bono Act, which extended the US copyright term by 20 years to life plus 70 years (or 95 years for works ‘for hire’). The bill was sponsored by Congressmen who received significant campaign contributions from Disney. In the Supreme Court challenge of the Act (2003, *Eldred v. Ashcroft*, 537 U.S.), an *amici curiae* brief by a group of economists, including five Nobel laureates, suggested that a copyright term of life plus 70 years provided 99.99% of the value of protection in perpetuity; i.e. virtually perpetual copyright economically speaking. It is evident that a *retrospective* extension to the term of copyright restricts public access whilst not providing any additional incentive to cultural production. Still, the majority of judges (7:2 votes) refused to rule against the extension on the grounds that the Court could not challenge the powers of Congress in a matter of policy. One of the two dissenting judges advanced a more principled constitutional analysis: ‘This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.’ (537 U.S. (2003); Breyer, J., dissenting, at 26). See also Breyer, 1970.

<sup>xiv</sup> For modern ‘rule-utilitarians’, the inviolability of property rights may itself be justified from the outcomes of such a system. This line of thinking goes back to

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Jeremy Bentham who remarked that ‘a state cannot grow rich except by an inviolate respect for property’ (quoted in Drahos 1996, ch. 9).

<sup>xv</sup> Compare Louis XVI’s letter to his government (1776): ‘Every effort should be made to deal, as soon as possible, with the requests of the Parisian and provincial publishing houses regarding ownership rights to works and the duration of privileges. A large number of authors have made representations to me to this effect, and I realize the matter is one close to the heart of scholars. ... to an author, a privilege is the fruits of his labour, to a publisher a guarantee against costs. ... The author should be given precedence, and assuming the publisher’s share stands in proportion to his expenses and he is able to return a reasonable profit, he should have no cause to complain.’ (Dock 1963, p. 127; quoted in Petri 2002, p. 62f) The King’s intervention led to a rejection of publisher’s rights beyond the lifetime of the author.

<sup>xvi</sup> The Prussian *Allgemeines Landrecht* (1794, 1.11§ 997) had listed musical compositions alongside maps and copper engravings (Wadle 1996, p. 176), and a publishers’ petition (Dunker 1834) to the federal assembly (*Bundesversammlung*) mentions musical compositions after mathematical schedules but before maps. The official commentary on the copyright act of the German state of Saxony still stated in 1844: ‘Musical compositions do not belong to the category of products of literature because the means of representation are symbols, not script. They belong to the products of art, of the fine arts. The law is intended to protect works of fine art in addition to the products of literature.’ (Meinert 1844, p. 16)

Composers probably formed the concept of a performing right as early as they conceived of publishing rights. In 1664, the German composer Heinrich Schütz stated in the preface to the printed edition of his *Christmas Oratorio* that performances could only take place with the author’s consent (‘mit des Authoris Bewilligung’). As a practical solution, he offered the orchestral parts separately against an additional fee (MGG 1966: 1168). During the 17th century, a performance royalty system became common practice at the Paris theatres where monitoring constituted no serious problem. In 1791, Pierre-Augustin Beaumarchais instigated a bureau for collecting royalties for writers and composers of *dramatic* work (in 1829, this became the *Société des Auteurs et Compositeurs Dramatiques*, still active today). It was not until the early 19th century, that the right to public performance became an indicator of the emerging concept of an abstract authored work.

Publishers immediately took advantage of the ruling in *Bach v. Longman*, registering music at the Stationers’ Company. Between 1770 and 1779, 35 scores were registered, during the last decade of the 18th century the figures reached 1828 (from the transcription of the register of the Worshipful Company of Stationers, analysed by Krummel 1975, quoted from Hunter 1986: p. 281). Yet, Hunter argues, composers seem not to have won an immediate improvement in earnings. Litigation was generally conducted between publishers (see Coover 1985).

Note that despite the nascent provisions of music copyright, composers continued to use entrepreneurial, non-copyright strategies to make a living. Until well into the 19th century, the most important sources of income for successful, independent composers were not publishing revenues but commissions, dedications and performances of new compositions. Handel and Mozart made their (changeable)

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fortunes through organising the performance of their own works, a commercial route closed to many lesser composers. Not much of the fortunes accumulated by publishers such as the Ballard dynasty in Paris, Breitkopf & Härtel in Leipzig, Artaria in Vienna, or London's father and son Walsh reached the composers. John Walsh Senior published Handel's first set of sonatas under a false Amsterdam imprint to avoid payments to the composer. After business relations were established, Handel received £20-£30 per opera or oratorio (Rasch 2001). John Walsh Senior's estate amounted to £30,000 in 1736; his son left £40,000 thirty years later (Hunter 1986, p. 75).

<sup>xvii</sup> Within two years of its first performance at the Berlin Royal Opera House, *Der Freischütz* had been performed for the 50th time. Apparently, 9,000 copies of his piano version were sold in only one year (Berlin had no more than 200,000 inhabitants at the time).

<sup>xviii</sup> For a lucid discussion of this subsequent re-interpretation of *Donaldson v Becket*, see Rose 1993, 107ff.

<sup>xix</sup> First signatories were Germany, Belgium, Spain, France, Britain, Haiti, Liberia, Switzerland and Tunisia.

<sup>xx</sup> James Boswell, *Life of Johnson*, 1791; quoted in Rose 1993, p. 85. Johnson argued in favour of a term between 60 and 100 years (20 July 1763); cf. Locke's reference to 50 years in his 1694 intervention (note ix above).

<sup>xxi</sup> The tension is present in the Universal Declaration of Human Rights (1948) which recognised in Article 27.(1) that 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' But Article 27.(2) reads: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' For discussion, see Drahos, 1999.

<sup>xxii</sup> Petition 'Artists Unite for Strong Copyright', led by Jean Michel Jarre with the assistance of IFPI (19 January 1999), signed by among others Boyzone, the Corrs, Robbie Williams, Tom Jones, Eros Ramazotti, Mstislav Rostropovich, Barbara Hendricks, Die Fantastischen Vier, Aqua and Roxette. Note that Robbie Williams later declared that Internet music file sharing is 'great' (MIDEM music trade fair, Cannes, January 2003).

<sup>xxiii</sup> The German publishers' campaign against the copyright exception for teaching and scientific research (§52a) argued: 'If copies of books are free, nobody will buy originals. If nobody buys originals, nobody will publish books or journals. The result: If nobody publishes, Germany's thinkers will soon have to look for a different employment' (Advert *Frankfurter Allgemeine Zeitung*, 31 March 2003).