Opinion:

Copyright History as a Critical Lens

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Summary: This article, a follow-up to an Opinion published by the E.I.P.R. in 2016 ('Interrogating Copyright History' by E. Cooper and R. Deazley), surveys recent developments in copyright history scholarship and argues that, as well as a form of scholarly enquiry in its own right, history can be a powerful lens for critically thinking about copyright and looking to the future.

In 2016, the E.I.P.R published an Opinion - *Interrogating Copyright History* - in which Ronan Deazley and I explored the various ways in which the past matters to those researching copyright today and thinking about its future.[1] The Opinion set out our responses to an event - the *Copyright History Symposium* held in March 2015 - that we organised as members of CREATe, the copyright research centre at the University of Glasgow.[2] CREATe, founded in 2012 expressly to research copyright's future, has always included copyright history as one strand of its research. At the *Copyright History Symposium*, a panel of distinguished academics[3] responded to the question 'What is the Point of Copyright History?' by reference to *Copyright at Common Law in 1774* by H. Tomás Gómez-

[1] E. Cooper and R. Deazley, 'Interrogating Copyright History', (2016) 38(8) E.I.P.R. 467-470.
[2] See further, E. Cooper and R. Deazley (eds), 'What is the Point of Copyright History? Reflections on Copyright at Common Law in 1774 by H. Tomás Gómez-Arostegui', CREATe Working Paper 2016/04, available at www.create.ac.uk under 'Working Papers'. See further the event's resource page: https://www.create.ac.uk/copyright-history-symposium-resource/

[3] The panellists were Howard Abrams (University of Detroit Mercy), Lionel Bently (University of Cambridge), Oren Bracha (University of Texas), Mark Rose (University of California, Santa Barbara) and Charlotte Waelde (University of Exeter). The discussion was chaired by Hector MacQueen (University of Edinburgh).

Arostegui, which had then been recently published.[4] Gómez-Arostegui, drawing on his own detailed archival work, argued that previous understandings of the ruling of the House of Lords in *Donaldson v Beckett* (1774) – that the origin of copyright was exclusively statutory – were incorrect.[5] While in a US context, Gómez-Arostegui's work might have doctrinal and normative implications for copyright law today (for example as relevant to the intention of the Framers and the US First Congress in drafting the intellectual property clause of the US constitution of 1787), the *Symposium* identified a range of other ways in which historical work can be important more generally: as a source of ideas and arguments about property in intangibles, as a means of furthering our understanding of the relation between law and trade practice, and as empirical evidence of how a change in the law might affect markets and incentives and payments to authors, amongst other things.[6] The event also drew attention to the centrality of original archival research to copyright history. As Ronan Deazley and I argued in our 2016 Opinion, work with primary sources ensures that historical work is guided by critical inquiry and not dogma.[7]

Since writing the E.I.P.R. Opinion just over five years ago, the critical appraisal of primary sources (as opposed to second-hand scholarship) continues to lie at the heart of copyright history, as was evident in a recent panel discussion at the *CREATe Copyright History Digital Resources event* held in December 2021, showcasing the latest developments in the digitisation of copyright history archival sources.[8] However, the field has also changed. In particular, the range of

[4]H.T. Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 Conn. L. Rev. 1, also available as CREATe Working Paper 2014/16, available at www.create.ac.uk under 'Working Papers'. The paper was delivered as a CREATe Public Lecture in March 2015, prior to the Symposium.
[5] *Donaldson v Beckett* (1774) 1 E.R. 837 HL. Those previous interpretations include R Deazley, 'Re-reading *Donaldson* (1774) in the Twenty-first Century and Why it Matters' [2003] E.I.P.R. 270.
[6] Cooper and Deazley, 'Interrogating Copyright History' 2016 E.I.P.R. 467, 469-470, referring to the comments made at the Symposium by a number of academics including Hector MacQueen, Jose Bellido, Lionel Bently, Isabella Alexander and Giles Bergel.
[7] Cooper and Deazley, 'Interrogating Copyright History' 2016 E.I.P.R. 467, 468.
[8] 'CREATe Digital Resources: Copyright History', webinar hosted by CREATe, University of Glasgow on Wednesday 15 December 2021, concerning L. Bently and M. Kretschmer 'Primary Sources on Copyright (1450-1900)' (www.copyrighthistory.org) and I. Gadd and G. Bergel 'Stationers' Register Online'

critical approaches to copyright history has broadened significantly, and I provide four examples here.

First, there has been an important shift in copyright history, away from the longstanding primary concern with the laws protecting books and literary works, to copyright protecting other subject matter, including visual art, drama and news.[9] Shifting the focus to different subject matter brings to the fore previously unappreciated ideas about copyright and its history, including basic questions such as what copyright is and who it should serve.[10] As I have argued in more depth elsewhere, in taking us away from a view that the law is based on fixed immutable principles, history can give us a heightened sense of the choices we make today.[11]

Secondly, recent scholarship has shown that reappraising the history of international copyright – as opposed to foregrounding national approaches - can be a means for radically re-thinking the way we understand international copyright and, this can have path-breaking implications today for national and regional laws throughout the world.[12] Thirdly, spurred on by present-day

(stationersregister.online). The event featured presentations by Jane Ginsburg, Ian Gadd and Giles Bergel, and comment from Martin Kretschmer, Lionel Bently, Neil Netanel and Elena Cooper. A recording of this event will be released by CREATe in 2022.

9 For example: E. Cooper, 'Art and Modern Copyright: The Contested Image' (2018, CUP), K. Scott, 'Becoming Property: Art, Theory and Law in Early Modern France' (2018, Yale University Press), M.S. Delamaire and W. Slauter eds 'Circulation and Control: Artistic Culture and Intellectual Property in the Nineteenth Century' (2021, Open-Book Cambridge), D. Miller, 'Copyright and the Value of Performance 1770-1911' (2018, CUP), W. Slauter, 'Who Owns the News: A History of Copyright' (2019, Stanford University Press), and L. McDonagh, 'Performing Copyright: Law, Theatre and Authorship', (Hart Publishing, 2021) Chapter 2. On the significance of the visual arts strands of this scholarship to art history see E. Cooper 'The 'visual turn' in copyright history and its relevance to Art History', The Burlington Magazine, December 2021, 1148-1157.

[10] For a review essay charting the significance of recent copyright history scholarship see E. Cooper, 'Becoming Property and Copyright and the Value of Performance', Law Culture and the Humanities, Vol 16, Oct. 2020, 504-507. For a book review of Scott's *Becoming Property* see E. Cooper, The Burlington Magazine, May 2020, p.460 and Slauter's *Who Owns the News* see E. Cooper, Law and History Review, Vol. 39, Issue 1, 2021, p.205-6. The text of these reviews appears in CREATe Working Paper 2021/3 'Copyright History in Review' available at www.create.ac.uk under 'research papers'. See also the copyright history review essay by Hector MacQueen in the American Journal of Legal History, 61(1), 2021, 126-138.

[11] Cooper, Art and Modern Copyright, p.250-251.

[12] T. Aplin and L. Bently, ' Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works' (2020, CUP) Chapter 2. For reviews see E. Cooper (2021) 137 (Oct) Law Quarterly Review 685, C. Oppenheim, (2021) 43(5) E.I.P.R. 347-348 and T. Cheng-Davies (2021) 3 Intellectual Property Quarterly 242-244.

concerns, the first longitudinal history has been published uncovering the relation between intellectual property law and racial inequality, raising in a far more direct way the implications of intellectual property law's inclusions and exclusions to social justice more generally.[13] Finally, copyright history scholarship also now includes an approach that is more 'real world': in foregrounding legal and business structures and revealing legal doctrine to be just one aspect of the empirical reality of how copyright operates in practice, historical work can lay bare the relation between law and corporate power, amongst other things.[14]

These perspectives make yet clearer the way in which copyright history, as well as a form of scholarly enquiry in its own right, can also be a powerful lens for critically reflecting on the law today. In view of these developments in scholarship, it is timely to revisit the question raised in *Interrogating Copyright History* – what is the point of copyright history? - and I do so by reflecting on the discussions at a more recent CREATe event which I convened: the *CREATe Public Lecture Series* of Autumn 2021, in which two scholars – Dr Anjali Vats and Professor Kathy Bowrey – explored the theme of 'Intellectual Property and its History', drawing on their recently published monographs, which was followed by in-depth comment in an extended Question and Answer session.

By way of background, Anjali Vat's *The Color of Creatorship: Intellectual Property, Race and the Making of Americans* (Stanford University Press, 2020) is the first longitudinal history of the relationship between intellectual property and racial injustice, dealing with US law from the eighteenth century to today. She argues that US intellectual property doctrine is bound up with conceptions of citizenship, that citizenship is itself a 'raced concept', and that racial hierarchies are naturalised in intellectual property doctrine through concepts like 'true

[13] A. Vats, 'The Color of Creatorship: Intellectual Property, Race and the Making of Americans' (Stanford University Press, 2020), reviewed by E. Cooper (2021) 30(6) Social and Legal Studies, 965-969.
[14] K. Bowrey, 'Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author' (Routledge, 2021) reviewed by E Cooper, (2021) 32(7) Entertainment Law Review p.241-242 and by J. Lai. (2021) 43(2) E.I.P.R. 142-144.

imagination', 'human progress' and the 'consumer gaze'.[15] Kathy Bowrey's *Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author* (Routledge, 2021) is the first historically grounded account of the emergence of the Big Media industries of the 20th century, concerning the emergence of film, music and publishing. In her work on the emergence of the film industry in the early twentieth century – the subject of her recent lecture (and Chapter 5 of her book) – Bowrey argues that there was change as regards the 'industrial significance of authorship', as individual and family firms gave way to big multi-national enterprises, contractual terms became standardised and the negotiating power of the individual author was diminished. As a consequence, Bowrey concludes that, in the early twentieth century, 'the new multi-national companies and cross-industry alliances… were empowered while the natural rights of the author were de-natured, diluted, and copyright's ideologically celebrated characteristic property – primarily rewarding creative, as opposed to commercial, endeavour – was fundamentally disrupted'.[16]

What is the critical potential of copyright history, as revealed in the discussions at the recent *CREATe Public Lectures*? There are, of course, many different approaches to legal history. However, my view is that both lectures clearly demonstrated the way that the work of the legal historian can bring to light developments that would otherwise be masked or hidden from view. Anjali Vats, interestingly, does not see herself a legal historian; her interest in history stems from her interest in the law today. Therefore, for Vats, history is about asking where the relation between intellectual property and racial injustice (that she sees in US law today) came from. Showing the relation between US intellectual property law and racial injustice to be deeply embedded historically, going all the way back to the making of the American nation in the 18th century, enables us to

[15] Vats, Color of Creatorship, p.5-9.
[16] Bowrey, 'Copyright, Creativity, Big Media and Cultural Value', p.136.

see with yet more clarity and also to treat with more urgency, the troubling relation between intellectual property and racial injustice in more recent times.

Kathy Bowrey's lecture, on the history of copyright and the early film industry, pointed to different ways in which aspects of intellectual property that have been masked. At the close of her account of early film copyright, Bowrey draws attention to the factors present in the early twentieth century - industry self-regulation and lawyers' focus on positive doctrinal law - that placed the implications of the industrial significance of authorship beyond any 'serious scrutiny'.[17] In my view, Bowrey's approach reveals the importance of legal history precisely as a tool of 'scrutiny'. Why is this significant? In my own work on the history of copyright protecting painting, engraving and photography in the UK in the nineteenth century, I argue that copyright in the visual arts in the nineteenth century, has a distinct history from literary copyright, and that - after codification in 1911 and with the focus of copyright historians on literary copyright - we have very much forgotten many of those distinct nineteenth century ideas about artistic copyright. Accordingly, I argue that copyright history can have a 'destabilising' effect, in bringing to light ideas that were once known, but now forgotten.[18] Bowrey's work, instead casts critical light on developments that – rather than being forgotten - have *never* been in public view. In this guise, the work of a legal historian is akin to that of an investigative journalist: uncovering legal and business records that have *never* been discussed or debated before. By going to these primary archival sources, many in private hands, that have never been publicly seen before, Bowrey can then critically analyse the highly important yet totally under-explored relation between copyright and power.

[17] Bowrey, 'Copyright, Creativity, Big Media and Cultural Value', p.136.
[18] E. Cooper, 'Art and Modern Copyright: The Contested Image' (CUP, 2018), Chapter 1 and Chapter 7, particularly pp.250-251. Chapter 1 of 'Art and Modern Copyright' is available for free download in the 'research papers' section of www.create.ac.uk as Working Paper 2021/4 E. Cooper 'Introduction to Art and Modern Copyright: The Contested Image'.

How though can changing our understanding of the past, change the way we look to the future? Again, we can glean different perspectives on this question, from the discussion occasioned by both lectures. In Vats' work, history points to the longstanding continuity in the relation between race and intellectual property, despite the illusion of radical change that might be suggested by the development of US Civil Rights laws in the twentieth century and the language of 'post racial egalitarianism' during the US Presidency of Barack Obama.[19] In looking to the future, then, the historically entrenched nature of racial inequality's relation to intellectual property, informs Vats' conclusion is that we cannot rely on law alone to effect change; though changes to judicial approaches – for example to the interpretation of 'originality' – should be encouraged, we should not overlook the need to open up the 'problem of racial inequality at the root, with ideological depth',[20] as well as to explore ways in which lawyers can be trained in what (in her lecture) Vats termed 'racial literacy'.

Turning to Kathy Bowrey's lecture, rather than a story of longstanding continuity, I see her account of the denaturing and diluting of creative authorship in the early twentieth century, with the emergence of the powerful multi-national corporations of the film industry, as a story of change. This is well illustrated by comparing Bowrey's account of the early twentieth century film industry with my own work on the nineteenth century which shows that an affinity between copyright and creative authorship *was* retained in the nineteenth century (despite pressures to the contrary) and sometimes empowered resistance to social power relations. In photography, for instance, which by the second half of the nineteenth century was increasingly organised on an industrial model with photographers 'employed' by large commercial firms,[21] the early photographic trade union

[19] Vats, The Color of Creatorship, p.66 and 110.
[20] Vats, The Color of Creatorship, p.198.
[21] On the employment relationship in the nineteenth century, see further, E. Cooper, 'Joint Authorship in Comparative Perspective: Levy v Rutley and Divergence between the UK and USA' Journal of the Copyright Society of the USA, Vol. 62 No 2, Winter 2015, footnote 19.

movement, alongside calls for better wages and working conditions, drew on section 7 of the Fine Arts Copyright Act 1862.[22] Section 7 enabled 'any person aggrieved' to recover statutory penalties where a person *inter alia* sold, published, exhibited or disposed of, a photograph bearing the name of a person who did not execute or make the work. The early photographic trade union movement drew on section 7 in support of their contention that photographs (which were usually marked with the name of the photographic firm) must bear the name of the 'operator': the individual photographer that took the photograph. As photographic firms would only hire a new 'operator' by inspecting specimens of their work, naming the individual photographer on each photograph would make photographic labour more mobile.[23] These arguments were also seen as supported by the Court of Appeal ruling in *Nottage v Jackson*, that held that the 'author' of a photograph for registration purposes was a creative individual, and not the photographic firm.[24] Viewed from a nineteenth century vantage point, then, the nature and extent of the twentieth century changes explained by Bowrey - the de-naturing, dilution and disruption of copyright's relation to creative authorship - are of increased significance. This puts beyond doubt the crucial importance of the twentieth century to copyright history, a period that to date has been under-explored.

How does charting historical change, though, impact on how we look to the future? As Bowrey explained in her lecture, one aspect of her interest in history is in inspiring us to think more deeply today about how we support creative endeavour; historical experience shows that creators are best served, she argues, where they exercise 'a higher degree of agency' and so, today we should think again about how to empower authors to make important decisions for themselves 'rather than relying on others'.[25] With this conclusion in mind, putting Bowrey's

[22] 25&26 Vict.c.68.
[23] Cooper, Art and Modern Copyright, p.66.
[24] (1882-1883) LR 11 QBD 627 (Court of Appeal), discussed in Cooper, Art and Modern Copyright, p.56-61.
[25] Bowrey,'Copyright, Creativity, Big Media and Cultural Value', p.211.

early twentieth century account into conversation with my own work on the nineteenth century experience, makes clear that historical development is not inevitably about progress; it is too simplistic, for instance, to assume that the law in recent times is, to refer to the European Commission Green Paper on the Information Society (published at the advent of the internet), 'the outcome of thinking and experience' and part of an 'evolutionary process'.[26] Rather, an historical perspective might suggest we should be recovering an aspect of what we have lost and here, if we adopt Bowrey's conclusion, that would be restoring an affinity between copyright and creative authorship.

In this way, history's critical lens, whether revealing a story of continuity or change, matters. There is value in looking backwards, before we look forwards: an historical perspective helps us to recover the contingency of the present, to imagine things differently and to look to the future with a more critical eye.

[26] European Commission, Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society (COM(95)382 final) para 57-58 discussed in Cooper, Art and Modern Copyright, p.251.