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Becoming Property: Art, Theory and Law in Early Modern France
By Katie Scott. New Haven, CT: Yale University Press, 2018. 384pp. $75.00 (hardcover).
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Copyright and the Value of Performance, 1770-1911
By Derek Miller. Cambridge: Cambridge University Press, 2018. 291pp. $29.99 (paperback).
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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 overwhelming 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.

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