

COPYRIGHT HISTORY IN REVIEW

CREATE Working Paper 2021/3

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CREATE

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Abstract

This Working Paper is a re-print of reviews of recent scholarly books concerning the history of the laws that we today term 'intellectual property' by Elena Cooper published in *The Burlington Magazine*, *Law and History Review*, *Law, Culture and the Humanities* and the *Modern Law Review*. The first three reviews, concerning the work of Katie Scott (*Becoming Property*, 2018, Yale University Press), Derek Miller (*Copyright and the Value of Performance*, 2018, CUP) and Will Slauter (*Who Owns the News?* 2019, Stanford University Press) chart a change in recent copyright history scholarship - a shift in the focus of copyright history away from books and literary works to other subject matter (visual art, drama and news) - and can be read in conjunction with the accompanying CREATE Working Paper 'Introduction to Art and Modern Copyright: The Contested Image (CUP, 2018)' also by Elena Cooper (CREATE Working Paper 2021/4). The final review concerns a collection of essays concerning the history of intellectual property more generally edited by Claudy Op den Kamp and Dan Hunter (*A History of Intellectual Property in 50 Objects*, 2019, CUP) which examines the history of intellectual property law through the lens of 50 different objects. Taken together, the reviews reveal the depth and breadth of historical work in the field and the richness of historical perspectives as a terrain for future study.

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Introduction

In a series of reviews, published in *The Burlington Magazine*, *Law and History Review*, *Law, Culture and the Humanities* and the *Modern Law Review*, I assessed the significance of four scholarly books, published in 2018 and 2019, concerning the history of the body of law that we today know as 'intellectual property'. The first three books are monographs concerning the history of copyright: *Becoming Property: Art, Theory and Law in Early Modern France* by Katie Scott (2018, Yale University Press), *Copyright and the Value of Performance 1770-1911* by Derek Miller (2018, CUP) and *Who Owns the News? A History of Copyright* by Will Slauter (2019, Stanford University Press). The final book is an edited collection - *A History of Intellectual Property in 50 Objects* edited by Claudy Op den Kamp and Dan Hunter (2019, CUP) - exploring aspects of the history of 'intellectual property' in fifty essays, each using an object as its starting point. The full text of the reviews is reproduced in this *Working Paper* following this brief introductory overview.

The first three reviews (for *The Burlington Magazine*, *Law and History Review* and *Law, Culture and the Humanities*) discuss a change in focus in recent copyright history scholarship: a shift away from copyright history's longstanding focus on copyright protection for books, to the histories of other subject matter (visual art, news and drama). By way of background, the activity in the field of copyright history today, is often traced back to the work of pioneering scholars of law and literature in the 1980s and 1990s. Scholars such as Mark Rose ('The Author as Proprietor' *Representations*, 1988; *Authors and Owners*, Harvard University Press, 1993), Peter Jaszi and Marta Woodmansee (for example, Jaszi and Woodmansee's edited collection *The Construction of Authorship*, Duke University Press, 1994 and Woodmansee's article 'The Genius and the Copyright, 1984, *Eighteenth Century Studies*, 425), inspired by Michel Foucault's *What is an Author?*(1969), exchanged views about the historicity of 'authorship' and its implications for copyright law. In so doing, they broadened a field which had previously been the province of publishing historians, principally the work of John Feather (for example, 'The Book Trade in Politics', 1980, *Publishing History*, 19). Their work was soon followed by accounts focussed on legal doctrine by legal scholars, led by the monograph *The Making of Modern Intellectual Property Law* (CUP, 1999) by Brad Sherman and Lionel Bently. In tracing the history of the categories and concepts which intellectual property lawyers today take as givens, Sherman and Bently established copyright history as a critical terrain for legal scholarship, directly challenging the then prevailing orthodoxy of the irrelevance of the past to thinking about the present and opened the way for the work of a new generation of legal scholars.

Yet, the new scholarly landmarks which set the broad parameters for thinking about copyright history, such as copyright and internationalisation (Seville, *The Internationalisation of Copyright Law*, CUP, 2006) and the relationship between copyright and the public interest (Deazley, *On the Origin of the Right to Copy*, Hart, 2004; Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart, 2010; Gomez-Arostegui, 'Copyright at Common Law in 1774', 2014, *Connecticut Law Review*, 263) all concerned, entirely or at least primarily, the laws protecting literature and books. It was not until recently - in 2018 and 2019 - that monograph-length studies of copyright history concerning other subject matter were published, including important landmarks in visual art, drama and news. These titles include my own *Art and Modern Copyright: The Contested Image* (CUP, 2018) concerning nineteenth century protection for paintings, drawings and photographs in the UK (the first chapter of which has now been released as a CREATE Working Paper: *Introduction to 'Art and Modern Copyright: The Contested Image'*, Working Paper 2021/4), as well as the works of Scott, Miller and Slauter, detailed above.

The first three reviews reproduced in this Working Paper, assess the significance of these latter three works (by Scott, Miller and Slauter) for copyright history and the humanities more generally. All the titles in this recent wave of scholarship are rigorous and innovative in the range of original archival material on which they draw. They are also broad in their interdisciplinarity, reaching beyond the remit of earlier law and literature work (which focussed on the legal concept of 'authorship' and the influence of Romanticism) also to encompass the relationship between other legal concepts and other aesthetic ideas. Collectively, these monographs demonstrate that shifting the focus to different subject matter, - visual art, drama and news - can draw out previously unappreciated perspectives on copyright history, whether in terms of the perception of the problems which copyright is to address and nature of appropriate legal solutions, the relation between copyright and aesthetics and/or real-world cultural or business practices, and the provision of fresh ideas about more basic theoretical questions (such as the nature of property in intangibles or more fundamentally what copyright is and who it should serve). Moreover, all these studies speak to the present day, for example the protection of news in more recent times (Slauter), concerns about the proliferation of infringement (Scott), and the relation of law and current cultural practices (Miller), thereby touching also on issues of interest to policy makers, judges, and practising lawyers.

The importance of historical perspectives to our understanding of not just copyright but intellectual property more generally, is revealed by the final reviewed title: *A History of Intellectual Property in 50 Objects*, which I reviewed in the *Modern Law Review*. My review draws out five examples of themes that pervade the essays in the volume: stories surrounding

particular objects can illuminate histories of legal development, the relationship between legal and cultural developments, nuanced accounts of the relation between law and technology, observations about rights-holder behaviour over a long trajectory, as well as the stories of social groups marginalised by legal categories. *A History of Intellectual Property in 50 Objects* is also a rare example of an intellectual property book that fully utilises the power of visual images in exploring these perspectives: the power of the visual, not just to support and to illustrate what is said in the text, but also actively and immediately to communicate central arguments to the reader, and in a few instances, to extend those arguments beyond those contained in the text.

Overall, this Working Paper – *Copyright History in Review* – draws attention to the depth and breadth of historical work in the field, and its richness as a terrain for future study.

***The Burlington Magazine*, May 2020, p.460-1**

Becoming Property: Art, Theory and Law in Early Modern France, by Katie Scott, 384 pages, 117 colour + b/w illustrations, (Yale University Press, New Haven and London, 2018) ISBN: 9780300222791.

Copyright history has long been dominated by studies of the law protecting written texts, not the visual arts. In *Becoming Property*, Katie Scott breaks new ground, with the first account of the protection of visual arts by early intellectual property laws in France, from the early sixteenth century (the first protection for printing woodcuts) to the early 1800s (after the passage of the first copyright law protecting works of authorship generally in 1793). The book, a product of meticulous archival work, drawing on an impressive range of unpublished material – legal briefs and court documents, as well as art sources – places centre-stage the relationship between art and law. Art became ‘intellectual property’ in early modern France, Scott contends, through the complex intersection of law and art. ‘Intellectual property’ was ‘art theory as a practice’; ‘art theoretical concepts were... constitutive of property law and its cultural forms’ (p.20).

For art historians, the focus on law may feel unfamiliar: art-works and artists are selected because of their presence in legal debates and court cases, not aesthetic considerations. Scott’s work speaks to broader legal interdisciplinary work about the visual arts of recent years, including the first book-length study of UK copyright and the visual arts, also published in 2018 (E. Cooper *Art and Modern Copyright: The Contested Image*, Cambridge University Press, concerning painting, engraving and photography, 1850-1911). In doing so, Scott’s work illustrates the rich potential which a close engagement with ideas about law, can offer art history scholarship.

The first chapter concerns copyright protection in the *ancien regime*, through personal ‘privileges’ or monopolies for printing specific works, from the sixteenth to the eighteenth centuries. While there was an increase in artists applying for privileges during the course of the seventeenth century, privilege was not part of regular artistic practice. The position changed with the emergence of intaglio printing of illustrated texts: intaglio printmakers began to ‘assert their authorial claims through litigation, by petitioning for privilege in their own names and by signing their work’ (p.56).

The following three chapters remain with the laws of the *ancien regime* – systems of personal ‘privilege’ – and consider how law intersected with particular artistic ideas: ‘emulation’ (Chapter 2), ‘imitation’ (Chapter 3) and ‘invention’ (Chapter 4).

Chapter 2 asks why painters, sculptors and engravers were slow to take up privileges offered by the *Académie Royale de Peinture et de Sculpture* from the late seventeenth century, focussing on the culture of 'emulation'. There were customary understandings within the Academy about where the line was to be drawn between emulation (which was encouraged) and plagiarism (which was condemned). The growth of art criticism, saw a move in cultural power from the Academy to the public, and the development of modes of viewing that were sensitive to similarity in composition and form. Emulation became 'self-conscious and anxious' (p.127) and, in the eighteenth century, resulted in 'a shift in artistic subjectivity, from an emphasis at the beginning of the century on properties of the self (Académie status) to an emphasis at the end on things owned by the self: intellectual property' (p.127).

Chapter 3 discusses 'imitation', focussing on portrait prints and works of wax (taken directly from the body). Privileges for portraits were consistently upheld, and in one case concerning a portrait print engraved in 1771 after a drawing by Charles-Nicholas Cochin *fi/s* of 1770, Scott discusses Cochin's conceptualisation of the portraitist as author 'because he augments... because he moves beyond the primitive outline of resemblance to embellish his model' (p.226). Turning to portraiture under the copyright law of 1793, protecting works of the mind which were the product of genius, Scott charts the emergence of 'the idea of the original copy, the copy that, by virtue of having been made by human hand after nature, or some other object in the public domain, necessarily constituted an invention' (p.238).

Chapter 4, concerning 'invention', turns its attention to patent protection for technical inventions involving colour - the chemistry of the colourant, or technology for applying colour-tracing overlaps in the discourses of art theory, technology and law. Drawing contrasts to Chapter 2, Scott shows how, in the discourse about patent privileges, inventors were not present in their inventions, in the way in which artists became present in works protected by copyright privileges. Patent privileges as property, were 'distinct from the self': the relation between inventor and invention was 'always a claim, articulated to the law and before the public' but 'never self-evident' (p.279).

The final chapter considers the copyright legislation of 1793, following the French revolution, protecting authors of works of the mind or of genius. Scott shows how the legislation broke new ground in cutting across previous trade divisions (which characterised the *ancien regime* privilege system), creating a single 'class of intellectual property owners' for the first time' (p.289). In this context, infringement cases - for example, court-action against the reproduction of art-works as wallpaper - involved adjudicating status divisions between high-art and industry,

the separation of bourgeois property owners from working-class imitators. Accordingly, 'the copyright question was not only about rights; it was also about hierarchy and status' (p.290).

In unfolding her sophisticated account of the meeting of law and art, Scott seamlessly moves between the specifics of particular court cases, broader currents in legal and aesthetic thought, as well as the visual images themselves (both protected and infringing) beautifully reproduced in the book in 112 plates. *Becoming Property* is highly recommended both to art historians and lawyers interested in early modern France, as well as those wishing to sample the rich scholarship which results from a nuanced engagement with the law by an art historian.

***Law and History Review*, Vol.39, Issue 1, 2021, p. 205-6.**

Will Slauter, *Who Owns the News? A History of Copyright*. Stanford: Stanford University Press, 2019. Pp. xii + 352. Paperback \$30.00 (ISBN 9781503607712).

Copyright history has become a burgeoning field, yet it has long been dominated by scholarship regarding books. That has changed in recent years, with the first book-length studies of copyright protecting drama (D. Miller, *Copyright and the Value of Performance*, 2019) and the visual arts (E. Cooper, *Art and Modern Copyright*, 2018; K. Scott, *Becoming Property*, 2018). Will Slauter's *Who Owns the News?* should be set in the context of this recent turn in scholarship which, in shifting the focus away from books, provides fresh perspectives on copyright and its history.

Slauter's work is the first study of the history of legal protection for news in Britain and the United States. Its subtitle presents it as "a history of copyright," which it undoubtedly is, but it also offers far more. First, drawing on original research and impressive in its disciplinary breadth, the book uncovers the intertwining of law and publishing practice and "sheds light on the history of both" (13). Second, as a history of law, Slauter's work encompasses not just copyright, but the subtle ways in which copyright related to other bodies of law, including censorship, newspaper taxes, postal regulation, and unfair competition. Third, the book tells a story of the past that speaks to the present, demonstrating history's continuing relevance. For example, recent European Union debates about the press publishers' right (introduced by the Digital Single Market Directive 2019/790) are for Slauter "another chapter" in a "centuries-old history" (281).

The book is held together elegantly by the introductory and concluding chapters, which draw together past and present. The middle chapters explore episodes in the history of law and news publishing practice from the sixteenth to twentieth centuries. The international story—the treatment of news under the Berne Convention (first concluded in 1886)—perhaps could have been more fully developed, but the meticulous detail of the national stories more than mitigates this.

Chapter 1 explores the regulation of news and other written works in sixteenth- to seventeenth-century Britain, by royal privileges—exclusive rights to print a particular work—and licensing, as censorship laws required approval by a government licensor before publication. Chapter 2 turns to eighteenth-century Britain. The first Copyright Act (1709) protected "books," with no mention of newspapers and periodicals. After the 1709 Act, it was not assumed that news was excluded from copyright protection, yet the business and culture of news worked against protection:

newspapers relied on copying and were sold on subscription and financed by advertising. Furthermore, anonymity was widespread: writers assumed a “depersonalised voice” due to the risk of seditious libel prosecutions and a cultural wish “to speak on behalf of the public” (65).

Chapters 3 and 4 concern the United States during the eighteenth and nineteenth centuries. These chapters introduce the enduring image of “scissors editors.” With copying essential to newspaper production, editors used scissors to cut out articles from rival newspapers, deciding which parts of other papers would be re-printed to fit the space available. In the years following the American Revolution, legislative policy favored the facilitation of news circulation; copyright policy was a “counterpart” to postal regulation as instruments that “enabled news to spread” (88). Accordingly, while the Copyright Act of 1790 protected “maps, charts and books,” there is no evidence that lawmakers considered newspapers to be included.

During the 1800s, newspaper editors remained uninterested in copyright, but they did expect credit to be given to the first newspaper that published a story. This change in attitude toward acknowledgement, when coupled with later changes in business practice, including the telegraph and the emergence of press associations, led some editors to seek legal protection. Chapters 6 and 7 discuss the protection of news by U.S. copyright and unfair competition law during the late nineteenth and twentieth centuries, including the 1918 case of *International News Service v. Associated Press*.

Intervening in this U.S. analysis, Chapter 5 presents the contrasting story of the protection of news in nineteenth-century Britain. The British regulatory context was different from that in the U.S.: newspapers in Britain were taxed, and newspaper editors were concerned that the proposed end to these “taxes on knowledge” would make way for cheap newspapers that would copy news and compete with the newspapers that collected it. Accordingly, as early as the 1830s, well before the emergence of the telegraph, newspaper editors campaigned (unsuccessfully) for special short-term copyright protection for news. Chapter 5 explores these proposals alongside the Literary Copyright Act of 1842 and the cases *Walter v. Steinkopff* (1892) and *Walter v. Lane* (1900).

Overall, this book is a fascinating read, providing fresh insight into the history of law and publishing regarding news and a nuanced engagement with copyright debates today. It will appeal not just to scholars of law and the humanities, but also legal practitioners and policy-makers grappling with the challenges posed by the legal protection of news today.

Law, Culture and the Humanities, 2020, Vol. 16(3), p.504-507

Becoming Property: Art, Theory and Law in Early Modern France

By Katie Scott. New Haven, CT: Yale University Press, 2018. 384pp. \$75.00 (hardcover). ISBN: 9780300222791

Copyright and the Value of Performance, 1770-1911

By Derek Miller. Cambridge: Cambridge University Press, 2018. 291pp. \$29.99 (paperback). ISBN: 9781108441698

Copyright history is currently a flourishing field for research. This boom in scholarship in recent decades is often traced to an 'historical turn' in thinking about copyright in the 1980s and early 1990s when scholars of copyright law and literature, inspired by Michel Foucault's "What is an Author?" (1969), exchanged views about the historicity of 'authorship' and its implications for copyright law. This scholarship was soon followed by accounts focussed on legal doctrine by legal scholars, led by the pioneering monograph *The Making of Modern Intellectual Property Law* (Cambridge UP, 1999) by Brad Sherman and Lionel Bently. These early scholarly landmarks set the foundations for the burgeoning research activity which followed, the enduring influence of which is well illustrated by the broad remit of the principal international society in the field: the International Society for the History and Theory of Intellectual Property (founded in 2008). Yet, notwithstanding this breadth of approach, until recent years, copyright history was overwhelmingly dominated by studies of copyright protecting books and literary works, the first subject matter of statutory copyright (protected by statute in Britain since the Statute of Anne 1710). It was not until very recently – in 2018 and 2019 – that the first monograph-length studies of copyright history concerning other subject matter were published: visual art, drama, and news. All of these accounts are rooted in significant original archival work, going beyond traditional legal sources, and speak, expressly or implicitly, to present-day debates about copyright. Further, all these monographs place center-stage questions of cross-disciplinary concern, not just to law, but also, for instance, to art history, theatre and performance studies, and the history of publishing. This review concerns two of these monographs: Katie Scott's *Becoming Property: Art, Theory and Law in Early Modern France* (Yale UP, 2018) and Derek Miller's *Copyright and the Value of Performance, 1770-1911* (Cambridge UP, 2018).

Interdisciplinary questions lie at the heart of both these works. Scott's monograph spans legal protection for the visual arts in France from the beginning of the sixteenth century to the period after the passage of the French Copyright Act 1793. Her objective is "the study of art's intersection with law" in interrogating "how and why art came to assume a distinct legal form, becoming intellectual property" (15). As she explains, the argument of the book is "art-theoretical concepts were... constitutive of property law and its cultural forms in early modern France" (20). Miller's *Copyright* concerns the story of the protection of performance rights for dramatic and musical works in the UK and the USA, from the seventeenth century (after the Restoration) to the codifying copyright legislation passed in the early twentieth centuries (in 1911 in the UK and in 1909 in the USA). Like Scott, he notes important connections between legal and cultural thinking: "the advent of performance rights reshaped how we value performance both as an artistic medium and as property" (i).

Both accounts begin with the pre-history to the first statutory protection, when the respective subject-matter – art and drama – received protection through privileges (monopolies granted to specific persons), before turning to the implications of the first statutory protection for their respective subject matter (French Copyright Act 1793, as regards Scott's account, and the UK Dramatic Literary Property Act 1833 and the US Copyright Act 1856 in respect of Miller's work). Scott's story gravitates towards the eighteenth century, tracing the important conceptual changes that enabled art to become 'intellectual property' in the period prior to protection by Act of Parliament (in 1793). By contrast, in Miller's account the crucial developments in the emergence of modern performance rights were *after* the advent of statutory protection (in 1833 and 1856) later in the nineteenth and early twentieth centuries.

The first chapter of Miller's *Copyright* traces how, from the Restoration until the first statutory performance rights in the UK – the Dramatic Literary Property Act 1833 – performances were regulated by the state primarily through the grant of monopolies to specific theatre troupes to perform *all* spoken drama; "performance rights in a given play were far less important than the absolute right to perform *any* play" (32). Disputes about these "pre-performance rights" involved "thinking about performance's relation to propriety," that is, what is needed to uphold the social and political order; unlike the Lockean author who creates valuable property through labor, "the proprietary owner claims her property because her ownership sustains the social order" and unauthorized copying rested "on the violation of communal norms" (63).

For Miller, then, modern ideas about performance rights, developed later: statutory protection for performances (in the UK in 1833 and in the USA in 1856) marked the start of "a new era" in which the courts defined "the performance commodity," shaped by modern notions of property (64). Up

until the late nineteenth century, courts were faced with fundamental aesthetic questions about performance and “the nature of dramatic and musical art” (2). This was a “crucial definitional period” (2); in two further chapters, Miller traces how the courts defined the dramatic work as “embodied human action” and musical work as “first and foremost melody” (120). Legal developments contributed actively to thinking about drama: for instance, Miller attributes cultural changes in the conception of the audience during the nineteenth century – as observers rather than participants – in part to “copyright’s role in ascribing the ‘passive’ nineteenth century audience into the political economy of performance” (123).

The parameters of protection of the dramatic work having been established in cases during the nineteenth century, the courts of the twentieth century then turned their attention to economic concerns: “Once judges knew confidently *what* a copyrighted work was, they could address themselves only to the work’s position in the marketplace” (3). In the final two chapters of Miller’s work, legal ideas are revealed, firstly, to have made a significant contribution to “the operation of the theatre and music industries” of the time, and secondly, to remain present in debates of more recent times: in the Epilogue, Miller demonstrates that copyright cases concerning the musical *Jesus Christ Superstar* from the late twentieth century, “reveal the persistent challenge of defining the limits of the performance-commodity and the nature of the performance right” (236).

For Scott, the pre-history to statutory protection (in France in 1793), is central to her account of how art became intellectual property, and in separate chapters she provides a detailed and nuanced analysis of how three concepts – emulation, imitation, and invention – were articulated in disputes over privileges relating to the visual arts. For instance, in Chapter 2, Scott traces the culture of ‘emulation’ at the *Académie Royale de Peinture et de Sculpture*, from the late seventeenth century, charting how during the course of the long eighteenth century, there emerged an emphasis on the work being “owned by the self: intellectual property” (127). As Scott explains, in the last decades of the *ancien regime*, privileges granted by the Académie became “a mix of alienable private property rights and inalienable personal and reputational claims to those characteristics of the artist embodied in the work” (127). As she concludes, in that sense, “Académie privilege could be said to resemble, perhaps even anticipate, nineteenth-century *droit moral*,” that is “the legal recognition” of “the extension of the artistic personality into the art work” (127).

Further, in the chapter concerning imitation, Scott uncovers legal disputes over privileges concerning portraits, which provided the “germ” of the emergence of the idea of “the original copy,” that is, that a copy is original “by virtue of having been made by human hand” and therefore

“necessarily constituted an invention” (238-239). Accordingly, in the final chapter on the advent of statutory protection in France, while Scott shows that the French Copyright law of 1793 did mark an important change, for instance, in creating for the first time a single “class of intellectual property owners,” which in turn gave rise to the question of the relationship between legal protection and the relative artistic status of different intellectual property owners, in Scott’s account, the pre-history to statutory protection was nonetheless an integral part of the story of the conceptual shifts which facilitated the emergence of art as ‘intellectual property.’ These stories of conceptual change in law and art are uncovered by Scott in meticulous detail, in a nuanced analysis that brings together the visual images themselves (both protected and infringing, reproduced in 112 plates), the particularities of specific court cases (as revealed in original archival court records and legal briefs), as well as the broader dynamics in thinking about law and aesthetics.

Scott’s *Becoming Property* and Miller’s *Copyright* clearly illustrate the richness of scholarship which results from interdisciplinary engagement with copyright history, going far beyond the remit of earlier interdisciplinary work of the 1980s and 1990s. Literary scholars in the 1980s and 1990s considered almost exclusively the relationship between legal and literary ideas about authorship, giving prominence to the influence of Romantic authorship. By contrast, Miller’s account “moves emphatically away from authorship,” being primarily a story about the copyright work (12), and both Miller’s and Scott’s work connects copyright history to a range of aesthetic ideas other than Romanticism. Indeed, Scott’s contention is that the connections between aesthetics and law (in France in the long eighteenth century) “were not” in concepts “characteristic of Romanticism, but rather” in ideas which were “central to the humanistic theory of art” (20).

Broadening copyright history to subject-matter beyond books, also shines light on copyright history as a source of ideas about ownership of intangibles, an enquiry which began in recent times with Sherman and Bently’s analysis of eighteenth century literary property debates in Britain in *The Making*, and continued, as regards the visual arts in the UK in the nineteenth century, with my own work *Art and Modern Copyright* (Cambridge UP, 2018). I argue that new subject matter raises different challenges for the law, and can result in different ways of thinking about rights in intangibles (249); this is well illustrated also, for instance, by Miller’s discussion of ideas of ‘propriety’ and Scott’s work about early debates surrounding portraits (discussed above). Further, in relating the legal history to the real-world practices of cultural actors – as revealed throughout Scott’s work in her detailed contextual analysis of specific legal disputes between artists and art publishers, and in Miller’s Chapter 4 which brings legal rulings into conversation

with the business practice of theatre and music industries – history is revealed to be a fruitful source of case-studies of how changes in the law relate to changes in cultural practices. These observations and others, as illustrated by Miller’s Epilogue, indicate the capacity of copyright history also to speak to the copyright issues of today, a significance which while not explored by Scott, is clearly contemplated in the précis to her book: “with the advent of ... methods of reproduction, multiplication and dissemination via digital channels, questions of intellectual property and the visual arts have become important once more” (backcover).

In moving copyright history away from the remit of books and literary copyright, recent scholarship provides examples of the breadth of perspectives which results from the interdisciplinary study of copyright history. Scott’s *Becoming Property* and Miller’s *Copyright* are therefore strongly recommended to all scholars interested in the study of culture in its widest sense, including scholars of law and the humanities.

Modern Law Review, November 2020, (2020) 00(0), 1-4

C. Op den Kamp and D. Hunter (eds), *A History of Intellectual Property in 50 Objects*, Cambridge: Cambridge University Press, 2019, 429 pp, hb £17.99.

A History of Intellectual Property in 50 Objects is a collection of essays about the history of the branches of law that we today term intellectual property, each chapter taking a single object as its starting point. Spanning a diverse range of objects, from the twelfth century to today - from the Mona Lisa to the Kodak Camera, the Lego Brick to the Internet - *A History of Intellectual Property in 50 Objects* is based on the idea behind the BBC radio 4 series *A History of the World in 100 Objects* presented by Neil MacGregor of the British Museum (published by Penguin, 2012) which has also been adapted to popular subjects such as *A History of Cricket in 100 Objects* (Serpent's Tail, 2013). Approaching intellectual property through objects, however, is more complex. Intellectual property is thought to protect intangible subject matter rather than tangible objects. As editors Claudy Op Den Kamp and Dan Hunter note in their introduction, approaching intellectual property through objects raises the question of how and whether the law reflects the theoretical assumption we have today, that intellectual property involves a 'separation between "the thing" and the "idea of the thing"' (2).

The essays comprising *A History of Intellectual Property in 50 Objects* are authored primarily by legal academics, but also by scholars from other disciplines (e.g. art, history, film studies, and computer science). All the contributions are scholarly rigorous - based on original research - but also accessible to the non-specialist reader. As the sheer diversity of subject matter makes a comprehensive summary impossible, this review instead draws together five examples of perspective that permeate the volume and demonstrate the scholarly value of studying intellectual property from the standpoint of objects.

First, a number of the essays demonstrate that objects can take us to intricate stories about legal development. Lionel Bently's essay concerning the Singer sewing machine in the nineteenth century, shows how the study of a single object can take us to cases which 'unknowingly' provided 'the foundations for much of modern trade mark law', e.g. the doctrine of genericide, the concept of the public domain, as well as ideas about the 'selling power' of a mark (77-79). Stefania Fusco, in discussing the Murano glass vase, shows how glassmakers were granted ad hoc patents by the Venetian state from the late fifteenth to eighteenth centuries (18). When, from the sixteenth century, glassmakers began to leave Venice to relocate elsewhere in Europe, 'they took with them their understanding of the benefits of an exclusive right to practice

their inventions' and these understandings contributed to the establishment of patent laws in other countries e.g. Belgium, France and England (22-23). Dev Gangjee uses the history of Champagne as a means of looking backwards, but also speculating forwards, about sui generis protection for geographical indications. He shows that Champagne has exercised a formative influence on the law in the twentieth century, but the 'story of Champagne is still being written': with climate change possibly shifting the focus of wine-making away from continental Europe, Champagne's 'powerful influence' on geographical indications may in the future instead come from England (167).

Other chapters, ask whether the history of a single object can reveal something timeless about intellectual property. Drawing on original archival material, Jane Ginsburg shows a successful application for a papal privilege from the 1590s, for Antonio Tempesta's Map of Rome, to span 'the full range of modern intellectual property rhetoric, from fear of unscrupulous competitors, to author-centric rationales' (42). While some debates from the past may feel familiar, their resolution is bound up with contingency, a point well illustrated by Peter Jaszi's chapter about Harriet Beecher Stowe's nineteenth century novel *Uncle Tom's Cabin*. Jaszi traces 'the winding path that copyright trod in the 19th and 20th centuries' concerning translation rights, international protection and term (81). History reminds us that the extensive protection which copyright works enjoy today, 'beyond the wildest imagination of Stowe and her contemporaries', is far from timeless or inevitable (87).

Secondly, a number of contributions to *A History of Intellectual Property in 50 Objects*, illuminate important stories about cultural developments. Michael Punt argues that eighteenth century copyright statutes protecting engravings in Britain underpinned the development of Hogarthian art. Copyright gave the artist William Hogarth 'the financial security to use art and aesthetics as an instrument of political resistance' (55). Chris Beauchamp shows that the intervention of Alexander Graham Bell's patent lawyers, defining the invention broadly in the patent, coupled with the subsequent upholding of that patent by the US courts, contributed to popular understandings of Bell as the inventor of telephone technology: 'the saga of Bell's patent framed the way that the origins of the telephone have been understood ever since', that is, 'a single invention, arrived at by a single person in a decisive break from the prior art' (103).

Thirdly, a number of essays provide a sophisticated understanding of the relationship between law and technology. Maurizio Borghi charts the diversity of early twentieth century legal responses, in different jurisdictions, to the emergence of the player piano, technology that marked 'the beginning of a war over the control of music and content that is being fought to this day' (153). Peter Decherney discusses the Kinetoscope developed by Thomas Edison in the late

nineteenth century: a peep-show device for individual spectators to peer into and watch moving images. Today, devices for viewing films by single spectators are 'staples of our existence', yet in the late nineteenth and early twentieth centuries, audiences preferred collective viewing of projected films (135). Connecting innovative but unpopular technologies of the past, to those that are ubiquitous today, Decherney shows the history of technology to be punctuated by stops and starts, the picking up of 'lost threads' and the taking of 'new directions', rather than a single linear narrative of technological development (135).

Fourthly, foregrounding objects and their protection by intellectual property laws over a long time-frame, enables interesting observations about rights-holder behaviour over a long trajectory. Jeannie Suk Gersen, in a chapter about the Chanel 2.55 handbag, shows that Coco Chanel, in the 1950s, openly encouraged the copying of her works. By contrast, by the 1980s, with the rights in the hands of Chanel Inc., the approach was far less forgiving of imitation, with millions spent annually on anti-counterfeiting (252). As a consequence, the bag has a 'duality' as 'both the paradigmatic original and the archetypal copy – an embodiment not only of authentic and rarified luxury, but also of fakeness, repetition, reproduction and substitution' (253).

Fifthly, essays in this collection demonstrate that a focus on objects can expose the law's blindness towards certain perspectives. Marie Hadley considers the boxer Mike Tyson's tattoo, recreated without consent on the face of one of the actors in the film *The Hangover Part II*. Hadley notes a conflict between copyright and 'competing cultural rights to indigenous design forms', as Tyson's tattoo was itself inspired by *ta moko*, the tattooing practice of the Maori people of Aotearoa/New Zealand. Claims to the tattoo's appropriation reveal 'the difficulty of claiming one truth in an intellectual property world that was born in the Western philosophical tradition' (401). In another chapter, Kara Swanson shows how the story of patent protection for the corset, as an 'oh so feminine technology, challenged the association of technology, patents and invention with masculinity' in the nineteenth century (89). Not only was corset technology accessible to female inventors, but patent litigation, concerning the corset's utility, provided an opportunity to challenge 'the gendered assumptions of the lawyers, judges, and the law itself' (91).

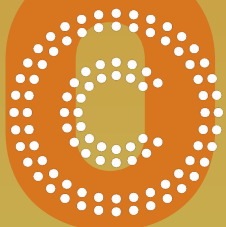
The above five themes provide a non-exhaustive set of examples of the rich and varied scholarship in the essays comprising *A History of Intellectual Property in 50 Objects* and is indicative of the volume's undisputed scholarly contribution. As a whole, the volume is clearly organised, with the essays categorised into five chronological time periods. The book design is attributed to co-editor Claudy Op den Kamp, a scholar of film studies, and she brings a strong visual dimension. The collection contains copious colour illustrations and these are interspersed

between the text in a creative way: text and image are intertwined in the narrative of each chapter. For instance, in Decherney's chapter (discussed above), a picture of a person enjoying the long-forgotten technology of past-times through head phones – the Kinetoscope – is placed side by side with the familiar image today of a person listening to their i-phone. The reader, in one glance, immediately grasps the similarity of the two technologies. Similarly, in a chapter about the protection of the PH-Lamp in the twentieth century, full colour photographs of Poul Henningsen's designs communicates 'the marriage between the aesthetic and the functional', central to Stina Teilmann-Lock's argument about the difficulty of fitting the lamp into intellectual property categories. The images, therefore, are equal partners with the text in the stories told by each author. Indeed, in some cases, such as Swanson's chapter about the corset, punctuated by images which demonstrate the corset's contested cultural status, the images invite the reader to contemplate dimensions that go beyond those discussed in the text: 'the corset as a technology of race as well as of gender' (92-93 and caption on 91).

Despite these strengths – the high quality of individual chapters beautifully crafted into a single volume – there are shortcomings. The history of intellectual property, particularly copyright history, is a burgeoning academic field and the content of the volume should, at least implicitly, reflect developments in scholarship. While the collection does include contributions from a number of undisputed leaders in the field, there are also notable absences from scholars whose original work has been formative of our understanding of intellectual property history in recent years, together with an absence of even some tacit reference to their work. The result is that the volume, taken as a whole, occasionally does not fully represent the current state of learning in the field. For example, Robin Wright's chapter about the Audiotape Cassette looks forward to copyright debates of the twentieth and twenty-first centuries, including the legal treatment of private copying, but that story might also have been brought into conversation with nineteenth and early twentieth century private copying debates (charted in Isabella Alexander's *Copyright Law and the Public Interest in the Nineteenth Century*, Hart, 2010, 245 and 282). In the Pre-Modern section, the shortest section of the book (comprising just 4 essays and which might have encompassed pre-statutory history in jurisdictions beyond Korea and Italian states) the problem is exacerbated by the odd editorial classification of Andrea Wallace's excellent chapter. The strength of Wallace's scholarship lies with original teaching about *reproductions* of the Mona Lisa in more recent times and not with its broad-brush claims about copyright history, suggesting the absence of protection for art by privileges prior to the copyright statute in France passed in the late eighteenth century (25). The voice of Katie Scott, the author of the landmark work on the protection of art in France, whose extensive archival work has uncovered the multiplicity of ways in which art was protected in the *Ancien Regime* (*Becoming Property:*

Art, Theory and Law in Early Modern France. Yale University Press, 2018) is wanting here. Editing a volume of this nature, of course, always involves difficult choices, but different decisions could have been made: one contributor to *A History of Intellectual Property in 50 Objects* is the author of two chapters (Peter Decherney) and one editor is the co-author of the editorial introduction and two chapters dealing with broadly similar subjects (Introduction, Lego Brick and Barbie Doll all co-authored by Dan Hunter).

Despite these criticisms, this volume is a pleasure to read and contains original scholarship of the highest quality. It is recommended both to scholars of law and the humanities, as well as being of general interest to legal practitioners and the general reader.



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