

Digging Up Fragments and Building IP Franchises

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Abstract

This article considers the difficulties of writing history at a time of intense politicisation of intellectual property law. Copyright in particular is examined, with a commentary on leading writings by James Boyle, Christopher May and Susan Sell, Ronan Deazley and Jane Ginsburg. It is argued that these writers share an interest in telling global copyright histories that directly relate to contemporary political concerns about law, the information economy and neo-liberalism. But in seeking to make history relevant, they are producing competing franchises preoccupied with identifying past and present legal outcomes with winners and losers, both public and private. In the process more complex jurisprudential questions about the organisation of legal power and the role of law in supporting commodification are overlooked. This article appeals for more nuanced writings of history that are more attentive to historical particularity and the limits of positive law.

1. Introduction

Historians are only weak, fallible human beings, who (like all of us) can never really scrub themselves clean of bias [but] historians *do* know something. ... They do have something to contribute to public debate. Some of these debates turn ... on a reading of history.¹

It is a highly politicised time for the history of intellectual property ('IP'). One often gets the feeling that, having lost out in seeking to effect global legal settlements of IP rights, academics who are feeling misunderstood, marginalised or excluded from influence on those diplomatic negotiations are relocating to history. It is as if historical writing can provide academics and their readers with agency and a capacity to influence how intellectual property rights will be drawn in the future.

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¹ Lawrence Friedman, 'Introduction: Writing Legal History', (2003) 4 *Theoretical Inquiries in Law* 437 at 441–2.

Although academic writing may not be referenced in trade agreements, it is still read and influences behaviour. It affects how communities of artists, authors and innovators talk about their practices and legal choices, how consumers understand their actions and consumption choices, and how products are marketed to us. The writing of history matters. However, the franchise reference in the title of this article points to, or warns about, the problem of writing (and reading) intellectual property history at this point in time. While we believe the problem affects all intellectual property, it is particularly acute with copyright, which is the main focus of this analysis.

We agree with the sentiment of Philip Gourevitch that we, as writers and readers, must necessarily supply some human element to texts. He says:

Here are these events that have happened, and you can add up the facts to a certain extent and you are still left to imagine them. And it doesn't mean to make them up, but ... the writing act and the reader and observer is left to grapple with it to supply certain human elements.²

The weight of the present, where global decisions about intellectual property loom large, is bound to filter into our understanding of history and our human responses. It is also difficult to escape from current understandings of the world, technology, the built environment, communications, social organisation and progress. But, at the same time, we are hoping for the human element we supply as writers and readers of intellectual property law to be more than antipathy or empathy toward particular policy winners and losers. An understanding of history should also lead to a more nuanced understanding of legal power and its relation to politics — including of law's essential incompleteness, limits and complications in readily securing political objectives. For this reason, we think we need to understand more critically what it is about the construction of the present global institution of intellectual property that presses so much on us, that we have begun to read legal history as primarily just a record of policy choices, identifying winners, losers and compromises.

This article explores examples of different kinds of copyright franchising, and discusses some hallmarks of selected writings by James Boyle, Christopher May and Susan Sell, Ronan Deazley and Jane Ginsburg. The first three writers mentioned have all produced books that use history in order to critique the contemporary role of law in commodifying knowledge. Ginsburg's shorter paper is, in part, a response to Deazley. Each of these writers has sought to make a definitive, historically grounded contribution to the understanding of global copyright law. These are all sophisticated works with quite different scholarly objects; however, we are interested in exploring how they all, as history, relate to the present. How are they implicated in the production of a new global intellectual property history, and what does that mean for us today?

² ABC Radio National, 'In Conversation: Will Self and Philip Gourevitch on Orwell, truth and clarity', *The Book Show*, 1 February 2008.

2. *James Boyle and the pro-public domain franchise*³

Boyle argues:

We are in the middle of a second enclosure movement ... ‘the enclosure of the intangible commons of the mind’ ... the new state-created property rights are ‘intellectual’ rather than ‘real’ but once again things that were formerly thought as either common property or as ‘uncommodifiable’, as outside of the market, are covered with new, or newly extended property rights.⁴

Protection of facts, data, the genome and other building blocks of life, copyright maximalisation — term extensions, stronger protections, limiting fair use rights, digital rights management — these are not simply the result of a new emphasis in information policy. It is, in Boyle’s analysis, equivalent to a substantial redistribution of resources away from the public and into private hands without compensation of the public for their loss — a ‘rapacious, state-aided “privatization”’.⁵ This redistribution of resources, he argues, mimics the effects of earlier enclosures that led to material and cultural changes in economy and society.⁶

In relation to the historical enclosure of land, readers are reminded of the effects on the rural poor who, deprived of access to traditional common lands, lost their livelihood. He describes the displacement of traditional sources of social and political power that enclosure entailed that led to the ‘loss of a form of life’.⁷ One aspect of a form of life is status. In the case of historical enclosure, the loss of status is most typically evidenced and exemplified by the extinguishment of the social group of yeoman. They were replaced by a new social grouping, the working class. Another aspect is conceptions of value. Boyle argues that with the redistribution of common resources the value of things (such as land) came to be determined solely by the market. Because the loss of a form of life is intangible, Boyle stresses that the costs of commodification are necessarily difficult to calculate. Each period of enclosure brought displacement to those communities affected. Some periods brought irreparable harms, others transformational benefits, with the overall result reflected in the distribution of benefits.

‘Losses of life’ associated with the second enclosure movement relate to an undermining of the conditions for innovation, progress and the production of

3 The discussion of the work of James Boyle draws upon unpublished PhD research by Natalie Fowell, PhD Student, Faculty of Law, University of New South Wales.

4 James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’ (2003) 66 *Law and Contemporary Problems* 33 at 37, republished in James Boyle (ed), *Collected Papers, Duke Conference on the Public Domain* (2003). A shorter edited version has recently been republished in James Boyle, *The Public Domain: Enclosing the commons of the mind* (2008) at 42.

5 Id at 34.

6 Id at 37; below n 14. Boyle notes that he is not the only writer currently using the enclosure metaphor, acknowledging similar references by Ben Kaplan, Pamela Samuelson, Yochai Benkler, David Lange, Christopher May, David Bollier and Keith Aoki.

7 Id at 35.

creative works. Boyle, Benkler⁸ and others argue that, in contrast to the historical enclosure of land, commodification of information along with other aspects of the public domain does not guarantee economic benefits.

The starting point for this proposition is the claim that there is a link between technological innovation and economic progress. Carol Rose implies the historical constancy of the relationship in this segue from a description of the common fields to the internet:

Transportation improvements in the early modern period integrated England into a more unified market; this integration in turn fostered agricultural specialization and enclosure while undermining the older, more localized and mixed economies of the common fields. Similarly today, the greater opportunities for copying and disseminating via the Internet — the new *res publicae* — may well have engendered the new efforts towards ‘enclosure’. Many intellectual accomplishments once needed no ‘fences’ because they were difficult to copy, but they are now available to the world through digital access and reproduction.⁹

Along with technological innovation comes the argument that law must catch up in order that potential economic benefits are not lost. That is, law must provide the ‘fences’ that reflect and protect new economic calculations of value. However, the assumption that optimal production of copyright works requires ‘fencing’ — a clear reference to the creation and enforcement of property rights — is a target of an investigation into the nature the relationship between private property and productivity within the information economy.

Boyle argues that we must compare the similarities between the two historical events as processes of commodification of forms of value that were or are outside the market. However, he further requires us to be attentive of the differences that are exposed, in order to understand the limits of the analogy between intellectual property rights and property rights in tangibles such as land. So for example, he states that:

[i]f there are similarities between our two enclosures, there are also profound dissimilarities; the networked commons of the mind has *many different* characteristics from the grassy commons of Old England.¹⁰

With landed interests, he further states that:

[t]he big point about the enclosure movement was that it *worked*, this innovation in property systems allowed an unparalleled expansion of productive possibilities.¹¹

8 Yochai Benkler, *The Wealth of Networks: How social production transforms markets and freedom* (2006).

9 Carol Rose, ‘Romans, Roads, and Romantic Creators: Traditions of public property in the information age’ (2003) 66 *Law and Contemporary Problems* 89 at 101.

10 Boyle, above n 4 at 41. (Emphasis added.)

11 *Id* at 35.

According to Boyle, while there were clearly winners and losers from the enclosing of the common lands, productivity overall benefited. The same cannot be said for the enclosure of intangibles like intellectual property.

He, among others, identifies two differences. First, intellectual property is non-rivalrous, and second, its conditions of production favour, indeed necessitate, a non-absolutist notion of property rights.¹² The theory underpinning the identification of these points of difference is an economic analysis of efficient resource use and production, and in particular the model put forward by Garrett Hardin in his seminal article, 'The Tragedy of the Commons'.¹³ It is sufficient for present purposes to identify some key assumptions: that resources are scarce, and that resources will be subject to overuse if no one person (natural or otherwise) has vested in them exclusive rights to control access. According to Boyle however, intangibles, such as copyright, can be identified as 'public goods', and their maximisation does not rely upon (but in fact contradicts) ordinary assumptions about efficient resource use. Copyright works are not 'scarce' in the ordinary sense because they can be simultaneously used by multiple users. Copyright works are also not at risk of overuse because multiple uses do not exhaust them.¹⁴

Even if enclosure of the arable commons always produced gains (itself a subject of debate), enclosure of the information commons has the potential to harm innovation. This is because of a foundational premise that, in creating copyright works, authors build upon and use existing works. Hence, *the capacity for all innovation and creative production is contingent upon the existence of a public domain — an 'open domain'*.

The enclosure metaphor draws our sympathy toward the 'victims' of the second enclosure movement. These are the disaffected, frustrated creators and producers who are unable to navigate the complexity, 'bottlenecks' and coordination costs of copyright law.¹⁵ However, society as a whole is also presented as a loser. Collectively we suffer from widespread lost productivity in terms of works that never eventuate, and in terms of the broader unrealised new economic opportunities that falter under the law's deadweight.

While seemingly focusing on exploring the negative consequences of both forms of enclosure, on another level this metaphor works positively to consolidate a claim that the public domain or information commons is productive. The public domain is presented at once as the opposite of copyright but also a necessary condition for its existence. Trosow captures the feedback dynamic with his comment on the discourse of balance:

'[B]alancing of interests'... accepts the contradiction between promoting innovation and ensuring access as an underlying premise, seeking mostly to ameliorate the tension.¹⁶

12 Id at 43–4.

13 Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

14 There are detractors on this point. See for example, William Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70(2) *University of Chicago Law Review* 471.

15 Boyle, above n 4 at 37.

The nature of the relationship between use and creation establishes a central problem of copyright much discussed today: how to accommodate that feedback loop in copyright's key doctrines?¹⁷ In maximising the production of creative products, *what is the ideal calibration that ensures the ongoing sustainability of the public domain, the primary resource for the production of future works?*

This leads Boyle to an exploration of the comparative virtue of commons-based practices. Free and open source licensing and creative commons licensing provide a mechanism for the production and dissemination of 'new' works that concurrently contribute to the growth of the information commons.¹⁸

A. Some Hallmarks of the Pro-Public Domain Franchise

Carried along with the enclosure metaphor are a number of very contemporary presumptions about the value of creativity, innovation and law.

First, there is a levelling of all kinds of cultural production. This flows from a marketplace mentality of valuing works and the requirement that all products serve as raw material for the next generation of production. In terms of history, this discards to antiquity significant complex social and legal debates about originality, authenticity, high art and commodification, even though these concerns still resonate in intellectual property and society today.

Second, the technologies of openness are presumed to serve inherently a public good. This reflects a prioritisation of free speech and the ongoing expansion of commodity relations across the globe, at the expense of supporting other cultural values and interests.

Third, in treating all works as essentially fungible, reduced to bits and bytes stored in databases accessible across the globe, this characterisation continues to set apart and devalue implicitly the unique, the spontaneous, the sacred and the site-specific cultural production that is an ill-fit with the practices of mechanical or digital reproduction and commodity relations.

Fourth, a reductionist approach to culture, a worship of technological progress and productivity are utilised to found a jurisprudential claim about copyright law. Namely, that copyright should be considered as regulatory, rather than proprietary, in nature. But what is entailed in this claim? It is certainly not the idea that property has no role to play. Rather, writers such as Boyle argue that respect for property is a double-edged sword.¹⁹ Private property is only a means to the end of achieving progress. So the critique of copyright expansion as an enclosure of information is not to deny the centrality of capitalist processes of production, of which private property is necessarily a part. Rather, the legal task becomes merely that of

16 Samuel Trosow, 'The Illusive Search for Justificatory Theories: Copyright, commodification and capital' (2003) 16 *Canadian Journal of Law and Jurisprudence* 217 at 230.

17 For a well-known example, see William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325.

18 Were this article to be written today, presumably the value of social networking would also appear in discussions of the future productivities.

19 Boyle, above n 4 at 34.

subduing the ‘excesses’ of property by facilitating the natural fecundity of the creative sector and the information economy. This reminds us of what Unger has described as ‘democratic perfectionism’, that is:

[t]he belief that a free society has an institutional formula that, once discovered (as it supposedly was by the founders of the American republic and the framers of the American constitution) needs to be adjusted only by rare moments of national and world crisis and, even then, only to adapt its enduring truths to changed circumstance.²⁰

Here neo-liberalism is to be managed by repositioning a particular US constitutional view of intellectual property as a global jurisprudential truth.

Last, while Boyle’s analysis often speaks of and for ‘the public’, the sense of sharing, community and public values all relate to the sensibility of the technologically-able, highly literate and well-connected Westernised global citizen. While global citizenship has become a core concept in contemporary political analysis,²¹ because citizenship has conventionally been analysed in terms of nation-states, one of the challenges for global citizenship is that it has no obvious legal point of reference. While not making it explicit, Boyle’s work points to the potential legal foundations of this citizenship and protection of the citizen’s creative and communication ‘rights’, secured by more enlightened global intellectual property laws. Copyright is written about as if it is, or could be, a kind of constitutional law for the Internet. Were copyright to balance appropriately the private rights of owners to control access to information against the public interest of creators, consumers, and the public-at-large to gain access, then the global foundations for innovation, productivity and creative abundance would be made more secure.²²

B. History, Metaphor and Mythology

It is somewhat artificial to tease out all the present-minded dimensions of Boyle’s enclosure metaphor in this way, in that they work as a package. However, it is important to scrutinise more closely what makes the metaphor work. In political rhetoric, the power of the metaphor is its myth-building capacity. Metaphors appeal ‘to our emotions (or pathos) through unconsciously formed sets of beliefs, attitudes and values’.²³ In the process metaphors transmit and naturalise underlying conceptualizations and influence our core value judgments.²⁴

Boyle’s work raises difficult issues about the role of the academic, the authority of history and the place of both in important contemporary political debates. While

20 Roberto Unger, *The Self Awakened Pragmatism Unbound* (2007) at 23.

21 The contribution of global citizens is formally recognised in some United Nations fora, for example the ‘civil society’ sector of the World Summit on the Information Society.

22 This view is critiqued in Kathy Bowrey, ‘Can a Public-Minded Copyright Deliver a More Democratic Internet?’ (2007) 56 *University of New Brunswick Law Journal* 26.

23 Jonathan Charteris-Black, *Politicians And Rhetoric: The Persuasive Power Of Metaphor* (2005) at 13.

24 Id at 40.

there is a peak in interest in the history of intellectual property law, past writings remain relatively inaccessible, in terms of both availability and comprehension, to us today. While metaphor works well to cut through complex issues, and especially for non-expert audiences, it can lead us away from the nuances of history that we really should keep alive.

3. *Christopher May, Susan Sell and the ‘Global Governance’ franchise*

The writings of Christopher May and Susan Sell share Boyle’s concern for the global constitution of intellectual property. Both have produced separate works on contemporary intellectual property²⁵ and this led to an interest in jointly authoring a history book. As they state:

We are interested in the power that stems from the ownership and control of particular innovations and technologies, established through the institutions of intellectual property, and how that power is able to govern the structures of intellectual property law to reinforce and reproduce advantage.²⁶

The motivation in writing history is to denaturalise intellectual property and locate it in the domain of ‘practical politics’. In the process, intellectual property can be subjected to a social good analysis, with particular attention to the impact of laws on human rights and the effect on the socially and economically disadvantaged. They state that:

[o]ur history of the institution of intellectual property aims to illuminate the persistent tension between those who seek to privately appropriate property in intellectual goods and those who seek its dissemination.²⁷

This analysis ranges from the Venetian Patent system to the World Intellectual Property Organization (‘WIPO’) and trade-related aspects of intellectual property rights (‘TRIPS’). However,

[t]he history that [they] explore is not a history leading inexorably to TRIPS, but rather an international history of the idea of making knowledge and information ownable.²⁸

Technology is identified as a major power and driver of ideational, material and legal change. For example, they state that:

[n]ew technologies spurred the development of social and early legal innovations eventually coalesced into the beginning of a recognizable body of intellectual property rights in Venice in the fifteenth century.²⁹

25 Christopher May, *The World Intellectual Property Organization: Resurgence and the development agenda* (2007); Susan Sell, *Private Power, Public Law: The globalisation of intellectual property rights* (2003).

26 Christopher May and Susan Sell, *Intellectual Property Rights: A critical history* (2006) at 32.

27 *Id* at 37.

28 *Id* at 5.

However the methodology strives to direct us to the variables and inter-relationships³⁰ between ideas, events, structural conditions and agencies of change:

Definitions of what constituted property depend upon time, place, the constellation of interests and degree of competition present, stage of economic development, and political economic power. Insofar as intellectual property was, and is, *an instrument of public policy* all of these factors are relevant.³¹

The book is only partially successful in applying this methodology. An unproblematic notion of law as (always) within the domain of practical politics is taken as a given. The original 'international' ambition of the book revolves around tracing global connections in legal developments across time, people and places. Though relatively unexplained, the connotation is of the continuity of imperial and private ambition to own and control knowledge resources, often in the name of benefiting 'the public' but in reality, falling short.

Intellectual property rights are characterised as *always there*, growing along with capitalism, as they state:

Throughout its history, intellectual property protection, intentionally or not, has always been a form of public policy. Intellectual property rights can serve particular development goals or can thwart them ... the diversity of intellectual property policies between countries remains, in part a function of their different stages of development.³²

This approach means that the history becomes very selective in emphasis. It is not a book written for those familiar with or interested in legal history or jurisprudence.

Running throughout the entire work is a presumption of a sovereign that is/should be capable of making authoritative laws for civil society, even though for much of the history covered there is nothing like a sovereign, a nation state or a civil society in the sense that we understand those political relations today. For example, the notion of a 16th and 17th century 'Britain' is casually introduced into the text.³³ While perhaps this is a quibble with detail, one might prefer a work of history to characterise accurately the nature of political institutions being investigated. However the generalisation brushes over a key problem. If the name

29 Id at 43.

30 Id at 32–7.

31 Id at 107. (Emphasis added.)

32 Id at 109.

33 Id at 80. As Christopher Hitchens has recently noted: '[W]hat is this country actually called? If you come from France or Sweden, you can say so when asked, and that's it. But if you come from an odd-shaped and rain-lashed little archipelago in the North Sea, you can answer 'England' (unless you are Scottish or Welsh) or 'Britain' (unless you are from the six counties of Ulster). The actual title of the country is the United Kingdom of Great Britain and Northern Ireland, which is really the name not of a place but of a distinctly odd 17th-century political compromise'. See Christopher Hitchens, 'England Made Them' *Vanity Fair* (January 2008) at 126.

'Britain' is problematic for the 16th and 17th century, where does that leave intellectual property as a creature of public policy? Further appreciating the jurisdictional limitations of early statutes and the significance of the Union with Scotland 1707 is an important dimension of the literary property debates.³⁴

Second, there are related problems with understanding law as primarily positive law. There is no real appreciation in this book of the long and difficult struggles that led to the modern liberal ideal of a supreme positive legal authority. It does not factor anywhere that there have been many different forms of legitimation of legal authority, such as natural law, Christianity, God, immemorial custom, practical reason and so on. Each of these legitimations presupposes different limits on the exercise of power, and structures different relations between political and legal authority, and between political authority and social life. The command of positive law, expressed through the monarch or Parliament, was very much curtailed by these competing moral and legal orders. There were complex debates about the respective order and boundaries of different kinds of legal authority such as equity, common law and positive law. These debates had consequences for the domain of politics, as a practical endeavour or otherwise.³⁵

Third, there was no settled legal hierarchy, probably until the early 19th century and in formal legal terms, not until the late 19th century. The development of a legal profession, legal training, legal books, the construction of legal bureaucracy and associated expertise all significantly affect the character of the law and its capacity to rule.³⁶

All of the above factors are preconditions for the creation of a positive legal category of copyright, patent, design and so on.³⁷ However, for most of its life, intellectual property, to varying degrees with each of its categories, has been caught up in struggles that fail to settle the precise nature of its legal form. Consequently *it is not certain what the character of the political power is that can or should be exercised over intellectual property*.³⁸ This radically complicates the manifestation of intellectual property as a subject of public policy.

It is only relatively recently that, as a global phenomenon, the *content* of intellectual property law, characterised as a concern over access to and distribution of resources, has become a defining reference point for intellectual property law. Preoccupation with the content of the 'balance' is an understandable reaction to the perceived instrumentalism of contemporary global law-making. However, as a matter of history, while no doubt law and politics were not immune to

34 See Ronan Deazley, *On the Origin of the Right to Copy: Charting the movement of copyright law in eighteenth century Britain (1695–75)* (2004) at 183–90.

35 Such concerns about religion and politics still resonate, to varying degrees, in some non-Western nation states today.

36 This is discussed further below.

37 It is important to note that as a matter of positive law, the first compendium Copyright Acts only date from the 20th century. See, for example, the Australian *Copyright Act 1905* (Cth); *Copyright Act 1909* (US); *Copyright Act 1911* (UK); *Copyright Act 1921* (Canada).

38 This will be discussed in relation to Ronan Deazley's histories below.

instrumentalist concerns, how those could be translated into law was, and perhaps remains, much more complicated than this analysis implies.

It is worth noting that May and Sell's history is heavily dependent on secondary sources, although interestingly the work of lawyers is overlooked, such as that of Brad Sherman and Lionel Bently,³⁹ and Ronan Deazley.⁴⁰ One reason for this may be that such works complicate the notion of an 'international history' and would frustrate identification of the 'institution' of intellectual property. After all, such works fundamentally problematise both notions. This leads to a consideration of the qualities of the global governance franchise.

A. *The global governance thesis*

This approach to history shares many of the values of Boyle's pro-public domain franchise. However, as a matter of political strategy, it is more precisely focused. The dominant interest is in opening up a debate about the interests served by global settlements of intellectual property rights by institutions such as WIPO and TRIPS today. Nation states, in conceding to stronger intellectual property laws, are the primary political actors under scrutiny.

In view of that imperative, reading historical primary sources, exploring earlier political and legal transformations, and specificities of legal reasoning and bureaucracy that are necessarily jurisdictionally specific, is perhaps unnecessary.⁴¹ It is suggesting the broad parameters of the debate and noting the historical fact of diverse settlements of intellectual property rights and notions of the public interest that matters most.

Related to the objective of opening up debate, May and Sell seek to disseminate intellectual tools that might help advocates determine better global laws in the future. They state:

Our explicit intent in this history has been to lay out the historical context of contemporary debates about intellectual property rights in order to provide an intellectual armory for those arguing that further harmonisation of intellectual property rights is not only premature but unlikely to be just, until the wide disparities in wealth in our global society are greatly reduced.⁴²

While the notion of history as a tool-box or as armoury is not unique to May and Sell, the global governance approach uses a historical focus to work against future injustice. Thus, it seeks to tap directly into anticipated future political negotiations, and change the odds in favour of those conventionally considered as vulnerable and disadvantaged.

39 Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Laws* (1999).

40 Deazley, above n 34.

41 Thanks to Jane Anderson for this point.

42 May and Sell, above n 26 at 218.

B. *But why use history at all?*

It is not altogether clear from this book why opening up debate about the public interest served by institutions such as WIPO and TRIPS, and about intellectual property policy more generally, requires a historical contextualisation or justification. Further, despite a global proliferation of property-inspired speech, it is not well-established that any nation states have acceded to the dictates of global intellectual property settlements, largely authored by the US and multinational interest, out of a basic misunderstanding of the ideology of intellectual property laws.⁴³ Outside of a few elites who regularly fly business class to Geneva, who needs to be convinced that these bodies push particular agendas and laws that promote particular multinational interests? What contemporary consumer has not already been exposed to explanations about the mysteries of copyright and access rights, discussions about the pricing of pharmaceuticals and the global legal power of multinational corporations? Who would not already have a view on such things, especially among the new global citizenship, and the frequenters of social networks, blogs and media sharing, for educational or entertainment purposes?⁴⁴

The 'new' powerhouses of China and India,⁴⁵ whose technologies and know-how featured as the basis of many early Western intellectual property claims, amply serve as a counterpoint to any naïve political claims about the interests served by contemporary intellectual property laws. Arguably China's success in negotiating and implementing TRIPS is a contemporary case study in resistance to the global dominance of intellectual property rights of the limited sort against which May and Sell caution. However, interestingly, in this and in both their sole authored works, they stay away from discussion of China, mainly mentioning the situation of far more impoverished, under-developed countries and legal systems. The Chinese example points to a need for a fuller consideration of local and domestic circumstances and negotiations of global political practice. It is a necessary part of the contemporary global intellectual property story, but one that defies easy characterisation in terms of winners and losers. To tell that part of the story safeguards against history being reduced to a centre/periphery analysis, where British intellectual property leadership is picked up by the US, and then later disseminated to the developing world via the United Nations ('UN') and the WTO bodies, in the process overlooking significant national deviations and alternative

43 For example, Australia acceded to the IP Chapter of a US free-trade agreement, including term extensions, in full knowledge that it was bad economics in terms of our balance of trade in cultural products. Discussion was not overwhelmed by mythological tales of IP rights. Keeping our 50 year post-mortem right was simply not on the table for negotiation. To the extent such clauses were justified at all to domestic audiences, greater access to US markets for primary producers among others, was simply presumed as a higher priority.

44 For example, email, mailing lists, torrents, Flickr, Photobucket, Facebook, YouTube, MySpace and Massive Multiplayer Online Role Playing Games ('MMORPG').

45 For discussion of India's approach to pharmaceutical patents see: Samira Guennif and Julien Chaisse, 'Present Stakes Around Patent Political Economy: Legal and economic lessons from the pharmaceutical patent rights in India' (2007) 2 *Asian Journal of WTO & International Health Law and Policy* 65; David Tomar, 'A Look into the WTO Pharmaceutical Patent Dispute Between the United States and India' (1999) 17 *Wisconsin International Law Journal* 579.

legal strategies and approaches. China would serve as an interesting counterpoint to the situation of the most disadvantaged nation states, but perhaps lead to less ideological conclusions about the exercise of global intellectual property powers and the contemporary significance of private property ideas.

The desire to use history to renew a sense of agency in relation to intellectual property politics is a concern shared with the work of Ronan Deazley. However, whereas May and Sell focus on the role of political actors, Deazley is primarily concerned with intellectual property as developed by legal actors.

4. *Ronan Deazley's copyright stripped bare*

On The Origin of the Right to Copy adopts a very measured, detailed and generally cautious approach, with Deazley completely immersing us in the detail of copyright jurisprudence with a specific focus on the period 1695–1775. The methodology strives to reveal facts, sketch the parameters of exposition and separate misinterpretation and contemporary conjecture from recorded historical opinion. The reason he does so is to try to expose forensically the true foundations of copyright. The motivation behind this is only found in a rather dramatic concluding statement:

The pre-eminence of the common good as the organising principle upon which to found a system of copyright regulation is revealed. This element of the public interest, overlooked or perhaps ignored in other historical tales of the origin of copyright, once moved to its very core.⁴⁶

His history concludes that the central role of the public interest in copyright has been obscured by a mistaken reading of history, that is, belief in the existence of common law copyright and, by extension, the notion of copyright as a natural authorial property.⁴⁷ However, the political implications of the misreading of history are more fully developed in *Rethinking Copyright*. This second book extends the time into the early 19th century and couples it with a broader exposition on the value of the public domain.

The *Origins* book begins with an anti-foundationalist thesis, sceptical of locating copyright's origins in any particular moment or event. The origins of the right are not found as a response to the lapsing of the *Licensing Act 1662*⁴⁸ in 1695 or censorship,⁴⁹ nor motivated by the reigning in of existing printers' monopolies,⁵⁰ or with the passing of the *Statute of Anne*.⁵¹ While the *Statute of Anne* is considered important, Deazley argues that it was too poorly drafted to provide much guidance in determining the property or ambit of the rights so conferred. Thus in terms of patrimony, the *Engravers Act 1735*⁵² should be treated

46 Deazley, above n 34 at 226.

47 Ronan Deazley, *Rethinking Copyright: History, theory, language* (2006) at 6.

48 *Licensing of the Press Act* (1662) 14 Car II, c33.

49 Deazley, above n 34 at 29.

50 *Id* at 45.

51 *Copyright Act* (1709) 8 Anne, c19 ('*Statute of Anne*'). See *id* at 74, 84, 164.

as a more appropriate reference point for the origins of copyright. While borrowing from the drafting of the *Statute of Anne*, the *Engravers Act* specifically linked protection to the concept of production of ‘original’ work by the engraver, recognising that the value lay in the design itself. Linking the right to the creation of an intangible entity is called a ‘silent revolution’ in the development of the law.⁵³

He tracks in great detail the judicial augmentation of the *Statute of Anne* at Chancery and at common law in the lead up to the famous literary property cases, *Millar v Taylor*⁵⁴ and *Donaldson v Beckett*.⁵⁵ However, he progressively debunks the view of the existence of any judicial or legislative agreement about perpetual common law property right. What Deazley seeks to expose is the variability and precariousness of the legal notion of literary property in the 18th century. He also notes, in passing, the relative confusion as to the appropriate ‘political’ forum for determining the literary property dispute:

It was apparent that this debate was not simply a dispute between London and the provincial booksellers, between two commercially self-interested bodies. This entire process was also developing into a conflict between the sanctity of the legislature and the ability of the judiciary to supercede parliamentary authority through their development of the common law.⁵⁶

The analysis is very carefully constructed and persuasive.

Millar v Taylor and *Donaldson v Beckett* are subjected to rather exhaustive and detailed treatments. The first case, in judicially developing the notion of an author’s exclusive property right, supported by general philosophies of property and, in terms of Lord Mansfield, with reference to justice, reason and natural law, is considered as significant. However, this ‘new’ notion of authorial right is also noted as the cause for the dissent of Justice Yates, who rejected the concept of perpetual copyright for lack of formal legal precedent and because of public policy considerations, stating:

It is equally my duty, not only as a judge, but *as a member of society*, and even as a friend to the cause of learning, to support the limitations of the Statute.⁵⁷

This leads Deazley to conclude that, though the majority supported the case for a perpetual right,

[t]he London monopolists had picked up a number of disparate legal-historical threads, bound them together within a compelling ontological framework, and created a new, altogether, different coherent form. The perpetual common law right had literally been written, talked and argued into existence.⁵⁸

52 *Engravers Copyright Act* (1735) 8 Geo II, c13 (*‘Engravers Act’*).

53 Deazley, above n 34 at 94.

54 (1768) 4 Burr 2303; 98 ER 201 (*‘Millar v Taylor’*).

55 (1774) 4 Burr 2408; 98 ER 257 (*‘Donaldson v Beckett’*).

56 Deazley, above n 34 at 162.

57 *Id* at 178. (Emphasis in original.)

Deazley suggests, that as a matter of jurisprudence, the majority in *Millar v Taylor* got it wrong. His analysis raises questions about the acceptable processes of legal reasoning, and the role of tradition and legal space for invention, or recognition, of new political and philosophical ideas at this time.⁵⁹

Donaldson v Beckett, the case that effectively overturned *Millar v Taylor*, is a difficult subject matter because of the state of legal administration in the late 18th century. The nature of the legal hierarchy and of legal reasoning was messy, but changing.⁶⁰ The notion of a non-legally trained peerage sitting as Court of Appeal and determining cases according to their own wisdom, was coming to be challenged from developments in the conceptualisation of law as a branch of science and of the common law.⁶¹ However in the late 18th century, even among the legally trained, there was no uniformly established method of legal analysis. This was especially so with cases involving ‘novel’ subject matter, such as intangible property. Innovative attempts at rationalising law and determining a structure to categorisations of right, such as Blackstone’s *Commentaries*,⁶² were rare, ambitious and such tomes were of questionable relevance to court proceedings at this time.⁶³

Such details matter. Apart from the problem that Deazley ably demonstrates of the misreporting of the various aspects of the *Donaldson* judgement, *when the nature of the legal category is uncertain, and the approach to it comes from different directions, the difficulty of extracting a consensus of legal principles about what was in dispute and the significance of what was decided, should not be under-estimated*. Deazley’s later criticism of the first copyright treatise writers as ‘mythologising’ copyright and displaying a pro-authorial bias,⁶⁴ tends to underplay the significance of this problem. There was no choice but to be selective:

the principal obstacle to institutional or treatise writing is the daunting problem of arranging methodically what is essentially disordered material; given a usable scheme, primarily what is needed is hard work, coupled, of course, with some analytical ability.⁶⁵

58 Id at 178–9.

59 This is discussed further in Part Five, below.

60 See generally Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (1991).

61 Carleton Kemp Allen, *Law in the Making* (1964) at 221. Allen notes ‘the practice of summoning the judges was not only extremely cumbrous and burdensome, but had an air or ironic futility when (as happened as late as 1853) a great volume of elaborate judicial opinion might be assembled only to be rejected’.

62 William Blackstone, *Commentaries of the Laws of England* (1765–69).

63 See for example, Daniel Boorstin, *The Mysterious Science of The Law: An essay on Blackstone’s Commentaries* (1941) where Blackstone is also described as ‘not a rigorous thinker’ at 189. He is treated more kindly by John Cairns in John Cairns, ‘Blackstone, An English Institutist: Legal literature and the rise of the nation state’ (1984) 4 *Oxford Journal of Legal Studies* 318.

64 Deazley, above n 47 at 37–42.

Simpson goes on to note that the treatise writers inherited the belief that private law contained a latent scheme of principles, to be uncovered and expounded in a rational and coherent manner, as appropriate to a science.⁶⁶ Nonetheless, he describes the 19th century English treatise as a ‘typical form of creative legal literature’.⁶⁷

Is it possible to select and expound the ‘principles’ of copyright, drawn from the historical record, without recourse to ideological influences that demonstrate some sort of bias? Further even assuming an unusual degree of authorial self-consciousness as to the politics of the task of treatise writing, how ‘useful’ would the first treatises have been as treatises had they ‘accurately’ reflected the mixed heritage of this peculiar form of property? Deazley concludes:

[t]hat the House of Lords in *Donaldson* rejected the existence of any common-law copyright is not of course how their decision is popularly portrayed or understood.⁶⁸

The popular view drawn from the case was that the common law right was extinguished (for published works) by the *Statute of Anne*, but remained for unpublished works. He goes on to add that the acknowledgement of a common law copyright required a suitable theory of literary property to underpin it. This meant that the author, his work and the reading public required proper definition. This leads us to what Deazley discerns as the ‘true legacy’ of the case — a convincing, accessible and necessary theory of literary property as authorial property, was utilised to flesh out the mythology of the perpetual common law right.⁶⁹

A. *The trouble with Origins*

Deazley’s case analysis and re-telling of Parliamentary and related reform initiatives is impressive. However, what are more difficult to accept are the broader implications he draws from this history.

If *Donaldson v Beckett* was misrepresented and popularly misunderstood, what is left to say about the origins of copyright?

Deazley’s conclusion that history demonstrates that the common good was a ‘core concern’ of copyright is debatable. He shows that discussions of the public good were very common, and that these incorporated a range of arguments. However is it possible to conclude any more than that? Does the notion of ‘the common good as organising principle’ infer that it was a legal principle in the

65 Alfred Simpson, ‘The Rise and Fall of the Legal Treatise: Legal principles and the forms of legal literature’ (1981) 48 *University of Chicago Law Review* 632 at 653. See also James Gordley, *Foundations of Private Law: Property, tort, contract, unjust enrichment* (2006) at 44.

66 Simpson, *id* at 666.

67 *Id* at 662.

68 Deazley, *above* n 34 at 218. It is worth noting that the standard text, first published in 1971, while only cursorily discussing *Donaldson*, does not get the decision wrong: John Baker, *An Introduction to English Legal History* (2002) at 454.

69 *Id* at 220.

sense of a legal principle that settles the category, or does this mean that it was merely a political value important at the time?

In this analysis, the *Statute of Anne* is devalued as a reliable source of an authorial right because of its bare bones treatment of the issue. But, on the other hand, he maintains that:

[t]he central focus of the statute was, and remains, a quid pro quo. Parliament was not concerned with the recognition of any pre-existing authorial right, nor was it primarily concerned with the regulation of the book trade. Rather it sought to encourage ‘learned Men to compose and write useful Books’, through the striking of (an) economic, social and cultural bargain ...⁷⁰

The significance of the *Statute of Anne* is read down in terms of private rights. Eighteenth century judicial embellishment of the private right is also discounted as being without proper legal foundation. However, by implication, the *Statute of Anne* is then ‘read up’ in terms of founding a common good/pro-balance thesis. Subsequent judicial development of the ‘public interest’ angle is conceived of as legitimate and authorised by the original general ‘core’ intent of the *Statute of Anne*.

This seems to conclude an enormous foundational significance on what Deazley describes as a ‘poorly drafted piece of legislation ... (when) there is nothing to suggest that the drafters, and parliament in general, had any real understanding of the various ideas with which they were dealing’.⁷¹ It also suggests cohesion or accord among those supporting limits to literary property. This is questionable given the disparate judicial decisions, and the speculative philosophical and legal reasoning of that time as Deazley has effectively described. For example, views in support of limits or ‘balance’ drew from anti-monopoly positions; concerns with consumer quality and prices; support for a free press; advancing the cause of education; the advancement of scientific truth; maintaining tangible/intangible property distinctions and so on. Analyses may have drawn upon multiple justifications, but in general the character of the reasoning was sometimes inspired by philosophy, more often, pragmatism. Thus, if one is meant to extrapolate from that into a broader notion of support for copyright law measured in terms of the ‘common good’ that involves a public/private ‘balance’ of interests, it involves reading these decisions at a level of abstraction and with a meta-narrative cohesion that was not distinctive of the character of the reasoning of the time.

We are not certain that the problem here is simply of Deazley’s making. It also comes from reading his book in conjunction with the other histories of intellectual property and the desire to ‘fix’ the historical record using a range of rhetorical and methodological approaches. But it brings up the question of why, today, there is an obsession with using history to ‘settle’ the origin of the right. It seems we are always looking for an ‘Other’ place to begin legal and political narratives. Perhaps

⁷⁰ Id at 164.

⁷¹ Ibid.

the relation between the past and the present is more comfortable if the past appears as a gulf, because this justifies a new program of bridge-building, while obscuring the contemporary personality behind the retro design.

5. *Jane Ginsburg's correction*

It is this retro-fitting dimension that has inspired Jane Ginsburg's recent corrective to pro-public domain historiography. Ginsburg explains:

What provokes this article ... are what I perceive to be anachronistic assertions of the 'immemorial' quality of today's aggressive concept of the public domain. Some of these arguments look to me like the Roche-Boois 'provincial' line of furniture: modern pieces with nicks and wormholes introduced to impart antique appeal. The normative claims for the public domain should persuade on their own, without the added patina of ancient precept.⁷²

We will confine our discussion to her treatment of the early English copyright law.

Ginsburg's primary interest is in exploring the status of authorial claims and rebutting the suggestion that these were a late 18th and early 19th century creation. If there had been a clear legal notion of the public domain it would have been utilised to delineate and limit authorial rights:

[i]f the statute were creating new proprietary rights subtracted from the public domain, one might anticipate that the statutory grant would be narrowly construed.⁷³

First, she demonstrates that the *Statute of Anne* was not closely confined to the nominated subject matter of 'books'. Second, non-compliance with formalities was not treated as rendering a work 'public'. Unpublished letters, for instance, were not required to comply with registration requirements. Third, the exclusive rights granted in the Act were the right to print, reprint and sell. However protection was extended beyond this to cover authors of 'fair abridgments' out of respect for their original labour and often independent purpose and market. They were not necessarily treated as infringements. Things like performances were sometimes treated as a publication, sometimes not. Fourth, in relation to the effect of the Act on duration of copyright she notes the *Donaldson* controversy did not resolve or lead to a confinement of authorial claims. Further, to the extent that the decision was understood as limiting authorial claims, she notes that aspect was soundly criticised at the time. After also finding substantial evidence of extra-statutory authorial rights in France and some evidence in the US, Ginsburg concludes that:

[i]t is so well established today that copyright cannot, and should not last forever, that it may be difficult to understand the appeal of perpetual common law

72 Jane C Ginsburg, "'Une Chose Publique'?: The Author's Domain and the Public Domain in Early British, French and US Copyright Law' (2006) 65 *Cambridge Law Journal* 636 at 637.

73 *Id* at 643.

copyright in published works. But in both Britain and especially France, demands for perpetual copyright persisted into the 19th century.⁷⁴

A. *But what is this property?*

Though only a brief paper that started its life as a public lecture, Ginsburg puts to one side the origins issue and refreshingly focuses on the concepts that do the work in resolving copyright claims of protection and infringement. In doing so it becomes clear that there was no overriding judicial reference to a notion of public domain as a measure or rationale of the property. By implication, this analysis also casts doubt over the value of statements such as ‘copyright is a creature of positive law’ as an effective summary of the significance of the *Statute of Anne*.

However, demonstrating in some cases the appearance of sympathy with authorial claims to own property does not, of itself, prove the existence of a common law right of the author. Or to put it another way, to the extent that the case analysis provides support for perpetual copyright, it also brushes over the whole unresolved problem of what kind of ‘property’ it really is. Is this property right earned by reputation, by expressing personal sentiment, or a reflection of civic status,⁷⁵ or a consequence of bare labour, or only ‘original’ labour? Is the property only conditionally granted for some of these reasons? If, as a matter of law, the parameters of ‘incorporeal property’ were unknown,⁷⁶ what knowledge is gained by identifying property-type claims? This is an issue that Ginsburg alludes to, but does not fully tease out, stating that she:

acknowledge[s] immediately that the search uncovers more ambiguity than certainty, more matters for further inquiry than tidy findings⁷⁷ ... the respective domains of author and public appear to have been much less clearly marked.⁷⁸

6. *Political rhetoric and legal realities of late eighteenth century property rights*

As already mentioned, settling the boundary and legal principles associated with a category of right, such as the right to literary property, was not really possible throughout the 18th century. Literary property was not ‘a category’ of law as such. Address to it was fragmented by construction of different claims to the right in Chancery, common law and Statute. Until after 1800, the common law was organised procedurally in terms of writs or forms of action and ‘writs were not

⁷⁴ Id at 668.

⁷⁵ This is how we read Lord Camden’s ‘filthy lucre’ statement, discussed by Ginsburg above n 73 at 652–3. Even though the aristocratic claim of not writing for money had become a cliché by the 17th century it remained a common reference. See Julie Peters, ‘The Bank, the Press and the “Return of Nature”’: On currency, credit and literary property in the 1690s’ in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (1995) at 372. See also Pat Rogers, *Grub Street: Studies in subculture* (1972) at 351.

⁷⁶ Ginsburg, above n 72 at 641 citing Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Laws* (1999). See also Peters, above n 75 at 371.

⁷⁷ Ginsburg, id at 637.

⁷⁸ Id at 642.

supposed to constitute an enumeration of the substantive rights that courts ought to protect'.⁷⁹ Gordley notes that '[t]he question was rarely which of the parties should prevail as a matter of substantive right'.⁸⁰

There were numerous approaches to legal reasoning and techniques in operation in both jurisdictions, and competing views on the relative authority of legislation over common law, and common law over equity. In addition to there being different sources of right and the need for different construction of claims given respective jurisdictions, there were not reliable records⁸¹ as the foundation for *stare decisis*.

In the 18th century, courts could reach results in property cases without any clear theory in mind.⁸² Common law reference to precedent was often declaratory of the existence of law and principles, however having located principles, adherence to them was not necessarily required. Lord Mansfield, for instance, argued at one point that:

The most desirable object in *all* judicial determinations ... (which ought to be determined upon natural justice, and not upon the niceties of law) is, to do substantial justice.⁸³

He believed in following legislative intent but thought 'never to impose a new law when there was an existing remedy adequate to the removal or correction of the evil complained of'.⁸⁴

Many analyses of the literary property debates draw much significance from the contributions by Mansfield and Blackstone to the jurisprudence. However, it needs to be remembered that the majority of cases at the time fixated on the practical matter before them and said little about the more difficult abstract justification for the legal authority invoked. Mansfield and Blackstone were truly 'exceptional' for their interest in the creation of abstract norms to justify rights.⁸⁵ Or, to couch the issue more in terms of the theme of this paper, *both were uncommonly aware of their potential influence as writers and producers of legal history*.

⁷⁹ Gordley, above n 65 at 43.

⁸⁰ Ibid. Gordley goes on to add at 44 that '... [t]he significance of these differences was often neglected during a great attempt to rationalise the common law that was made during the 19th and 20th centuries'.

⁸¹ Clyde Croft, 'Lord Hardwicke's Use of Precedent in Equity' in Thomas Watkin (ed), *Legal Record and Historical Reality* (1989) at 125–6. Croft says that 'the state of reporting of Chancery decisions in the eighteenth century was, as with common law decisions, unsatisfactory both in terms of quality and the number of printed reports available ... The quality of the report or reporter may have needed to be considered before a precedent could be accepted'. Apparently on occasion Lord Mansfield instructed barristers not to use certain reports because he viewed the source as unreliable. See James Oldham, *English Common Law in the Age of Mansfield* (2004) at 30; above n 72.

⁸² Gordley, above n 65 at 52.

⁸³ *Alderson v Temple* (1768) 4 Burr 2235; 98 ER 165 cited in Oldham, above n 81 at 27.

⁸⁴ See Oldham, *id* at 9; above n 35.

⁸⁵ Robert Gordon, 'Paradoxical Property' in Brewer and Staves, above n 75 at 105.

According to Oldham, it was disquiet with Lord Mansfield's advocacy of his jurisprudential approach that inspired the following comments from Lord Camden in *Millar v Taylor*:

Their business is to tell the suitor how the law stands, not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind. As it is, we find that they do not always agree; but what would it be, where the rule of right would always be the private opinion of the judge as to the oral fitness and convenience of the claim?⁸⁶

The notion of *stare decisis* was emerging in the mid-late 18th century and there was an awareness of the importance of consistency; however, it is quite difficult to pinpoint the time at which a doctrine of modern strict theory of precedent was established. There is significant diversity of learned opinion on the point.⁸⁷ However it is clear from the different approaches to the subject matter utilised in the late 18th century literary property cases that there was by no means a broad agreement as to the appropriate bounds of legal reasoning or authority. Further, it is obvious that simply removing the matter from Chancery, and bringing the matter to the fore in the noted common law cases, did not settle either the boundaries of the category or the principles by which it could be discerned.

That literary property was considered as a form of property is incontrovertible. It is so, in terms of the general property rhetoric that so dominated those times,

[p]roperty is one of the central tropes of eighteenth century public discourse—crucial to debates in public law, political argument, political economy, and moral philosophy. And not property of any and every kind, but a peculiar form of property: property as individual dominion.... This modal form of property as dominion ... is rapidly and recklessly generalized to intangibles, then to any type of potentially valuable expectancy, and ultimately to public, political rights as well.⁸⁸

However there is an important distinction between abstract claims of the 'right' of literary property and legal right. As Gordon notes with reference to other areas of law,

What strikes the backward looking observer as curious is simply this: that in the midst of such a lush flowering of absolute dominion talk in theoretical and political discourse, English legal doctrines should contain so very few plausible instances of absolute dominion rights ... The real building-blocks of basic eighteenth century social and economic institutions were not absolute dominion rights but, instead, property rights fragmented ...⁸⁹

86 See Oldham, above n 81 at 33.

87 Croft, above n 81 at 122.

88 Gordon, above n 85 at 95.

89 Id at 96.

While the relational nature of many forms of property could be partly explained away with reference to feudal remain, this ignored the reality that many of the rules could not be so explained because ‘they represented *emerging* property relations of a new commercial society’.⁹⁰ The right to literary property belongs to this class.

As a legal matter, it is not altogether evident that references to the perpetual right of literary property were, in fact, a reference to the legal category of intangible property rights that we understand today. Oldham, for example, disputes the conventional wisdom that Mansfield had a strong moral rights view of literary property. He suggests Lord Mansfield is drawing on tort and in particular actions for deceit and reputational damage, in order to determine the right.

In *Millar v Taylor* Lord Mansfield argues for protection of literary property,

because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication: how many; what volume; what print ...⁹¹

This claim could be evidence of an authorial right in the unpublished manuscript. However, motivated by considerable study of his controversial practice in defamation and libel, Oldham points out that Mansfield took a similar view of disputes involving common law trade marks or passing off. Further, he notes that Mansfield considered it was the role of the jury to determine damages in these cases as they saw fit, rather than to award account of profits for lost property.⁹² This suggests a close association between the property claim and the notion of property in the person. However if Oldham’s reading is correct, with Mansfield the content of the legal right is not necessarily just rooted in political philosophy justified with reference to Locke’s labour theory, a Blackstonian notion of a right by occupation,⁹³ or an early reference to romanticism. It is possible that, in addition to his political views on the excellence of all property, Mansfield was drawing upon general ‘principles’ of private law, rather than from any defined sub-category of property in particular. This interpretation is quite plausible given that precedent had not yet ossified into demarcating distinctive and easily separated categories.

This period of legal complexity in discerning literary property is often marked out as ‘pre-modern’ copyright. This work was code for the suggestion that the law is incomplete, incoherent and undeveloped. However that negative judgment only

⁹⁰ Ibid. (Emphasis in original.)

⁹¹ *Millar v Taylor* Burr at 2398 (Lord Mansfield).

⁹² Oldham, above n 81 at 196–7, 205.

⁹³ Blackstone’s justification for literary property was ridiculed by Yates J, commenting that ‘[t]he occupancy of a *Thought* would be a new kind of occupancy indeed. By *what outward Mark* must the Property *denote* Appropriation? ... At what *Time*, and by what *Act* does the Author’s *common law* property *attach*?’: see John Burrows, ‘The Question Concerning Literary Property’ in Stephen Parks, *The Literary Property Debate: Seven Tracts, 1747–73* (1974) at G66.

makes sense when measured against a fictional positivist ideal of a hierarchically ordered, logically principled law that presumably emerged at some point in the 19th century. Why this ideal state was never achieved with copyright is beyond the scope of this paper. However it should suffice to point out that, as Ginsburg identifies in her discussion of abridgments, in the 19th century there was not necessarily a logical consideration of the extent and justification of the exclusive right of original author, and then a consideration of whether the defendant had infringed. The respective claims to authorship of both plaintiff and defendant were commonly considered side by side, with rationalisation of the result with reference to diverse property justifications. These varied with different approaches often reflecting the kind of subject matter under consideration, as well as the ‘fairness’ of the defendant’s intentions. The notion of ‘exclusive’ right was very different to how we approach this issue today.⁹⁴

To draw conclusions about either side of the public domain/author’s right divide from the history of copyright law requires significant reification of property claims, and accordingly of the corresponding notions of public and private domain. And,

[w]hen the language of rights is left behind for the language of policy and commercial convenience, the problem rapidly arises that the policy rationales still all conflict with one another.⁹⁵

7. Conclusion — Configuring history to manage change

In the 1980s when contemporary debates about copyright’s history really took off, the primary emphasis was the notion that Anglo-derived copyright was an economic, and (unlike its Continental cousin) not a moral right. This was the backdrop to debates about the significance of the romantic author, utilitarian and philosophical justifications for the law and the nature of the exclusive rights.⁹⁶ Today this truism has morphed. We seem to be leaning towards a slightly different emphasis from copyright as an economic right to copyright as a creature of positive law. As pithy historical summaries, both statements have long been in circulation. Both continue to have validity in terms of explaining the nature of the general category of law. It has never been suggested that one is wrong and the other is right. However, the first used to point to a discourse on the nature and import of private rights, whereas the second now often leads to an emphasis on the public character of the law.

94 See Kathy Bowrey, ‘On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating “the humble grey which emerges as the result of long controversy”’ in Lionel Bently, Catherine Ng and Giuseppina D’Agostino (eds), *The Common Law Of Intellectual Property: Essays in honour of Prof David Vaver* (forthcoming, 2009).

95 Gordon, above n 85 at 101.

96 See Kathy Bowrey, ‘Who’s Writing Copyright’s History?’ (1996) 18 *European Intellectual Property Review* 322.

In order for the second to emerge it has had to slough off some of the baggage of the first; particularly some mythologising of private property rights. But the real target of critiques today is not really the earlier histories and their notion of property at all.

What usually drives our interest and antipathy toward private property today is not distaste for philosophy, the valorisation of some forms of creativity and originality or the notion of economic reward for intangible outputs per se. Rather, those ‘defending’ the public character of intellectual property rights are usually responding to neo-liberalism.⁹⁷ The objection is to the way it commodifies everything, emphasises private property but elides the social character of corporate power,⁹⁸ subtracts many of the once-associated individual liberties and produces regulatory structures that advantage multinational corporations.⁹⁹

The national treatise writers of the 19th century sought to locate rationales, justifications and order to copyright law, so they could ‘scientifically’ explain and naturalise an earlier period of significant economic transition. In the 21st century it is legal history that is being utilised to problematise neoliberal social and economic change. We no longer appeal to immemorial truth, science and objectivity of law for validation of reason. Our language is far more playful and impassioned, and perhaps more mindful of reaching non-expert audiences. But isn’t this just legal creativity in democratising and updating methodologies?

The franchise element seeps into the literature because, faced with perceived disadvantages in ‘cutting through’ when up against the symbiosis of the State and multinational corporations, precise, compact messages need to be communicated. Recognisable tags and packaging comes to infiltrate the discourse — real property allusions and economic discourses; references to the power of State actors and nation states; the seductive pull of the weight of the historical record; the personage of the original author. Each of these appeals to various passions and intellectual property constituencies, and has potential to cross-over to the mainstream. And each of these seeks to control the terms of the discourse over future global intellectual property rights.

Those terms are currently too narrow. The preoccupation with discussing the ‘public’ character of the law, territoriality of the rights and regional arrangements leaves the state as the ‘key locus of rights enforcement and protection’.¹⁰⁰ This neglects the local legal practices that continue to support private power and think the advance of new forms of commodification. This includes agreements and licensing that are often well in excess of the rights prescribed by the letter of the law.¹⁰¹ It includes the practices of the courts where they are required to read

97 See David Harvey, *A Brief History of Neoliberalism* (2005), especially at 160–72.

98 Alain Pottage, ‘Instituting Property’, (1998) 18 *Oxford Journal of Legal Studies* 331 at 338–40.

99 Such as the developments in the notion of contributory infringement, increasing responsibility for ISPs and anti-circumvention laws. These all ‘socialise’ enforcement of private rights.

100 May and Sell, above n 26 at 216.

101 For example, we now have a global trade in television formats, estimated to be worth US\$2.4bn in 2004. However this trade in ‘ideas’ has very dubious foundation in copyright. See Christoph Fey, Guy Bisson and Daniel Schmitt, *The Global Trade in Television Formats* (2005).

substantially into the positive law simply to try and make sense of the rights presupposed.¹⁰² Some of these legal developments have the potential to dissolve the future need for copyright altogether. In the entertainment industry, trade mark, passing off, personality rights, celebrity rights are today often easier to invoke to protect the most ephemeral of ‘properties’ and arguably also able to deliver stronger protections. It is more likely that these, rather than copyright, will be the new treaty areas to support the further reach of commodification. And in these areas it will be harder to win the hearts and minds of the fans to resist such developments than with copyright. In view of this possibility, a more lateral reconsideration of ‘Mansfieldian’ reputational property and its limits may be very timely.

This is where the copyright fixation with the history of formal law and questions of what is the right policy ‘balance’ of public and private interests also misses the point about commodification. Commodification requires new territorialisations. Our hunger for new commodities and commodity forms mean that there will be new fences, appropriations and enclosures. But the legal boundaries or categories are never fixed or secure. They are not everlasting. They are reinvented to the extent that they can be made to serve commercial interests, and when they reach those limits, they will be discarded by law reforms, supported by more new conceptualisations of private property. Faith in any enduring legal truth residing in copyright law to resist commodification is ill-founded and politically naïve.

So, rather than using history as a blueprint to map a path from the 19th century economy to ours, recovering our intellectual history allows us to recover generations of debates about the sense of property and the need for limits. While our societies differ, there was, once, an appreciation of different standards and qualifiers for different sorts of copyright subject matter. This is partly why there have been so many approaches to the nature of the literary property right. In practice, copyright has not treated all ‘property’ claims generically. The nature and strength of protection has accommodated various cultural and economic discourses about the merits of the particular genre of work and the costs of protection and non-protection.¹⁰³

What I think would be of most value for us today to consider from history are the particularities of ‘property’ claims,

[w]e live among particulars, but we always want and see something more than any particular can give or reveal — thus our restlessness, our boredom, our

102 As Finkelstein J opined, ‘[i]t is usually apparent whether a particular work may be the subject of copyright ... There are, however, some exceptions, and this case deals with one of those exceptions ... This appeal is concerned with copyright in a television broadcast ...’: *TCN Channel Nine v Network Ten* (2002) 118 FCR 417 at 420. After several appeal decisions it was clarified that protection awarded by the Act to television broadcasts was protection of ‘television programs’, however the later concept is not defined in the legislation nor specifically defined by the Australian courts.

103 Especially so in the area of indigenous property claims in Australia, although academic analysis inevitably still focuses on (and produces) new problems and limits.

suffering.¹⁰⁴

We need to abandon, for a time, the preoccupation with the global policy stage and look at what has gone on at the local level — the contours of the local politics, the nuances, compromises and the boundaries. In doing so, our histories will become more reflective, more inclined to question our own judgments, and likely to embed our personal convictions with the nuances still intact. As Jean-Bethke Elstain has suggested, ‘[i]t is the task of the public intellectual as I understand that vocation to keep the nuances alive’.¹⁰⁵

To the extent that the intellectual property historian today is also inevitably a public intellectual, we should demand no less.

The last decade of global and national copyright reform has undoubtedly advanced established multinational interests at the expense of other concerns. This politics deserves analysis and critical commentary by lawyers, historians, social commentators and the public more broadly. However in the Anglo-Australian and common law tradition, it is not, and has never been the case, that law is an empty vessel that can be filled to overflowing by political edict. It is that reality that creates legal challenges and the need for historical inquiry. Indeed, as law in context, sociological approaches, Foucauldian approaches and critical legal studies have repeatedly pointed out, often the law on the books bears little resemblance to the law in action. It is the essential incompleteness or contrariness of the legal form, and the ongoing need for historically valid forms of legitimation for exercises of legal power that creates a political space for legal movement, reinvention and change. While legal academics struggle to claim a place at the table where decisions about global law reform are made, we can still contribute much to the translation of this politics into legal practice. The importance of this analytical work should not be under-estimated and in best equipping oneself for that task, a deeper appreciation of legal history is a good place to start. This means letting go of the current preoccupation with the origins of copyright, and considering the complexity of legal foundations and forms much more critically.

104 Unger, above n 20 at 24.

105 Comment by Jean-Bethke Elstain, *The Future of the Public Intellectual: A forum* (25 January 2001) <<http://www.thenation.com/doc/20010212/forum>> at 27 October 2008.