Denis Diderot's '*Lettre sur le commerce de la librairie*' (1763/1767): A Reappraisal

1 Introduction

Denis Diderot's *Lettre historique et politique adressée à un magistrat sur le commerce de la librairie, son état ancien et actuel, ses règlements, ses privilèges, les permissions tacites, les censeurs, les colporteurs, le passage des ponts et autres objets relatifs à la police littéraire*,[1] to give the full title, is largely unknown in the Anglo-Saxon world. This fact may appear to conform to a certain cliché – that Britain or North American countries are traditionally little concerned about any thought outside the English-speaking world. The circumstance of 'Brexit' in the UK may reinforce the impression of a reassertion of British insularity with which a separation from French or continental European thought is being increased.[2] However, it would be unfair to cite this particular text as an example of such a possible development. The *Lettre sur le commerce de la librairie* (in this context '*librairie*' and '*libraire*' must be understood as 'publishing house' and 'publisher' or bookseller-publisher)[3] is not even well known in France and could hardly have made a great impact when it was written.

Diderot addressed his *Lettre* to Antoine Gabriel de Sartine who was *lieutenant général de police* in Paris and Director of the Book Trade (*directeur de la librairie*) in France.[4] The *Lettre* was written in October 1763, just when Sartine replaced Lamoignon de Malesherbes as director, and was then sent to Sartine in March 1764, in a toned-down version, but was not published.[5] Diderot probably revised the text in

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* This article is based on my talk at the British Literary and Artistic Copyright Association (BLACA), London, 8 November 2018.

[1] Diderot, ed. Versini (1995: 59-116), this is the edition used in the following. All translations from the French are mine. Another edition is Diderot, ed. Allia (2012). The text is also available at: http://classiques.uqac.ca/classiques/Diderot_denis/lettre_commerce_livre/lettre_com_livre.html (accessed: 8 October 2018), http://abu.cnam.fr/cgi-bin/go?commerce1 (accessed: 8 October 2018).

[2] An amusing presentation of the rather negative obsession of many English (not Scots) with the French (and the slightly bewildered indifference of the French about that) by the English writer and great Francophile Julian Barnes, on the occasion of opening of the Channel Tunnel in 1994, 'Froggy! Froggy! Froggy!', in: *Letters from London*, Barnes (1995: 312, 320). One might have some doubts whether this negative obsession will abate after 'Brexit'.

[3] See also Darnton (1979: xiv) who explains that eighteenth century French publishers were usually referred to as *libraires*, *libraires-imprimeurs* or *entrepreneurs*.

[4] Chartier (2002: 60).

[5] The adapted and significantly altered form of the *Lettre* was communicated to Sartine under the title of '*Représentations et observations en forme de mémoire sur l'état ancien et actuel de la librairie (...), présentées à M. de Sartine, Maître des requêtes, directeur général de la librairie et imprimerie, par les syndics et adjoints en charge*', whereby Diderot was not mentioned as author or signatory, see Rideau

1767, and, in 1769, thought of publishing it under the title of *Sur la liberté de la presse*, but that never happened during his lifetime. In fact, the text was eventually published in print for the first time in 1861.[6]

This article will not discuss the history of the French book trade[7] or of author's rights law in France,[8] but will confine itself to a discussion of Diderot's understanding of the legal concepts of privileges, (literary) property, the tension between protectionism and free trade, and the potentially perilous role of censorship for the book trade. It will therefore concentrate on an aspect of the intellectual history of the concept and the making of copyright or author's rights, based on, admittedly, a rather idiosyncratic text with little practical historical influence, but with a lot of interesting ideas. Previous academic discussions (except Chartier)[9] tended not to have focused too much on the *legal* concepts which appear in Diderot's *Lettre*.[10]

The idiosyncrasies of Diderot's text start with the overall argument of the letter. In the greater part of the rather discursive[11] *Lettre* Diderot examines the history and development of the privilege system (*privilèges de la librairie*) for the publication of books and its advantages and disadvantages for the French book trade; he frequently complains about the extreme damage to publishers and authors because of widespread pirate copying by booksellers in France who are not subjected to the privileges issued in Paris, such as Avignon or Lyon, or by foreign publishers who are naturally not bound by French privileges, such as the publishers in Amsterdam. But Diderot also postulates that the author has a literary property right which he can freely transfer, as any other property right, to the publisher in perpetuity. In the last part of the *Lettre* Diderot, seemingly as an afterthought, but probably as a hidden main message, raises his objections to the censorship system practised in France as being harmful to a prosperous book trade, while at the same time he prefers to maintain the privilege system, a monopoly right, to protect the French book trade, purposely in opposition to the then already popular idea of a free unregulated *laissez-faire* market. This short outline already reveals that some aspects sit uneasily together and can even be contradictory. Before the elements of Diderot's argument and their possible paradoxes are discussed

(2008a), sec. 3. For a detailed discussion of the different versions of the *Lettre*, see Proust (1961: 321, 325).

[6] Versini (1995: 55, 57-58), Chartier (2002: 60), Fujiwara (2005: 80), Trousson (2007: 188). A detailed history of the *Lettre* by Brunel (1903: 1).

[7] E.g. Turnovsky (2003: 387, 390). An overview with further references also in Fujiwara (2005: 79, 81, 86).

[8] E.g. Kamina (2001: 393-426).

[9] Chartier (2002: 62-63).

[10] One should also be careful about the use of imprecise definitions, such as 'The term privilege … stands for the primitive form of what we now call copyright', by Barzon (1988: 170).

[11] See the comment on the unusual style of the *Lettre* by Barzon (1988: 172), who suggests (hardly revised) hasty dictation.

in more detail, it is worth looking at Diderot's professional circumstances as a background that may help explaining Diderot's position.

2 Diderot, the *homme de lettres*, encyclopaedist, author and seller of literary works

In spring 1745 the publisher André Le Breton acquired the privilege to print a translation of the *Cyclopaedia* (1728) by the Englishman Ephraim Chambers. The publisher subsequently fell out with the translator, but Le Breton, together with two business partners, obtained a new privilege about a year later, this time for an expanded work, not just a translation. The original editor was, however, dismissed in August 1747 and replaced by the highly regarded mathematician and member of the *Academie Royale des Sciences de Paris* Jean-Baptiste Le Rond d'Alembert and the then relatively unknown – or controversial – Denis Diderot, who would even be sent to prison for a few months in Vincennes two years later for his *Lettre sur les aveugles* (1749).[12] The project of the *Encyclopédie* started well, covered by the privilege and particularly by the liberal censor and *directeur de la librairie* Malesherbes, who saved the first two volumes of the *Encyclopédie* (and its privilege) from the initial prohibition which its critics, including members of the Church, had tried to attain. But in 1759 the privilege got revoked by royal decree because of the tightening of censorship after the assassination attempt on Louis XV. in 1756. D'Alembert had resigned from his editorship even before the revocation. Malesherbes saved the project again, by allowing the publication tacitly without privilege and without censorship, provided the remaining ten volumes would appear at the same time and with a foreign place of publication. The volumes did then appear in December 1765 under the false place of publication of Neuchâtel in Switzerland. They were in part considerably amended and censured by the frightened publisher Le Breton himself, as the infuriated Diderot noticed in 1764, without, however, being able to reverse his publisher's single-handed editing. In 1772 appeared the last of the famous illustrations which accompanied the *Encyclopédie*, the *Planches sur les sciences, les arts libéraux, et les arts mécaniques*.[13]

What had prompted Diderot to write his *Lettre* is not entirely clear, but it appears that the publisher of the *Encyclopédie*, Le Breton, who was also syndic of the Guild of Parisian publishers/booksellers (*Communauté des Libraires Parisiens*), had asked Diderot to write a letter or memorandum to Sartine, to ensure continued support, at least a tacit support, of the authorities for the massive enterprise of the *Encyclopédie* which was under way. When the *Encyclopédie* had its royal privilege, it was

[12] On this text, see e.g. Furbank (1992: 54).

[13] Berger (1989: 9-13), Trousson (2007: 203-204).

nevertheless threatened by cheap unauthorised reprints from the south of France or from abroad, because the privilege did not apply to the whole country, for example not in Lyon or Rouen, and even this limited protection against price-undercutting competing reprints ceased after the *Encyclopédie* had lost its privilege. Nevertheless, the privilege system was thought to be the only protection for Parisian booksellers from imported pirate copies.[14] Because of this economic consideration, it seems, Diderot took the side of the booksellers in favour of maintaining the privilege system, and did not advocate an independent author's right in favour of the author. An author's right in the modern sense of the word of course did not exist in France at that time and was not in Diderot's mind: he rather concurred with the idea that an author's work was freely alienable property, as any other property, initially owned by the author.[15]

The project of the *Encyclopédie* was beset by the problem of piracy all along, with or without the privilege. However, the biggest piracy war really started after the completion of the *Encyclopédie* in 1772, and well after Diderot had written his *Lettre*. As a result of the withdrawal of the privilege, probably the majority of copies were sold abroad, because the French government did not allow an open sale. The second edition was published in Geneva by a consortium of publishers led by Charles Joseph Panckoucke in Paris. Since the first and second folio editions were expensive, three quarto and two octavo editions were subsequently published.[16] These cheaper editions would actually disseminate the *Encyclopédie*, also in France. In 1768, Panckoucke had bought the rights to future editions and the plates of the *Encyclopédie*, but it is unclear what these rights really were, given that the privilege was revoked in 1759, and a copyright in a modern sense did not exist.[17] What then followed, was an all-out trade war, partly among pirating printers themselves. In particular, Panckoucke's plan to produce a revised edition of the *Encyclopédie* was curbed by a cheap quarto edition of the original text published by an unauthorised printer from Lyon, Joseph Duplain.[18] Panckoucke counteracted this by giving up his plan of a revised edition and by making an agreement with Duplain in 1777 with regard to the quarto edition, whereby each party took half of the profits. Duplain's quarto edition became 'legalised' in this way, but faced immediately threats by other pirate printers, in form of cheaper quarto or

[14] Versini (1995: 56-57), Fujiwara (2005: 80).

[15] Diderot (1995: 78-79).

[16] Exact record of the editions of the *Encyclopédie*, and where ascertainable, the number of copies sold, by Darnton (1973: 1345).

[17] Darnton (1973: 1332). Panckoucke did receive a twelve-year *privilège général* on March 29, 1776, for the *Recueil des planches sur les sciences, arts et metiers*, that is, for the plates of the *Encyclopédie*.

[18] Darnton (1973: 1334).

octavo editions.[19] The history of the *Encyclopédie* itself is a good illustration for Diderot's concerns about the book trade.

Furthermore, the Parisian booksellers feared the erosion or complete abolition of the privilege after in 1761 the King's Council (*Conseil du roi*) granted the privilege for the publication of La Fontaine's *Fables* for fifteen years – not to a bookseller, but to the granddaughters of the author. This privilege, or apparently rather a simple licence, was in contradiction to the rights of the booksellers who wished to renew or obtain the privilege for that work.[20] For Diderot, who also discussed this *Affaire des Petites-filles de La Fontaine* (14 Sept. 1761)[21] in his *Lettre*, this decision was a breach of well-acquired publishers' rights: the opposition against the privileges in the *La Fontaine* case could be seen as a gracious act by the prince, but directed against the right of another, in that it took the property of a possessor in order to transfer it to a plaintiff against maxims of the law.[22]

Keeping up the project of the *Encyclopédie* and the economic interests of the publishers in Paris could not convincingly be the only motivation for Diderot's *Lettre*. Diderot's personal experiences with his publishers were rather complicated at times, also with Le Breton, who, as has already been said, acted as a private censor behind Diderot's back for the last ten volumes of the *Encyclopédie* and took the edge off a number of articles.[23] In 1764, a year after he had prepared his *Lettre*, Diderot, enraged by Le Breton's acts but powerless, could only write to Le Breton: 'Now that is the result of twenty-five years of work, pain, expenses, dangers, mortifications of any kind! An incompetent, an Ostrogoth [a 'Hun'] destroys everything in one moment. I speak of your butchering …'[24] Accordingly, in his *Lettre* Diderot speaks up for the publishers in a guarded way: 'I would like to tell you that this here is not just the issue of the interests of a guild. Ah! What does it matter to me if there is one guild more or less – what does it matter to me who is one of the most zealous proponents of liberty, understood in the widest sense … who has always been convinced that corporations were unjust and dreadful …'.[25]

However, Diderot did not see himself only as author, as *homme de lettres* as opposed to the publishers and booksellers, but also as one of them: 'Fortunately for me, and for you, I have more or less acted in the double profession as author and as bookseller, I have written and printed several times at my own expense, and I can assure

[19] An extensive discussion of the trade war over the quarto and octavo editions of the *Encyclopédie* by Darnton (1979: 139) *et seq*.
[20] Chartier (2002: 61), Rideau (2008b), sec. 4 and note 13.
[21] Discussion of this case by Rideau (2008b), sec. 2.
[22] Diderot (1995: 75-76).
[23] Chartier (2002: 62).
[24] Cited in Fujiwara (2005: 92).
[25] Diderot (1995: 59).

you that nothing matches worse than the active life of the trader with the sedentary life of an *homme de lettres*.'[26]

Beside the publishers' economic interests, there was another motivating factor for writing the *Lettre*. Particularly the fact that Diderot kept working on the *Lettre* after it was delivered to the intended addressee Sartine in 1764 in muted form and without naming Diderot's authorship, and that he had the intention of publishing it around 1769, showed that the defence of the publishers' privileges was also a justification and possibly cover for a *plaidoyer* for a free press and a free literature ('*Sur la liberté de la presse*' was the planned title for this publication). The argumentative tensions and contradictions in relation to the old privilege system, the new, liberal idea of a free market and of unfettered alienable property rights, the ownership rights of authors versus publishers, and the plea for free speech and press freedom characterise the *Lettre* throughout. This balancing act will be presented in the following sections.

3 The *Lettre*: the privilege as the foundation of the book trade

> 'In Avignon especially, where ten years ago only two printing houses were languishing, there are now thirty very busy ones. Does one write in Avignon? Is this region civilised? Are there authors, men of letters? No, monsieur, it is a people as ignorant, as dull as in the past; but it benefits from the non-observance of the regulations and inundates our southern provinces with its pirated editions (*contrefaçons*). This fact has not been overlooked. Is anyone alarmed by that? Not in the least.'[27]

The first part of the *Lettre* deals with the history of the privilege system[28] and then with the influence of privileges on printing, publishing, bookselling, and whether their abolition would make the authors win or lose.[29] Principal points of discussion are the possible transferability of privileges, whether their exclusive nature is beneficial or damaging to commerce, how they contribute to the funds or capital of a publisher/bookseller, whether it is better to limit the duration of privileges and to refuse renewal, what the rights of a publisher are when he acquires the work through transfer (*cession*) from the author, and what the different interests of author and publisher are.[30]

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[26] Diderot (1995: 80).
[27] Diderot (1995: 99).
[28] Mostly up to p. 77, Diderot (1995: 77). For a modern account of the French privilege system as presented by Diderot, see Chartier (2007: 132-135).
[29] Mostly from p. 77, Diderot (1995: 77).
[30] Diderot (1995: 59-60).

After this historical outline Diderot gives examples of books that did not sell well, and, not without irony, chooses writers who were even then considered to be the most important, some of them also highly controversial and popular, authors of France: the playwrights Corneille and Racine, Voltaire, but also philosophers (in a broad sense, including natural philosophy), like the early Enlightenment writer Pierre Bayle (*Pensées diverses sur la comète de 1680* (1683), *Dictionnaire historique et critique* (1702)) who was accused of deism or even atheism, as well as Pliny and Isaac Newton. The argument is clear: scientific and philosophical works need protection through privileges because they will always have a small number of buyers only and can never become big business.[31]

Diderot explains that the recent decisions of the *Parlement* (a provincial court, usually hearing appeals, in the *ancien régime*)[32] continued to renew and extend the privileges, but, in contrast to the *Parlement*, the King's Council rightly distinguished between free agreements of the author and the publisher (*l'acte libre de l'auteur et du libraire*) and the Chancellor's privilege.[33] The Council interpreted the decisions of the *Parlement* as restricting the privileges to ancient texts that were originally published on the basis of generally available (public domain) manuscripts, while the publishers' property remains guaranteed to those who have legally acquired from the living authors or their heirs.[34]

Furthermore, privileges do not have, according to Diderot's argument, an absolutely excluding, monopolistic effect: if it was only the question of reserving to one single individual the inalienable right to print books in general, or books in a particular area, like theology, medicine, law or history, or the translation of a specified author, or a science or art, and if that right is only an arbitrary act of a prince's will, with no foundation other than his personal pleasure, power or force, then such a privilege is obviously against the public good, against the progress of knowledge and

[31] Diderot (1995: 61-62).

[32] The most important *Parlement* was the *Parlement de Paris*. An outline of the role of the *Parlements* in French censorship in particular, see e.g. Furbank (1992: 90-91). On the role of the author as the one responsible when books were censured, see Chartier (1994: 50-51).

[33] Diderot's description presupposes some understanding of the structure of the French privilege and censorship system from the sixteenth century onwards. Ordered by Francis I, the *Parlement* of Paris passed a prohibition in 1521 according to which theological books could only be published with prior approval of the theological faculty of the Sorbonne; as of 1535 this also applied to medical books. That was followed by a complete prohibition of Lutheran and anti-Catholic books in 1542. The inspection of books was carried out by a commission (*libraires jures* and members of the university). In the Edict of Chateaubriand of 1551 these regulations were tightened and the import of books from protestant places of publication was completely prohibited, as well as the sale of books (not only theological ones) that were not approved by the Sorbonne. Publication was dependent on the grant of a privilege. See Weyrauch (1985: 318-219), and Chartier (1994: 49-50) with further references. Under Louis XIII, numerous decrees concerning censorship and printing regulation were passed. These were collected in the *Code de la librairie et de l'imprimerie*, promulgated in Paris in 1723. See Fujiwara (2005: 81), with further references.

[34] Diderot (1995: 70).

the merchants' businesses. But if there is a manuscript, legitimately transferred, legitimately acquired, of a work with a privilege which belongs to one acquirer only, and one cannot transfer this right in total or in part to another without a rights violation, then this right does not restrict creations and publications of endless variations on even the same subject. Diderot gives the example of the owners of the translation of Virgil by (François) Catrou which does not interfere with the owners' rights of the translations and publications of Virgil by La Landelle, Lallement and Desfontaines.[35]

This argumentation mixes, probably deliberately, the nature of a privilege with that of a literary property right,[36] whereby 'property' is indeed to be understood as ownership of a manuscript in its physicality and, as part of it, in the literary text it contains. There is no notion of a separate, intangible author's right in the text in a modern sense which manifests itself in this or that physical copy as concrete reifiers of the notional literary text or 'work' as the subject-matter of the author's right/copyright protection. There is, however, an idea of public domain works (Vergil) which can be appropriated/used for derivative/adapting works, for example translations that ought to attract protection themselves, but not in relation to the underlying public domain information (Vergil's text) which remains available to anyone pursuing a similar project ('*la propriété individuelle n'empêche point d'en composer et d'en publier à l'infini sur le même objet*'). In modern terms this can be seen as an application of the idea/expression dichotomy, for the public domain text (e.g. Vergil's *Aeneid*) or idea and information is available for different forms of expression (e.g. translations) which by themselves are protected (as original works).

The reason for the proximity of Diderot's pre-author's right analysis to its modern copyright interpretation is that the copyright and the author's right, straight from their start in Britain,[37] and in France during the French revolution,[38] have been modelled as property rights upon owners' ownership rights of traditional, especially tangible, property.[39] The new author's right was not a privilege, and was not meant to be, as Le Chapelier made quite clear in his report of 1791: '[giving an author the benefit of his work] is an exception which, under the old regime, was effected by royal

[35] Diderot (1995: 79-80).

[36] Chartier (2007: 131).

[37] Statute of Anne 1710, 8 Anne 19, section II: 'And whereas many persons may through ignorance offend against this act, unless some provision be made, whereby the *property in every such book*, as is intended by this act to be secured to the *proprietor* or *proprietors* thereof, may be ascertained, as likewise the consent of such *proprietor* or *proprietors* for the printing or reprinting of such book or books may from time to time be known …' (emphasis added) On the Statute of Anne, see Cornish (2010: 14).

[38] See e.g. Loi du 19 juillet 1793, Art. 1er: 'Les auteurs d'écrits en tout genre, les compositeurs de musique, les peintres et dessinateurs qui feront graver des tableaux ou dessins, jouiront durant leur vie entière du *droit exclusif* de vendre, faire vendre, distribuer leurs ouvrages dans le territoire de la république et d'en céder *la propriété* en tout on en partie.' (emphasis added). On the notion of 'property' in such legislation, see e.g. Geiger (2010: 132).

[39] Rahmatian (2011: 15-16).

privileges; which in England, is the subject of a protective statute; which, in our new legislation, will be the object of a positive law, and that will be much wiser.'[40]

Diderot interpreted the privilege as a property right, not as a royal favour, similar to what would later also apply to the author's right.[41] But in contrast to the latter, this property right is indeed a property right to a physical object that can be the result of an artistic expression, like a sculpture, where the physicality of the object overshadows the intangible conceptuality of the copyright work that it also embodies, more than in other art forms, such as literature or music which are in principle independent of a specific corporeal expression.[42] Diderot's particular interpretation of the privilege, a transformation into a property right and effectively an official sanction of a contract between an author and a publisher, probably reconciled him with his task to speak up for the booksellers' guild und the privileges it rests on, against his general objection to corporations and monopolies.[43]

Diderot's precise understanding of this property concept will be examined in more detail later,[44] but a critical point he makes reiterates his restricting and distinctive interpretation of the nature of the privilege. Diderot explains that by a decree (letters patent) of 20 December 1649, the Council prohibited printing any book which did not have the King's privilege. It also gave preference to printers who had obtained the privilege first, prohibited pirate printing, and restricted demands for renewal of the privilege to those who have been granted the privileges first, and ordered that the letters granting privilege or renewal of privilege be registered in a public register.[45] This general practice was not observed in the Council's decision in the *Affaire des Petites-filles de La Fontaine* (14 Sept. 1761) in which the privilege was given to La Fontaine's granddaughters, although the rights in the work were first transferred by the author himself to his publisher Barbin who (or his successors in title) renewed the privilege.[46]

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[40] Le Chapelier's report of 1791 (longer version in *Moniteur Universel*, vol. VII, p. 116): '[faisant jouir un auteur de son travail] est une exception qui, dans notre ancien régime, était consacrée par des privilèges royaux; qui, en Angleterre, est l'objet d'un acte tutélaire; qui, dans notre novelle législation, sera l'objet d'une loi positive, et cela sera beaucoup plus sage.' Quote from, and translation by, Sterling (2008: 1567-68).

[41] Thus the widespread narrative, for example by Hesse (1989: 474), that '[i]n France, ideas were not legally considered property during the eighteenth century', but 'a gift from God, revealed through the writer', is simplistic. Later, however, Hesse recognized the 'property of the creator'-idea in the eighteenth century and referred specifically to Diderot, see Hesse (2002: 34). There are arguably some imprecisions from the viewpoint of intellectual history, such as 'Diderot, Lessing, and Fichte celebrated romantic originality', see Hesse (2002: 36): Fichte probably, Diderot and Lessing rather not. For a more differentiated history of authorship and copyright against the simplifying 'Romantic authorship' narrative, see Rahmatian (2011: 149-182).

[42] Rahmatian (2011: 17-19).

[43] Chartier (2002: 62).

[44] See below under 4.

[45] Diderot (1995: 71).

[46] See Rideau (2008b), sec. 2.

Diderot has – or pretends to have – little sympathy for this ruling. Ironically he remarks that it is nice that a people honours its great men and he will not reprimand this noble and generous sentiment. But granting the privilege under these circumstances appears as if Alexander, the conqueror of Thebes, was meant to respect the house of Pindar among the ruins of his land; in fact, however, it is as if Pindar's house has been spared and honoured although Pindar had already sold his house to someone else and Alexander has torn apart and cancelled the sales contract and chased out the legitimate owner.[47] The decision of the King's Council overrode the booksellers' asserted rights to the privilege in that after the expiration of the original privilege it let the right (literary property right?) 'revert' to the author's heirs.[48]

4 The proprietary nature of the privilege in Diderot's interpretation: traces of Locke

Diderot's idea that a royal privilege should not really be different from a property right has a predecessor in the case of the privilege of Crébillon. The playwright Prosper Jolyot de Crébillon (1674-1762) transferred the property in his works to Parisian publishers, but towards the end of the royal privileges that the publishers enjoyed for the exclusive exploitation of his work Crébillon sought the King's protection through privilege for his work for himself. The grant of such a privilege for the benefit of the author, not the publisher, would enable the author to renegotiate the terms of exploitation with his publishers. So the publishers who held a privilege in respect of his works objected to the registration of his new privilege. The case came before the King's Council, and although it did not reach a decision in this case, the conflict was between the concepts of a traditional privilege (the author's request for a privilege for his own benefit) and of an existing property right which the privilege could only affirm, but not abrogate (the author's earlier transfer of rights in his work to the publishers). The latter position was obviously taken by the booksellers. Their defence counsel argued that the privilege is undoubtedly an act of mercy by the monarch but, when granted, it does not change anything in the nature of the property right; it rather affirms justice in that 'it puts the owner into the position to reap the fruits of his labour and expenses'.[49]

The position of the Parisian booksellers followed the view of an *avocat au Parlement de Paris*, Louis d'Héricourt (1687-1752) who said in a memorandum in 1726 that it is not the privilege granted by the king which confers ownership in the work

[47] Diderot (1995: 75).
[48] Fujiwara (2005: 84).
[49] Rideau (2008b), sec. 3.

on the publishers. It is rather the publishers' acquisition of the manuscript with which the author transfers ownership to them, by means of the price he receives for it.[50] For Héricourt the literary property is outside the realm and the arbitrary grace of the privilege, and therefore he considers the transfer of a privilege as illegal and void.[51] Diderot studied Héricourt's writings in his preparation of the *Lettre*, and he referred to him approvingly: 'I have had the satisfaction to see that I share the same principles with him and we both draw the same conclusions.'[52]

In his *Lettre*, Diderot follows Héricourt as far as the effects of the privileges are concerned. The privilege, Diderot says, is only a safeguard granted by the sovereign (ruler) for the preservation of a good (here the literary property). Were the notion of the privilege of the publisher beyond these limits, that would be an error, 'that would mean planning an atrocious invasion, playing with conventions and property, injuring unfairly the literati and their heirs and successors in title' (he uses the juristic term '*ayants cause*'), and that would 'gratify through tyrannical preference one citizen at the expense of his neighbour.'[53]

Diderot presents the usual agreement between the publisher and the author as follows: the author proposes his work to the publisher, they agree on a price and other stipulations. These stipulations are agreed in a deed under private seal by which the author transfers/assigns (*cède*), in perpetuity and with no reversion, his work to the publisher and his successors in title (*ses ayants cause*).[54] As already said, in Diderot's time the rights were attached to the physicality of the work in form of a manuscript and passed with its transfer; the literary property being the written text in form of the physical manuscript; beyond that there was no legal concept of an author's right in the text as such. This author's property is an early example of the liberal understanding of property. Diderot says: I (as author) am obviously the master of my good or bad productions, which I have freely, which I can alienate against a price received, and which I can give away like a vineyard or field from the heritage of my forefathers.[55] The justification for (literary) property ownership initially vested in the author has a Lockean flavour:[56]

> 'In fact, what is the good that can belong to man, if a work of the human mind, the inimitable fruit of his education, his studies, his evenings, his time, this

[50] On Héricourt's concept of literary property, see also Baldwin (2014: 58, 60).
[51] Passage quoted in Fujiwara (2005: 84-85).
[52] Diderot (1995: 79).
[53] Diderot (1995: 79).
[54] Diderot (1995: 69).
[55] Diderot (1995: 76).
[56] Diderot (1995: 78).

> researches, his observations; if the most beautiful hours, the most beautiful moments of his life; if his own thoughts, his feelings of his heart, his most precious part which does not perish, what immortalises him, do not belong to him? What comparison is this between man, the very essence of man, his soul, and the field, the meadow, the tree or the grapevine, which nature initially offered to us equally and which the specific individual has only appropriated by cultivation, the premier legitimate means of possession? Who is more entitled than the author to dispose of his thing by way of gift or sale?'

True ownership includes the author's right to free alienation, and that apparently also applies to the fruit of 'his own thoughts, his feelings of his heart, his most precious part which does not perish, what immortalises him'. This is thinking in terms of copyright concepts, not author's rights concepts; the author is initially *property* maker (not creative artist) and first property owner, and copyright-property is conceptually not different from any other property.[57] If such a property right is not safeguarded in all consequences, then this is a grave injustice: Diderot argues that if someone has bought a house and has not exclusive ownership and use (enjoyment), if all acts which assure possession do not also assure exclusive privileges, and if, under the pretext of being indemnified for the price of his first acquisition, the owner can be deprived lawfully of the house, if such a robbery (*spoliation*) were not a most tyrannical act, then a people would be reduced to the condition of being serfs.[58] Diderot conflates here the booksellers' privilege in the classical sense with the author's literary property right, whereby a privilege itself is property, as Diderot claims. That blurs the difference between the (physical) literary property in the manuscript granted by the author that is freely and irreversibly alienable and perpetual, and the privilege granted by the king (normally) to a publisher to protect him against illicit copying and reprinting. And this privilege is also supposed to have the quality of a property right itself but is not supposed to interfere with the private property right in the manuscript or literary property alienated by the author but rather confirms and fortifies it. It is not completely clear whether Diderot deliberately mixed these different qualities of property (whereby the interpretation of the privilege as property is peculiar anyway) or whether he did not entirely appreciate himself the legal niceties of this analysis.

However, one point is certain in Diderot's view: the literary property in the author's manuscript and the unassailability of the transfer of ownership to the publisher is a cornerstone of law and society. Literary property is the most legitimate of all possessions, like a house or field and should not be treated differently: 'Let's leave the

[57] Rahmatian (2011: 35, 43).
[58] Diderot (1995: 77).

chamber, my friends, and break the quill and take the instruments of the applied arts (*arts mécaniques*) if the genius is without honour and without freedom.'[59] The author is the master of his work, or nobody in society is master of his affairs. The publisher possesses the work like the author and he has got the incontestable right to print and reprint.[60] This property approach to a literary creation, as it seemed to be prevalent in the eighteenth century (except with Kant),[61] ensured the assignability and marketability of the work, and may be a reason why copyright, and later author's rights to some extent, would focus conceptually so heavily on the property aspect rather than the personal aspect of the right.[62]

Thus effectively the author is postulated as the owner of the literary property in order to enable him to alienate this property unassailably and irrevocably to the publisher who then also obtains a privilege to protect the enjoyment of the acquired literary property against unauthorised reprinting, the protection which the other 'property right' of the privilege entails. By contrast, a modern copyright would allow the author to enjoy the proprietary rights in his work irrespective of the ownership in the actual manuscript and would protect from pirate editions through the reproduction right that the copyright contains. If it is a copyright in a strict sense, the author would be allowed to alienate and divest himself completely of this property right; if it is an author's right, he would only be able to assign the economic rights (dualist system, France), or could not assign at all (monist system, Germany).[63]

Diderot does not seem to show awareness of a notion of moral rights,[64] at least not in the *Lettre*. He does say that a bookseller should take care that when a book has been published either at home or abroad, that not one line is being mutilated or changes are made,[65] which hints at the integrity right. When Diderot found out in 1764 that his publisher had amended significantly the last volumes of the *Encyclopédie* behind his back, today a clear violation of the integrity right, Diderot's reaction was far less muted.

Diderot's idea of the freedom of the citizen (he uses frequently the term '*citoyen*' rather than '*sujet*') to own and alienate property, which he rightfully obtains as the fruit of his own labour, contains much of Locke's spirit and the role Locke assigns to property. As Locke set out in the well-known passage of his Second Treatise of Government, God has given man all resources of nature in common, and man must

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[59] Diderot (1995: 94).

[60] Diderot (1995: 79).

[61] Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks* (1785) ('On the Unlawfulness of Reprinting of Books'), a shorter version in his *Metaphysics of Morals*, Kant (1977: 404-406). Commentary, e.g. by Rahmatian (2011: 86-90).

[62] Stern (2012: 31-32).

[63] Rahmatian (2011: 49, 51, 205) with further references.

[64] For an overview of moral rights in modern legal systems, see e.g. Lucas-Schloetter (2015: 50).

[65] Diderot (1995: 106).

appropriate these resources for his use by taking them out of their natural state. Man has property in his own person, '[t]he *labour* of his body, and the *work* of his hands … are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.'[66] The step from tangible property which Locke had in mind in the late seventeenth century to intangible literary property was not so easy. Locke himself was, however, open to the notion of a literary property, because in his comments to the draft of a Licensing Bill for the Stationers' Company in 1695, following the expiration of the Licensing Act 1662 in 1692,[67] he said that Parliament had better 'secure the Author's property in his copy or his to whom he has transferred it."[68] This indicates the endorsement of a concept of literary property, though still much attached to its physical manifestation, the copy. So that was actually not a modern copyright as such, but a concept of literary property which Diderot, under Locke's influence, would later have in mind. A real connection between Locke's property theory in his *Second Treatise*, chapter 5, and property rights in books does not seem to exist.[69] In his *Second Treatise* Locke clearly has tangible property in mind. His reference to 'copy' and 'transfer' in his comments to the Bill also suggests that he has not abandoned the idea of literary property as a tangible property.

Later Lord Mansfield in *Millar v. Taylor*[70] was very open to a principal examination of the notion of property and was happy to include the notion of literary property in the realm of property, even beyond the Statute of Anne, in the form of common law copyright-property alongside statutory rules. As is well known, this interpretation did not survive because of *Donaldson v. Becket*,[71] a decision that rejected the common law copyright, at least for published works.[72] However, the notion of literary works being property (whether or not statutory only) was based on the notion of the author having control over his publications, not only for economic, but rather also for reputational reasons,[73] if one follows Lord Mansfield's reasoning. The Statute of Anne nevertheless contains (at the end) a reversion of rights provision in favour of

[66] Locke, *Second Treatise*, §§ 26-27 (2013: 287-288), (original emphasis).
[67] See e.g. Ginsburg (2006: 640-641), Rose (2003: 78). The Licensing Act 1662 expired in 1692, but was continued until the end of the existing session of Parliament. Renewal was then refused in 1695.
[68] Locke, *Comments on the Licensing Bill*, 1695 (1979: 795) (modernized spelling).
[69] Hughes (2010: 557).
[70] *Millar v. Taylor* (1768) 4 Burr 2303. See Deazley (2004: 175-177).
[71] *Donaldson v. Becket* (1774) 4 Burr 2408. See Deazley (2004: 205-210).
[72] The reading of *Donaldson* suggests that common law copyright persists for unpublished works, but the interpretations in this regard are not all that clear, see Ginsburg (2006: 651) and Rose (2003: 80-81).
[73] Rose (1993: 81).

the authors after fourteen years,[74] which speaks more for an economic rationale. Although the Statute of Anne conceptualised literary property always as property in the usual sense,[75] its main focus was rather trade regulation to safeguard the booksellers' economic interests.[76] The author's proprietary entitlement was then mainly a prerequisite to establish the booksellers' protection from pirate printing, and was therefore not the primary focus of legislation. Diderot's position is similar when he supports the property protection of authors' writings, also against too far-reaching privileges.

However, when Diderot occasionally refers to England, he does not mention the Statute of Anne.[77] He remarks that in England there are booksellers but there is no booksellers' guild (*communauté de libraires*); books are printed and there are no privileges. However, 'the pirate printer is dishonoured like a thief', and that theft is pursued before the courts and punished by the laws. But he points out that pirate printing of books published in England went on in Scotland (the Scottish case of *Hinton v. Donaldson*[78] was decided after the *Lettre*, in 1773)[79] and in Ireland (Thomas Jefferson would later also benefit from the cheaper Irish editions),[80] while within England, for example in Oxford or Cambridge, books from London are never pirated. In England, Diderot reports, there is no difference between the sale of a field or a house and the sale of a manuscript.[81]

The natural right to property through own labour underpins the idea of the author's right's property right in his work, following Locke. However, Locke saw property furthermore as a cornerstone of liberty: the freedom of the individual to create property and to dispose of it freely.[82] For Locke, property is also man's life, liberty and estate:[83]

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[74] Statute of Anne, 8 Anne, c. 19 (1710): 'That after the Expiration of the said Term of Fourteen Years, the sole Right of Printing or Disposing of Copies shall return to the Authors thereof, if they are then Living, for another Term of Fourteen Years.'

[75] 8 Anne, c. 19 (1710): 'Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the *authors or proprietors of such books and writings*, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books …' (emphasis added).

[76] Deazley (2004: 45), with some qualifications.

[77] Diderot (1995: 78, 110).

[78] *Hinton v. Donaldson* (1773) Mor 8307, 5 Br Supp 508.

[79] MacQueen (2016: 128).

[80] Letter from Thomas Jefferson to Alexander Donald with enclosure, Philadelphia, Oct. 11, 1792, Jefferson, *Papers* (2003: 469): 'The Irish 8vos. are preferred to the English because cheaper'.

[81] Diderot (1995: 78).

[82] Rose (1993: 85).

[83] Locke, *Second Treatise*, § 87 (2013: 323).

> ‘Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man, or number of men in the world, hath by nature a power, not only to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men; but to judge of, and punish the breaches of that law in others …’

That is supposed to apply to literary property as well, also according to Diderot’s understanding.[84] However, it is the privilege which enables the punishment of the breach of life, liberty and estate – the estate here in form of the literary property which may be held by the author but most typically by his publisher who acquires the literary property from the author. Accordingly, the author may be (or should be) prevented from obtaining a later privilege in his works that may interfere with the literary property of his publisher, as the Crébillon case has shown. The liberty protected by the literary property is therefore not so much the liberty of the author, but the liberty of the publisher who acquires the literary property irrevocably and unassailably from the author in order to enjoy this liberty conferred by property: hence the importance of the preservation of the publishers’ privileges in Diderot’s interpretation.

5 Protectionism rather than free trade

The privilege, as Diderot sees it, is supposed to reinforce an existing literary property right. If one applies modern author’s right/copyright analysis, then the literary property transferred by the author to the publisher contains the right to *use* and exploit (e.g. reproduction right), while the privilege contains the right to *exclude* and defend against infringement (pirate copying). The modern author’s right encompasses both aspects of property and is independent of a specific corporeal reifier (manuscript etc.). Whether a property right itself or not, the privilege seeks to prevent pirate printing, and Diderot invokes feelings of natural justice for a general consent to this protection measure. Does one have to have a deep understanding of the principles of justice to feel that pirate printing is theft? he says, and then he also complains that pirate printing carries on, particularly in the provinces where one pretends not to know of the privileges and their extensions.[85] Diderot feels that he needs to argue against the increasingly prevalent trend of his time in favour of free trade against restrictions, guilds and protectionist measures. It is a strange paradox, he says, in a time where experience and common

[84] Diderot (1995: 77-79).
[85] Diderot (1995: 72-73).

sense concur in showing that every shackle is damaging to commerce, to advance that it is the privilege only which can sustain the book-selling trade: 'The privilege is abhorred by the good citizen and the enlightened minister.'[86]

However, Diderot argues, competition ruins the best enterprise. Especially pirate printed books undercut the price and put the publishers out of business. The public only appears to benefit from competition, but in fact lawful printers remain without recompense, while the unlawful pirate printer remains with no fortune. The result is bad workmanship and bad authors because there is not enough money in the book trade due to so much pirate printing.[87] Complete liberty of the trade will lead to the complete extinction of the community of letters.[88] One can count easily the number of publishers who made a lot of money out of the book trade, but there are so many who one does not mention, those who languish in the rue Saint-Jacques or the quai des Augustins (in Paris).[89] Competition hits in effect only the small authors because the booksellers have to secure their turnover with cheap and low-standard works,[90] with the effect that more ambitious and scientific works are not (re)printed, for example Basnage's *Coutume de Normandie* or Ducase's *Jurisprudence*.[91]

Diderot claims that we owe to the property right in the acquired manuscripts and the unalterable permanence of the privileges that the works of scientists and encyclopaedists are available in print, and that also includes the works by [Bernard de] Montfaucon,[92] Cujas,[93] [Jean-Baptiste] Rousseau,[94] Molière, Racine and 'in a word, all great books of theology, history, learning, literature and law.'[95] If privileges are completely abolished, the bookseller/publisher would have no protection against competition, which would destroy his credit and enterprise, unlike if the property is exclusively transferred to someone who can then exploit it.[96] Publishers without privileges are manufacturers without funds or capital.[97]

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[86] Diderot (1995: 77).

[87] Diderot (1995: 63-64).

[88] Diderot (1995: 116).

[89] Diderot (1995: 82). The street or quay of the booksellers in Paris was then particularly the quai des Augustins (now quai des Grands-Augustins, 6ème arr.).

[90] See the study about the 'Grub Street'-like scene of literary workers and hacks of the *Ancien Régime* by Darnton (1982: 16-20) *et passim.*

[91] Diderot (1995: 90).

[92] Bernard de Montfaucon (1655-1741), a French Benedictine monk, paleographer and a founder of the discipline of archeology, author of *L'antiquité expliquée et représentée en figures* (1719-1724), to which Diderot specifically refers.

[93] Jacques Cujas (Cujacius) (1522-1590), the jurist and legal humanist.

[94] The playwright and poet Jean-Baptiste Rousseau (1671-1741).

[95] Diderot (1995: 74).

[96] Diderot (1995: 82).

[97] Diderot (1995: 87).

Furthermore, Diderot stresses that the book is not an ordinary commodity: a work of literature is not a machine or an invention. Often there is an infinity of circumstances which explain why a book has been written and why it is successful or not. The quality of the book is no indication for its success, and he gives the example of the initial editions of Montesquieu's *De l'Esprit des lois*.[98] And he also puts forward a more pecuniary argument: cloth which is no longer fashionable and up to date retains a certain value if still in stock, while a bad book in stock has no value at all.[99]

Therefore, privileges are necessary. Diderot concedes that there is no doubt that the ruler or sovereign who can abolish laws in circumstances where these have become harmful can also refuse the continuation of a privilege, but there is probably no imaginable case where he would have the right to transfer this privilege or divide it (as a partial transfer). This is the result of the nature and name of the privilege (that is a title to have a general and exclusive right against everybody else), as well as of its limited duration.[100] There are those, Diderot says, who advocate the transformation of the privileges to simple (non-exclusive) permissions without exclusion clauses which, if given to several persons at the same time, will vitalise the market and create competition in relation to the sales quantity of beautiful editions at the lowest possible price. But that would be treating the privilege as if it were given or refused only out of grace.[101]

Furthermore, Diderot argues, it is not right to say: all exclusive rights are bad. One should rather show that it is not the property exclusive to the publisher that is damaging to the public interest. So the argument that the privilege should be abolished, despite being a property right and founded on a proper acquisition, does not hold good.[102] An indefinite privilege would not lead to a price monopoly in Diderot's opinion: 'Would the perpetuity of the privilege allow the publisher to dictate prices?' he asks, and concludes that it would be a stupid trader who ignores his interest to achieve quick sale of his (cheaper) products.[103] Diderot's general distrust towards guilds becomes apparent in his comment in which he emphasises that the abolition of guilds (*corporations*) has nothing to do with the privileges: these two matters are often confused.[104]

Privileges also confer obligations on the privilege holder, in some cases even beyond their expiration. Diderot gives the example that the King's Council issued an

[98] Diderot (1995: 66).
[99] Diderot (1995: 85-86).
[100] Diderot (1995: 79).
[101] Diderot (1995: 89).
[102] Diderot (1995: 88).
[103] Diderot (1995: 95).
[104] Diderot (1995: 98).

order against the publishers in Toulouse for the confiscation of unauthorised reprints *after* the expiration of the privileges. The reason was that these books could be found in great numbers even in the shops of the privilege holders: a merchant, Diderot argues, should not be idle in relation to his assets which are stapled in his warehouses. He has obtained the privilege and has acquired the author's manuscript and paid him. Thus privileges must be used and the sale of unauthorised reprints by holders of privileges prevented.[105]

Most importantly, protection from cheap, unauthorised reprinting of books from abroad must be ensured to preserve the French book trade. The merchants of one nation, Diderot argues, are and will always be in a state of war with the merchants of another. Their only remedy is to close the import of the foreign editions, to grant privileges for the own works to the first holder, or, if one prefers that, to treat the works as ancient manuscripts for which one does not pay a fee and which are in the public domain (*droit commun*).[106]

As a result of his conclusions, Diderot proposes the following for the future of privileges for the publishers and booksellers in France: (1) The system of privileges should remain; (2) The privileges should be regarded as simple safeguards of vested publishers' property rights, as the acquired works are unassailable property, and the reprints belong to these who acquired them, unless there is a derogation clause to the contrary; (3) The transfer of privileges should not be allowed, except in the only case where the legitimate owner freely and knowingly without payment allows it; (4) privileges should continue to be registered with the booksellers' guild (*chambre syndicale*) in Paris; (5) this registration can be suspended where it is prejudicial to a third party's right, until a decision by the King's Chancellor has been made; (6) in relation to foreign books which could fall under a privilege: the first possessor shall own it like his own property, or they are declared common goods, whichever one judges more reasonable; (7) import restrictions shall be rigorously enforced; (8) imports from 'piracy centres' like Avignon should be strictly controlled, and customs declarations (*acquit-à-caution*) of books from these places should be required for allowing the import.[107]

Diderot knew that he argued against the ever greater tide in favour of free trade and a *laissez-faire* economic system. Monopolism and mercantilism, terms initially coined by the critics,[108] were under attack during the time of the writing of the *Lettre*. The Physiocrats, starting with Quesnay, recommended free trade.[109] While Quesnay

[105] Diderot (1995: 75).
[106] Diderot (1995: 100).
[107] Diderot (1995: 101-102).
[108] Schumpeter (1954: 115).
[109] Schumpeter (1954: 235) and note 5.

himself qualified free trade and free competition in some respects,[110] Turgot (rather a 'post-Physiocrat') advocated an unrestricted free trade in the 'liberal' sense,[111] as it would later be called. This leads directly to Adam Smith,[112] who did, however, make limited allowance for a 'privilege' (copyright) for books.[113] Diderot's concept jars with these economists' view who would have considered his proposals as protectionist-mercantilist. They would win the argument in the historical process, but Diderot himself already provided for this development by interpreting the privilege as an ultimately dispensable confirmation of an existing private property right, actually against the true nature of the privilege. Such a property-privilege can then serve as a liberal, freely transferable and exchangeable, no longer feudal, private property right – an essential legal element for free trade.

Diderot may have attempted to present a bold statement in favour of the (reformed) privilege, but he realised some unwanted consequences of maintaining this system. He says, for example, that if one is against the extension of privileges, so that the work is put into the public domain (*en commun*) (that is, free trade), then this leads to the impoverishment of the publishing businesses, but if one is in favour of the extension of privileges, then only big businesses benefit from that (that is, protectionism).[114] In fact, this conundrum and a few others cannot be resolved, and they haunt the free trade/protectionism debate to the present day. It sounds a bit like a precautionary clause when Diderot finishes his defence of the privilege with the following words:[115]

> 'Well, monsieur, that is what I had to tell you about the privileges of the book trade. I may be mistaken in some points, but those are of little importance; I may have given certain reasons greater weight than they have; I may not yet be fully initiated in the profession to reach a correct evaluation of the advantages and disadvantages; but I am certain of my sincerity, or else my wisdom.'

6 The relationship between the privilege and '*ouvrages dangereux ou proscrits*'

[110] E.g. Quesnay (2008: 244-245, 301, 306-307).
[111] E.g. Turgot (1997: 150-151, 200-201); Schumpeter (1954: 234-235, 244).
[112] E.g. Smith (2000: 481-488, 501-502, 814-815); Schumpeter (1954: 245).
[113] 'A temporary monopoly … may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author. But upon the expiration of the term, the monopoly ought certainly to determine …', Smith (2000: 814).
[114] Diderot (1995: 68-69).
[115] Diderot (1995: 101).

Diderot was well aware of another function of the privilege: censorship. However, he could not discuss this too prominently in his *Lettre*, partly because he did not want to undermine the aim of the *Lettre* to back the preservation of the publishers' privileges, and partly because he had the traumatic experience of having been imprisoned in Vincennes between July and November 1749 for some of his works, particularly the *Lettre sur les aveugles à l'usage de ceux qui voient* which appeared earlier in that year.[116] But he did devote the final section of the *Lettre* to the question of censorship, a theme which was probably closest to his heart in the preparation of this text, as his plans around 1769 to publish a reworked version under the title *Sur la liberté de la presse* indicate.

What is the situation about 'dangerous' or 'proscribed' books?, Diderot asks. They are printed in secret abroad or in France: there are four times as many copies of these books than of a book under a privilege. And these books are even more dangerous than the *Lettres Persanes* (by Montesquieu, but Diderot needed not to mention the author of one of the most famous texts of the French Enlightenment). And yet, there are hundred editions of this book, Diderot says, and he adds that the same applies to the *Decameron* by Boccaccio, and the works of the Roman satirists Juvenal and Petronius. In which private library can one not find the authors (Pierre) Bayle, Montesquieu, Helvetius (*De l'esprit*), Rousseau – and here Diderot does not refer to the poet Jean-Baptiste, but to the famous Jean-Jacques and mentions his *Émile*, the *Héloïse*, his '*Traité de l'inégalité des conditions*' (as Diderot puts it, but actually: *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* – his *Second Discourse*), and his *Contrat social*. Some books of this kind pretend to have been published in Amsterdam and other places outside France.[117] Not without a certain pride Diderot presents the finest works of the French Enlightenment,[118] and some of them, like those by Montesquieu and Rousseau, are as important today as they were then.

Diderot's argument is this: the books that are of the greatest interest to the public, such as Pierre Bayle's *Dictionnaire* (the principal work of the early Enlightenment) do not, and cannot realistically, obtain a privilege, but are still printed, condoned and tacitly sold and bought in France, while the proceeds of these sales actually go abroad to booksellers who circumvent the law.[119] It would be better to tax such books rather than prohibit them if they are candidates for a privilege or a tacit approval of publication without a privilege.[120] What happens, however, is that the

[116] Trousson (2007: 61-72).
[117] Diderot (1995: 104-105).
[118] See Darnton (1982: 14-15) on the fact that the great writers of the French Enlightenment were within one generation and did not have adequate successors.
[119] Diderot (1995: 105, 107).
[120] Diderot (1995: 110).

stronger the prohibition of a book is, the more that raises the price of the book, the more it excites the curiosity to read it, the more it is bought, the more it is read. No dangerous book is unavailable, but the (inflated) proceeds of sale go abroad.[121]

Diderot could not take the risk of attacking censorship directly, also because he would then have upset the informal practice of 'tacit permission', a generally accepted, but not officially acknowledged toleration, under which the book in question was not formally sanctioned and made legal, but not proscribed either.[122] Diderot himself relied heavily on that informal procedure and the benevolence of friends in high places, such as Malesherbes, for his own works and for the publication of the *Encyclopédie* after it had lost its privilege. A consequential-commercial argument – censorship is ultimately ineffectual and the increased profit goes to foreign booksellers who break the law – was here much more innocuous. Hence Diderot rather reemphasised the 'strange contradiction' that there were prohibited books for which one did not ask for a privilege or could not hope for a tacit permission to publish, and yet these books were distributed by men in disregard of the law, known and seen by the authorities. In addition, much more had to be paid for these books because of the violation of the rules. Diderot also asks whether it is not another contradiction that one refuses a (domestic) trader a licence – whose interest it is to prevent pirate printing – while one effectively grants that licence to others, that is, foreign printers who break the rules.[123]

Diderot contrasts the situation of France with that of England, but England is not, as one might expect, presented as an example to follow. The situation with regard to censorship is different in London, Diderot says. There are no privileges, and no censors. An author brings his book to the printer, it is printed, it appears. If the boldness of the work justifies the strong objection of the public, then the authorities contact the printer who will remain silent or name the author: in the first case they will start proceedings against the publisher, in the second case against the author. Diderot adds: 'I would be angry if this policy were established here (in France); it would soon make us too wise.'[124] This ambiguous irony is characteristic of Diderot; on the face of it, the English practice is to be rejected (as too liberal), but with an exaggerated or absurd statement that subverts the original argument.

7 Conclusion

[121] Diderot (1995: 108).
[122] Rideau (2008a), sec. 8.
[123] Diderot (1995: 114-115).
[124] Diderot (1995: 110).

In his *Lettre*, Diderot sought to reconcile two contradictory positions for pragmatic reasons: the retention of the printers' and booksellers' privilege and the unassailability of the literary property, here understood as the rights in the physical manuscript which encompass the text of it. He also wanted to include a veiled attack on censorship although censorship was in fact one function of the privilege. He did that by postulating the privilege not as an unaccountable and unpredictable act of grace by a prince, but as a property right that confirms and supports the (existing) property right of the publisher in the manuscript and text. The literary property right in the manuscript vests initially in the author as the maker of the work, in the spirit of Locke. The freedom the author as property owner enjoys, again in line with Lockean thinking, particularly materialises in the author's right to free and irrevocable alienation of that property to a publisher, so that the publisher's rights in the author's text are permanently secured, even against the author himself. Nowhere does Diderot advocate an independent author's right separate from the right in the physical manuscript. This novel, in essence early liberal, interpretation of the privilege as a property right followed contemporary legal opinion (Héricourt) which Diderot was familiar with. Diderot addressed the censorship aspect of the privilege by giving a commercial argument: rather than prohibiting books and or refusing them a privilege (effectively acting as a licence to print), it would be better to tax them, because in the present situation these 'dangerous' books are in high demand and overpriced, and copies are imported into France in great numbers, but the proceeds of sale go to (foreign) booksellers who break the law, and not to the French economy.

However, Diderot's argumentation cannot eliminate the concern that the privilege system maintains a monopoly against free trade as it became the prevalent 'enlightened' opinion during his time in France. What Adam Smith would later attack as 'mercantilism' manifested itself exactly in such guilds, privileges and monopolies, embedded in the feudal political order. So if Diderot claims that a privilege will not lead to a price monopoly (why would a seller holding a privilege want to sell less as a result of a higher price?), then this rather indicates wishful thinking in contrast to economic reality and the nature of man – in the views of Mandeville, Helvétius, Voltaire and those of the Scottish philosophers of the Enlightenment, Kames, Hume and Adam Smith who himself was probably one of the more forbearing ones when it came to the interpretation of human nature.

Diderot's *Lettre* is not free from contradictions which become understandable in its historical context. Today, the *Lettre* is an important document of the intellectual history of copyright law. It shows that in pre-revolutionary France before its first author's rights law the idea of a 'literary' property was much influenced by Locke's idea of property, a property right modelled upon traditional tangible property, not a

moral rights-based intangible author’s right for which France is seen as the principal example today.

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