

INTRODUCTION TO 'ART AND MODERN COPYRIGHT: THE CONTESTED IMAGE' (CUP, 2018)

CREATe Working Paper 2021/4

ELENA COOPER



CREATe

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Abstract

This Working Paper is a re-print of the introductory chapter of the monograph 'Art and Modern Copyright: The Contested Image' published as part of the Cambridge Intellectual Property and Information Law series by Cambridge University Press in 2018. Art and Modern Copyright is the first in-depth and longitudinal account of the history of copyright relating to the visual arts and concerns the protection of painting, engraving and photography in the UK 1850-1911. Together with the copyright history monographs discussed in the accompanying CREATE Working Paper 'Copyright History in Review' (Working Paper 2021/3), Art and Modern Copyright can be seen as part of a new wave of recently published scholarship which shifts the focus of copyright history away from its longstanding concern with the protection of books and literary works, to other subject matter (visual arts, drama and news). The Introduction to Art and Modern Copyright argues that art added something new to the making of modern copyright law in the UK – the history of artistic copyright was in many respects distinct from the history of literary copyright – and provides an overview of the thematic chapters of the book that substantiate that claim: the protection of copyright 'authors' (i.e. the claims to protection advanced by painters, photographers and engravers), art collectors, sitters and the public interest. It also makes a number of more general claims about the value of copyright history. In particular, rather than looking to history to uncover a point of origin or foundational moment, Dr Cooper explores the value of history as a destabilising influence. In taking us to ways of thinking about copyright that, in some respects, differ starkly from our own and have no authority today or continuity with the present, history can sharpen the critical lens through which we view current copyright debates and lend to us a more flexible way of thinking through legal challenges today. Art and Modern Copyright was shortlisted by the Society of Legal Scholars for the Birks Book Prize for Outstanding Legal Scholarship in 2020. Drawing on extensive original archival work made possible by a Peter Orton Fellowship at Trinity Hall Cambridge, it significantly extends a PhD thesis (concerning photographic copyright only) supervised by Lionel Bently at Cambridge University, which was awarded a Yorke Prize by the Faculty of Law, Cambridge in 2011.

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'The history of copyright has overwhelmingly been concerned with literature and not art.' So wrote Kathy Bowrey over a decade ago.¹ While a number of short studies about the history of artistic copyright have since been published,² it remains the case that scholarship setting the broad parameters for thinking about copyright history focuses on books,³ the first copyright subject matter to be protected by statute. *Art and Modern Copyright* fills this gap, providing the first in-depth study of artistic copyright over a longitudinal period. It concerns the history of copyright protection for paintings, photographs and engravings, from the debates of the 1850s culminating in the Fine Arts Copyright Act 1862⁴ to the codification of copyright with the passage of the Copyright Act 1911.⁵

By way of background, the first copyright statute of 1710 (the Statute of Anne)⁶ applied to 'books,' and this was followed by a series of subject specific statutes passed during the eighteenth and early nineteenth centuries protecting engravings⁷ and sculptures.⁸ The Fine Arts Copyright Act 1862 was a further subject specific measure and it provided for the subsistence of copyright in paintings, drawings and photographs, which was new copyright subject matter in 1862.⁹ This piecemeal legislation remained in force, alongside other subject-specific legislation treating different types of copyright work in different ways (a total of 21 statutes by 1911), until their repeal

¹ K. Bowrey, 'Who's Painting Copyright's History', in D. McClean and K. Schubert (eds.), *Dear Images: Art, Copyright and Culture* (London: Ridinghouse RCA, 2002) p. 257 at p. 257.

² For a detailed review of the literature on the history of artistic copyright see E. Cooper, 'How Art Was Different: Researching the History of Artistic Copyright', in I. Alexander and H. T. Gómez-Arostegui (eds.), *Research Handbook on the History of Copyright Law* (Cheltenham and Massachusetts: Edward Elgar, 2016) p. 158.

³ For instance, scholarship setting out the broad parameters of the relation of copyright history to ideas about authorship and the public interest primarily concerns literary copyright, e.g. I. Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford and Portland Oregon: Hart Publishing, 2010); R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Oxford and Portland Oregon: Hart Publishing 2004); R. Deazley, *Rethinking Copyright: History, Theory, Language* (Cheltenham and Massachusetts: Edward Elgar, 2006); H. T. Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 *Connecticut Law Review* 1; M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge Massachusetts and London: Harvard University Press, 1993); M. Woodmansee and P. Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham and London: Duke University Press, 1994).

⁴ 25&26 Vict. c.68 (1862). A copy of the Fine Arts Copyright Act 1862 can be found online as part of Primary Sources web resource: L. Bently and M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)*, www.copyrighthistory.org.

⁵ 1&2 Geo. V. c.46 (1911).

⁶ 8 Anne, c.19 (1710).

⁷ 8 Geo. II c.13 (1735); 7 Geo. III c.38 (1767); 17 Geo. III c.57 (1777); 6&7 Will IV c.59 (1836); 15&16 Vic. c.12 (1852) s.14.

⁸ 38 Geo. III c.71 (1798); 54 Geo. III, c.56 (1814).

⁹ There was some residual protection for the painter under the Engraving Acts, but copyright subsisted in the print and not the painting itself: Chapter 2 p.22. On the question of copyright protection for photographs under the Engraving Acts: Chapter 2 p.37 and n.147.

and replacement by a single statute: the Copyright Act 1911,¹⁰ which was premised on the general principle of uniform treatment for all copyright subject matter.¹¹

In *The Making of Intellectual Property Law* – the first title in this *Cambridge Intellectual Property and Information Law* series – Bently and Sherman identified ‘the 1850s or thereabouts’ as the point at which modern intellectual property law ‘emerged as a separate and distinct area of law replete with its own logic and grammar’.¹² The modern law of copyright involved a shift from a ‘pre-modern’ reactive subject-specific piecemeal approach to protection, to a more abstract forward looking law, extending protection to literature and art in the widest sense.¹³ The period 1850 to 1911, Sherman and Bently argue, was a time in which the framework of modern intellectual property – copyright included – was completed, through codification and rationalisation.¹⁴

A central premise of *Art and Modern Copyright* is that, in this period, 1850 to 1911, art added something new to the making of modern copyright law; art was perceived to pose fresh challenges, for which the model of literary copyright did not always provide answers. Whereas existing scholarship explains certain developments in nineteenth century artistic copyright – the protection of painting in 1862 – by what art and literature had in common,¹⁵ I argue that in many other respects the story of artistic copyright was different. In addressing new challenges, artistic copyright added a distinct dimension to the ‘logic and grammar’ of the emerging law of modern copyright.¹⁶

Art and Modern Copyright explores the distinct facets of modern artistic copyright in relation to four themes, each spanning the period 1850-1911 and dealt with in separate Chapters: the protection of copyright ‘authors’¹⁷ (i.e. the claims to protection of painters, photographers, and also, where relevant, engravers¹⁸ – Chapters 2 and 3), art collectors (Chapter 4), sitters (Chapter 5) and the public interest (Chapter 6). In exploring these perspectives, the thematic chapters draw heavily on the author’s own substantial original archival research, casting light on

¹⁰ This was subject to a few exceptions: the 1911 Act did not repeal s.7 and s.8 Fine Arts Copyright Act 1862 and the Musical Copyright Act 1906 (6 Edw. 7 c.36).

¹¹ See Chapter 3 p.50.

¹² B. Sherman and L. Bently, *The Making of Modern Intellectual Property law: The British Experience, 1760-1911* (Cambridge: Cambridge University Press, 1999) p.3.

¹³ *Ibid.* p.119.

¹⁴ *Ibid.* p.129.

¹⁵ L. Bently, ‘Art and the Making of Modern Copyright Law’, in D. McClean and K. Schubert (eds.), *Dear Images: Art, Copyright and Culture* (London: Ridinghouse RCA, 2002) p.331, discussed further in Chapter 2 p.12.

¹⁶ Contrast to R. Tushnet, ‘Worth a Thousand Words: The Images of Copyright’ (2011-2012) 125 *Harvard Law Review* 683, 683, discussed in Chapter 3, n.20.

¹⁷ ‘Authorship’ is the legal category by which painters, engravers and photographers were protected.

¹⁸ Explained below: p.5.

material hitherto unconsidered by historians of copyright, as well as art historians and sociologists of art. This includes not only papers left by lawyers and legal and governmental institutions, but also the papers of artists, collectors, art societies, art dealers and art institutions, such as galleries and museums.¹⁹ In drawing on this material, I uncover, amongst other things, the claims and practices of painters, collectors, engravers, printsellers, celebrities, galleries, portrait and press photographers, as well as an association of photographic ‘pirates’ (those trading in unauthorised photographs of copyright works).

In exploring these facets of copyright history, I make a number of more general claims. As a work of legal scholarship, *Art and Modern Copyright* differs from legal scholarship that looks to history to help us better to understand a point of origin,²⁰ a ‘foundational moment’,²¹ or to argue that history might set a ‘default basis’ for the law,²² or provide evidence of longstanding continuity or deeper roots to particular features of the law today.²³ Rather, I draw attention to a different role for copyright history: the value of history as a destabilising influence. In taking us to ways of thinking about copyright that, in some respects, differ starkly from our own and have no claim to any legal authority today or continuity with the present, history can sharpen the critical lens through which we view current copyright debates and lend to us a more flexible way of thinking through legal challenges today.

Further, *Art and Modern Copyright* makes an important claim as regards the relevance of legal scholarship to the history of the cultural domain. As I show, legal developments were premised on a number of conflicting characterisations of artistic copyright’s object of protection: works of creativity, works of mechanical labour, unique material objects, repetitions of a performance, privacy, the commercial value of the celebrity image and objects of study or social improvement. In this way, certain developments in copyright intersected with broader debates over cultural classifications which were, in turn, bound up with wider contests over artistic and social status, and changes in technology, commerce and aesthetics. For art historians and sociologists of art, *Art and Modern Copyright* points to the complex and dynamic nature of law’s relation to art historical developments, irreducible to a simple generalisation. Further, this book provides a number of specific examples where cultural developments cannot be fully explained without

¹⁹ A full list of archival sources can be found at p.xiv, ‘Abbreviations and Archive Sources’.

²⁰ Gómez-Arostegui, ‘Copyright at Common Law’, 6.

²¹ M. D. Dubber, ‘New Historical Jurisprudence: Legal History and Critical Analysis of Law’, (2015) 2 Critical Analysis of Law 1, 14.

²² Gómez-Arostegui, ‘Copyright at Common Law’, 1 and 4.

²³ B. Beebe, ‘Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law’ (2017) Columbia Law Review, forthcoming, presenting continuity between the omission of ‘aesthetic progress’ from the US Constitutional Clause and certain developments in US copyright law since the early twentieth century.

an account of the intricacies of the law, including the manner of its enforcement. As the title of this book indicates, the story of modern copyright as regards art, was both one of contests over the 'image' or concept of copyright, as well as contests relating to the visual images it protected.

An overview of the thematic Chapters now follows, by way of guidance to the reader. Each theme is addressed in a self-contained manner in separate Chapters, while cross-referencing to interconnected aspects of other themes where appropriate. This means that the reader can pick and choose the order in which the thematic material is read, depending on their interest. At the same time, a fully rounded picture of the developments in artistic copyright at any point in time can only be obtained by considering all the thematic Chapters together. While the book primarily concerns UK copyright, connections are made to contemporaneous developments in other jurisdictions (primarily France and the USA),²⁴ changes in international copyright treaties within which UK law was made (nineteenth century bilateral treaties and the Berne Convention),²⁵ as well as to significant differences in the local artistic copyright laws of certain self-governing dominions: Victoria, New South Wales, the Commonwealth of Australia, New Zealand and Cape Colony.²⁶

The first theme is the subject of Chapters 2 and 3 - *Art, Copyright and 'Authors'*. It concerns how art was different as regards the nature of the claims made by various groups that sought to be classed as copyright 'authors' ('authorship' being the legal category by which painters, engravers and photographers were protected) and how those claims influenced processes of legislative reform and adjudication in the period 1850-1911; the focus here is on the relationship between the claims of painters and photographers - as beneficiaries of new protection introduced in 1862 - though engravers are mentioned where relevant.²⁷ Existing scholarship argues that painting was protected by copyright in 1862 because it 'ought to be put in the same category' as writing as a matter of law,²⁸ and that this was premised on the 'aesthetic equivalence' of painting and literature: both were accepted, in the typical or ideal case, to involve the expression of the ideas of a creator. However, as I show in Chapters 2 and 3, artistic copyright also protected imitative/reproductive subject matter that, in the typical or ideal case, did not fit this paradigm. Exploring how the claims of photographers to protection were considered in the context of

²⁴ Chapter 2 p.42 (France); Chapter 3 p.63 and 83 (USA); Chapter 5 p.p. 173 (USA, France and Germany).

²⁵ Chapter 2 p.43 (bilateral treaties providing the context for the 1862 Act) and Chapter 3 p.52 (Berne Convention).

²⁶ Chapter 6 p.p.209-10 (Victoria, New South Wales and the Commonwealth of Australia); Chapter 5 p.192 (Cape Colony and New Zealand).

²⁷ Protection for engraving dates from the eighteenth century: above p.2.

²⁸ Bently, *Art and the Making*, 332, citing the Attorney General on the second reading of the Copyright (Works of Art) Bill 1861 (Parl. Deb., vol 162, ser. 3, col. 1637, 6 May 1861).

those made by other artistic copyright 'authors' such as painters and engravers, these Chapters demonstrate that the subject matter of artistic copyright also extended to practices whose aesthetic equivalence with painting and writing – even in an ideal case – was contested. Artistic copyright added a distinct dimension to the framework of copyright. The grounding assumptions of the category of copyright, as Sherman and Bently have shown,²⁹ was the protection of mental or creative labour, but by the mid nineteenth century the terrain of artistic copyright also expressly protected mental labour's theoretical opposite: mechanical labour.³⁰ While the protection of works of mundane labour was also a characteristic of literary copyright at this time,³¹ artistic copyright debates extended this yet further: by 1911 photographic copyright was protected on a mechanical paradigm alone – alongside early sound recordings – without any reference to human authorship, even in the ideal case.

In uncovering this dimension to copyright history, a more complex relation between legal debates and aesthetic ideas emerges, than that suggested by the consideration of painting in isolation. Drawing on the writing of art historians and sociologists of art – principally *The Making of English Photography: Allegories* by Steve Edwards³² and *Art, Power and Modernity: English Art Institutions, 1750-1950* by Gordon Fyfe³³ – I show that, in the mid nineteenth century, copyright debates often intersected closely with questions of artistic and social status: both legal and aesthetic developments were conceived within a taxonomy of authorship spanning mental and mechanical labour. Art was a contested terrain, and aesthetic classifications were frequently implicated in the pressure placed by various groups in the legislative arena;³⁴ copyright debates both drew on and actively contributed to wider debates about artistic status described by Edwards and Fyfe.

By contrast, by 1911, there was a shift in the relation between copyright debates and art, as regards painting, engraving and photography. By 1911, copyright was weak institutional evidence of artistic status. Adjudication under the 1862 Act produced a clear disjunction between copyright and art, and while in legislative reform the Royal Academy of Arts repeatedly sought to forge links between copyright and artistic status in a bid to assert its authority over cultural classification more generally, these initiatives ultimately failed in legislative reform. Early press

²⁹ Sherman and Bently, *The Making*, 173 and 192.

³⁰ Contrast to J. Hughes, 'The Photographer's Copyright – Photograph as Art, Photograph as Database' (2012) 25 *Harvard Journal of Law & Technology* 81, discussed in Chapter 2 n.52.

³¹ Alexander, *Public Interest*, p.p. 196-220.

³² Edwards, *English Photography*.

³³ G. Fyfe, *Art, Power and Modernity: English Art Institutions: 1750-1950* (London and New York: Leicester University Press, 2000).

³⁴ Contrast to A. Barron, 'Copyright, Art and Objecthood' in D. McClean and K. Schubert (eds.), *Dear Images: Art, Copyright and Culture* (London: Ridinghouse RCA, 2002) p. 277, p.284, discussed in Chapter 2, n.12.

photographers, with their ambivalent relation to aesthetic status, dominated the legislative debates on photographic copyright from the turn of the twentieth century, with the result that links between copyright and artistic status were severed by 1911. Photographs were protected on a mechanical paradigm alone in 1911, just at the point at which, as art historical literature shows,³⁵ there was art institutional evidence that photography, in the ideal case, was a fine art involving the expression of the ideas of a creator.

The second theme is the subject of Chapter 4 - *Painting, Copyright and Collectors* - which explores the position of the art collector in debates on painting copyright in the period 1850-1911. Histories of literary copyright - principally *Authors and Owners: The Invention of Copyright* by Mark Rose - describe the separation of legal protection for the intangible work from the physical book, as a development in eighteenth century copyright law.³⁶ By contrast, I show that a complex relationship between the intangible work and the physical object was explored in the nineteenth century debates about painting copyright such that copyright was conceived also as a law for regulating and restricting artists. Unlike literature where, once published, the physical book manuscript was understood to have no inherent value at all, with painting, the physical object - the painting on canvas - was often of great financial value. Accordingly, it was frequently contended that copyright should protect interests in the painting as a physical object, alongside or in preference to authorial interests in the intangible work. On this view, copyright was a law to be used *against* artists, that is, to restrict the activities of artists that were thought to damage the economic value of the physical painting owned by a collector. In exploring this facet of the copyright debates, I uncover the interplay between the debate of copyright concepts and the nineteenth century taxonomy of the copy, described in art historical literature - such as *The 19th-Century Art Trade: Copies, Variations, Replicas* by Patricia Mainardi³⁷ and *Art and the Victorian Middle Class: Money and the Making of Cultural Identity* by Dianne Sachko Macleod³⁸ - which cast light on ideas and subtle distinctions lost during the course of the twentieth century. I show that painters sought copyright rules that would accommodate the 'repetition' (a subsequent 'version' of a picture by the same artist in the same medium as the original e.g. oil painting) premised on painting as a performance or oral story-telling, whereas collectors proposed copyright rules that restricted this practice, to protect the financial value of

³⁵ M.F. Harker, *The Linked Ring: The Secession Movement in Photography in Britain 1892-1910* (London: Heinemann, 1979) and B. Newhall, *The History of Photography: From 1839 to the Present* (New York: The Museum of Modern Art, 1982), discussed in Chapter 3, p.50.

³⁶ Rose, *Authors and Owners*, 64-5, discussed below Chapter 3 p.107.

³⁷ P. Mainardi, 'The 19th-Century Art Trade: Copies, Variations, Replicas', (2000) *Van Gogh Museum Journal* 63.

³⁸ D. Sachko Macleod, *Art and the Victorian Middle Class: Money and the Making of Cultural Identity*, (Cambridge: Cambridge University Press, 1996) p.324.

the physical canvas as a unique material object. Legal debates both drew on and actively contributed to wider aesthetic understandings of the artist's repetition. Indeed, copyright was a terrain in which collectors' objections to the repetition were articulated far earlier than is accounted for in art historical literature.³⁹

The notion that copyright also concerned the interests of the owners of paintings leads into the third theme, discussed in Chapter 5: *Art, Copyright and the 'Face'*, which concerns the ways that artistic copyright functioned as a law protecting the 'face' or likeness of the sitter from the late 1850s to 1911. As well as considering how copyright ownership by the commissioner was motivated by the wish to protect the private nature of portrait paintings, I show that photographic copyright operated akin to a modern day publicity right in the two decades following the passage of the Fine Arts Copyright Act 1862 (a time which we today think of as a low-point for UK protection for the celebrity name and identity more generally⁴⁰). Not only did pecuniary interests in the celebrity image in the UK develop far earlier than in the USA (as described by Michael Madow in his much cited *California Law Review* article, *Private Ownership of Public Image*⁴¹), but copyright law, in providing a legal underpinning for trade understandings, contributed to their creation. The scheme of section 1 of the 1862 Act, with its complex ownership clause, facilitated trade distinctions between 'public' and 'private' photographs and contributed to the emergence of the celebrity image as an object of property. Trade practice, in turn, fed into the way cases concerning celebrity portraits were pleaded by photographers in litigation before magistrates; in leaving the labour of the photographer absent from the copyright analysis, the decisions of magistrates reinforced the values of the trade, rather than displacing them with an alternative construction. Drawing on John Baker's notion of the law's 'two bodies' explored in *The Law's Two Bodies: Some Evidential Problems in English Legal History* – the coexistence of lawyers' understandings of the reality of law's practical operation alongside statements contained in canonical texts⁴² – I comment on the legal institutional factors that enabled copyright to contribute to the creation and protection of the commercial interests that accompanied the rise of the celebrity image described in art historical scholarship such as *The Beautiful and the Damned: The Creation of Identity in*

³⁹ Chapter 4, p.113.

⁴⁰ Chapter 5, p.173, discussing *Clark v. Freeman* (1848) 11 Beav 112; 50 E.R. 759 and the work of Huw Beverley-Smith in the second title in this Cambridge Intellectual Property and Information Law series: H. Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge: Cambridge University Press, 2002).

⁴¹ M. Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights', (1993) 81 *California Law Review* 125.

⁴² J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), discussed in Chapter 5 p.189.

Nineteenth Century Photography by Peter Hamilton and Roger Hargreaves.⁴³ While a number of changes complicated copyright's role in protecting the face in the period 1880-1911, drawing on rare archival material – the records of the theatrical photographers, Foulsham & Banfield –⁴⁴ I show that, in the context of the theatre, copyright continued to operate akin to a publicity right to the early years of the twentieth century.

The final theme, explored in chapter 6 – *Art, Copyright and the Public Interest* – concerns the manner and extent to which artistic copyright accommodated various 'public interests'. On one level, the public interest in artistic copyright, exhibits similar characteristics to that noted by Isabella Alexander in her leading study of the role of the public interest in nineteenth century literary copyright, *Copyright Law and the Public Interest in the Nineteenth Century*: the public interest was a multifaceted and flexible concept, accommodating a variety of different interests.⁴⁵ However, in other respects the story of the public interest in art was very different. For instance, Alexander argues in relation to literary copyright, that conceiving the promotion of authors and the public as an 'opposition' or 'balance', 'has had an important role historically in developing copyright law'.⁴⁶ By contrast, the wider discourses on the public benefit of the promotion of art in the nineteenth century meant that, in the debates about artistic copyright, these goals were often closely intertwined: the promotion of art was directly related to improvement in public taste and economic prosperity. This suggests a broader social basis for artistic copyright.

However, turning to the development of principles that would be thought of as subjects for defences to infringement from the twentieth century onwards, contrasting examples are given. On the one hand, I show that the notion of private copying emerged far earlier in artistic, rather than literary copyright; by the mid nineteenth century there was a strong art discourse surrounding the importance of copying for study, which provided the Fine Arts Copyright Act 1862 with a different cultural and economic context for the legislative drafting of copyright rules, than that noted by Alexander in the debate of private copying in relation to literature and music. I also explore the cultural and economic contexts that explain the yet more extensive protection given by certain colonies – Victoria and New South Wales – to the right to copy in galleries and museums, while contrasting this to the vehement opposition on the part of local galleries, led by

⁴³ P. Hamilton and R. Hargreaves, *The Beautiful and the Damned: The Creation of Identity in Nineteenth Century Photography* (London: The National Portrait Gallery, 2001).

⁴⁴ Chapter 5 p.200.

⁴⁵ Alexander, *Public Interest*, discussed in Chapter 6 p.205.

⁴⁶ *Ibid.*, p.2 and 297, discussed in Chapter 6 p.205.

the Walker Art Gallery, Liverpool (whose continued existence was, in part, dependent on royalty income) to similar proposals put forward in the UK in 1911 which were ultimately unsuccessful.

While the example of private copying and gallery copying in certain colonies might suggest artistic copyright was more amenable to the accommodation of the public interest, in other respects artistic copyright was more restrictive. In this regard, I consider the inter-relation of copyright at common law and gallery rules regulating copying (at the National Gallery, London and Scottish National Gallery) before turning to a detailed case study of the manner in which the courts resisted attempts to accommodate social interests in determining infringement, at the very time when scholarship on literary copyright history – Kathy Bowrey's *On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence* – has noted the flexibility of infringement tests in balancing various competing interests through notions of 'fairness'.⁴⁷ Outside the court-room, an association of 'pirate' photographers put forward arguments about the public interest in the issue of unauthorised cheap and good quality photographic reproductions of engravings after famous paintings (such as *The Railway Station* by William Powell Frith and *The Light of the World* by William Holman Hunt) and arguments of this nature gathered force in certain newspapers and the art press, as well as being implicitly recognised by the practices of a government department (the Department of Science and Art). Yet, this was not an interest that the courts were willing to accommodate in determining infringement under the Engraving Acts and the Fine Arts Copyright Act in cases brought by printsellers such as Henry Graves and Ernest Gambart. The final part of the Chapter turns to art reproduction in the final decades of the nineteenth century, noting the copyright issues raised by the practices of art publishers, such as The Fine Art Society, and the manufacturers of commercial products that used the 'serious' art of Royal Academician painters in advertising, such that advertising hoardings became the 'poor man's picture gallery'.

The thematic Chapters (Chapters 2-6), uncover distinct aspects to the story of modern copyright, that have long been lost from view, some of which differ significantly from how we think about copyright and its history today. By 1911, these facets were concealed behind codified provisions, premised on the uniform treatment of all copyright subject matter. With copyright historians' focus on literature, not art, these stories have remained hidden, escaping the attention of not just lawyers, but also art historians and sociologists of art. Yet, as I fully explore in the concluding chapter (Chapter 7), drawing the thematic Chapters together, these

⁴⁷ K. Bowrey, 'On Clarifying the Role of Originality and Fair Use in Nineteenth Century UK Jurisprudence: Appreciating "the humble grey which emerges as the result of long controversy"' in C.W. Ng, L. Bently and G. Agostino, *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* (Oxford and Portland, Oregon: Hart Publishing, 2010) p.45.

lost perspectives are far from just antiquarian interest - the concern only of the legal historian. They also have important implications for us today, in how we understand copyright, its history, its engagement with the 'visual', as well as copyright's contribution to the history of the cultural domain.

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Art and Modern Copyright

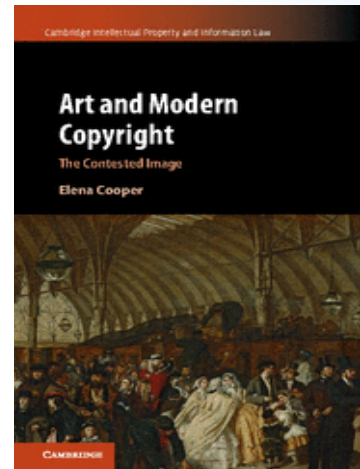
The Contested Image

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This book is the first in-depth and longitudinal study of the history of copyright protecting the visual arts. Exploring legal developments during an important period in the making of the modern law, the mid-nineteenth to early twentieth centuries, in relation to four themes - the protection of copyright 'authors' (painters, photographers and engravers), art collectors, sitters and the public interest - it uncovers a number of long-forgotten narratives of copyright history, including views of copyright that differ from how we think today. As well as considering the distinct nature of the contribution of copyright to the history of the cultural domain accounted for by scholars of art history and the sociology of art, this book examines the value to lawyers and policy-makers today of copyright history as a destabilising influence: in taking us to ways of thinking that differ from our own, history can sharpen the critical lens through which we view copyright debates today.

1. Introduction; 2. Art, copyright and 'authors', 1: 1850–62; 3. Art, copyright and 'authors', 2: 1862–11; 4. Art, copyright and collectors: the wrongs that artists commit; 5. Art, copyright and the face: a nineteenth-century publicity right; 6. Art, copyright and the public interest: galleries, printsellers and 'pirates'; 7. Drawing conclusions: images of art and images of copyright.



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