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# Book Reviews

## Challenging Paternity: Histories of Copyright

Mark Rose, *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993. Pp. x, 176. \$27.50.

Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics*. New York: Columbia University Press, 1994. Pp. xv, 200. \$29.50.

David Saunders, *Authorship and Copyright*. New York: Routledge, 1992. Pp. ix, 269. \$49.95.

**Rosemary J. Coombe\***

Intellectual property law has at long last become a field of engaged interdisciplinary inquiry. For years taught primarily by practicing lawyers and theorized only by liberal philosophers or scholars of law and economics—and thereby rendered a field of forms and abstractions—the laws of intellectual property have recently attracted scholars concerned with

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\* The author would like to thank Peter Jaszi for helpful discussions and his ongoing support and enthusiasm in the endeavor to expand the fields in which we consider regimes of intellectual property.

the social contexts of their emergence and the contemporary fields in which they function.<sup>1</sup> The majority of these studies have been historical in emphasis.

What unites the resurgence of historical interest in intellectual property law is the recognition that concepts such as the "author," the "work," the "invention," the "original," the "imitation," and the "copy," do not have self-evident referents. Instead, recent scholarship indicates just how culturally specific and historically contingent such seemingly transparent terms actually are, and how complex the contexts in which they emerged, were contested, and gained legitimacy. For scholars of intellectual property, the greatest challenge of the last five years has been one of contextualization—situating the central terms of intellectual property laws within the worlds of significance in which they attained meaning and the relations of power in which they legitimated forms of authority. This review will consider three recent volumes: the first two engage the complex cultural contexts of copyright law's historical emergence, while the third is

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1. In addition to the works reviewed here, see Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991); Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris 1789-1810* (Berkeley and Los Angeles: University of California Press, 1991); Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'" *Duke Law Journal* (1991): 455-502; Peggy Kamuf, *Signature Pieces: On the Institution of Authorship* (Ithaca: Cornell University Press, 1988); David Lange, "At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium," *Law and Contemporary Problems* 55 (1992): 139-51; Jessica Litman, "The Public Domain," *Emory Law Journal* 39 (1990): 965-1023; Litman, "Copyright as Myth," *University of Pittsburgh Law Review* 53 (1991): 235-49; Celia Lurie, *Cultural Rights: Technology, Legality and Personality* (New York: Routledge, 1993); L. Ray Patterson, "Understanding Fair Use," *Law & Contemporary Problems* 55 (1992): 249-66; L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of User's Rights* (Athens: University of Georgia Press, 1991); Mark Rose, "The Author in Court: *Pope v. Curl* (1741)," *Cultural Critique* 21 (1992): 197-217; Trevor Ross, "Copyright and the Invention of Tradition," *Eighteenth-Century Studies* 26 (1992): 1-27; Susan Stewart, *Crimes of Writing: Problems in the Containment of Representation* (Oxford: Oxford University Press, 1991); Martha Woodmansee, "The Interests of Disinterestedness," *Modern Language Quarterly* 45 (1984): 22-47; Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'" *Eighteenth-Century Studies* 17 (1984): 425-28; Woodmansee, "The Uses of Kant in England," in Wolfgang Wittkoski, ed., *Verlorene Klassik? Ein Symposium* (Tübingen: Max Niemeyer Verlag, 1986): 237-54; "Aesthetics and the Policing of Reading," *Cultural Critique* 11 (1988): 203-21. Perhaps the most important collection is Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994). This volume is a reprinting of twenty-two essays that first appeared as a special issue of the *Cardozo Arts and Entertainment Law Journal* 10 (1992): 277-720.

I have attempted to bring anthropological, political, and feminist insights to bear upon issues in intellectual property in Rosemary J. Coombe, "The Cultural Life of Things: Globalization and Anthropological Approaches to Commodification," *American Journal of International Law and Politics* 10 (1) (forthcoming 1994); "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy," *Canadian Journal of Law and Jurisprudence* 6 (1993): 249-85; "Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies," *Political Theory* 21 (1993): 411-33; "Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy," *New England Law Review* 26 (1992): 1221-80; and "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue," *Texas Law Review* 69 (1991): 1853-80.

a less nuanced survey of the history of copyright and author's rights in five jurisdictions.

Mark Rose's *Authors and Owners* is an elegantly written and carefully researched interpretive account of the emergence and development of British copyright laws in the eighteenth century. An expansion and extension of Rose's path-breaking article, "The Author as Proprietor: *Donaldson v. Beckett* and the Genealogy of Modern Authorship,"<sup>2</sup> originally published in 1988, this book provides the first comprehensive overview of the lengthy struggles which attended the transition from a regime of regulatory patronage and royal prerogative to the modern system of proprietary control over works of authorship. Examining the sixteenth through the late eighteenth century, Rose considers the full range of primary and secondary sources—original manuscripts of bills of Parliament, the numerous petitions and publications that delineate the contours of the eighteenth-century "literary property debate," the common law cases and Chancery injunctions, parliamentary debates and personal correspondence—in a subtle and nuanced reading of the historical record. In so doing, he weaves a fascinating narrative of the development of the modern idea of authorship and its relation to the idea of the literary work. These are the central terms of copyright law, which is perhaps the most fundamental institutional embodiment of the author-work relation.

Like most fine interdisciplinary interpretive studies, this book shows both a scrupulous attention to detail and an awareness of larger structural forces. Rose is attuned to the subtleties of language use in eighteenth-century legal and philosophical discourse, but resists any recourse to formalist analysis. He situates his interpretation of the literary property debate within a historical context shaped by the impact of print technology, the growth of print literacy and reading publics, responses to market relations, and the formulation of new aesthetic models of reading and writing. Rose's approach suggests that copyright law emerged from a historically specific context in struggles between interested parties who engaged emergent and already authoritative discourses to make their claims. The authority of the legal definitions and resolutions of those claims then provided legitimating cultural resources which produced and affirmed new identities and interests in the social arena. In this sense, Rose's work shares the perspectives of many scholars in critical legal studies, feminist legal studies, and the law

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2. *Representations* 23 (1988): 51-85.

and society tradition;<sup>3</sup> he explores the ways in which law is both culturally constituted and culturally constitutive.

As Rose acknowledges, it is a peculiarly modern conceit to understand the relation between the author and the work as a relation between a proprietor, conceived of as an originator, and a special kind of discrete commodity, a distinctive "work," conceived of as his "own." Rose shows how this relationship developed conceptually over an extended period of time, flowering most fully in the aesthetic theories of Romanticism. Until recently, liberal theories of possessive individualism and Romantic theories of authorship dominated both literary theory and the law. With the emergence of structuralist, poststructuralist, and postmodernist currents of thought, however, scholars have questioned the primacy and integrity of the author-work relation, opening the legal foundations of copyright law and its history to new forms of inquiry. Scholars neither well-versed nor particularly interested in such areas of literary theory will, however, find Rose's book both eminently readable and genuinely engaging. By developing his narrative analysis through examination of concrete cases and controversies, Rose illuminates wider fields of conceptual debate without resorting to the jargon that has alienated many readers from developments in literary theory.

Beginning with a comprehensive survey of the institutions and practices of printing and publishing in the sixteenth- and seventeenth-century English context, Rose commences his account of the literary property debates with the struggles that led to the passage of the Statute of Anne. Although recognized as providing the first set of authorial rights in literary works, the Statute was passed at the behest of booksellers attempting to end the Stationer's Company monopoly over the printing of books. It was more than a century after the Act's passage before the nature of the author's right and the nature of the property to which that right extended were given their modern form. These developments took shape in an extensive and contentious discourse manifested in a series of publicly circulated petitions,

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3. See Rosemary J. Coombe, "Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies," *Law and Social Inquiry* 14 (1989): 69-121; Coombe, "Contesting the Self: Negotiating Subjectivities in Nineteenth-Century Ontario Defamation Trials," *Studies in Law and Politics* 11 (1991): 3-40; Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992); Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York: Routledge, 1991); Mary Joe Frug, *Postmodern Legal Feminism* (New York: Routledge, 1992); Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983); Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57-125; Christine Harrington and Sally Merry, "Ideological Production: The Making of Community Mediation," *Law and Society Review* 22 (1988): 709-36; Christine Harrington and Barbara Yngvesson, "Interpretive Social Research," *Law & Social Inquiry* 15 (1990): 135-48; Gary Peller, "The Metaphysics of American Law," *California Law Review* 73 (1985): 1151-290; Austin Sarat and Thomas Kearns, eds., *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993); Kim Scheppelle, *Legal Secrets: Equality and Efficiency in the Common Law* (Chicago: University of Chicago Press, 1988); Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (New York: Routledge, 1993).

parliamentary and press debates, injunctions, and infamous disputes that extended well into the nineteenth century. The central concerns of this discourse included the rights which an author could claim, their origins in statute or common law, their duration, and the nature of the property to which they attached.

Proponents of authors' perpetual rights to their literary works (largely the booksellers, to whom authors assigned these rights in gross) ultimately lost their case in the 1774 House of Lords decision in *Donaldson v. Beckett*.<sup>4</sup> During their struggles, however, author's rights advocates, drawing from philosophical discourses of possessive individualism and aesthetic discourses of genius and originality, defined the rhetorical means by which the statutory term of copyright would be successfully challenged. Using these discursive resources, the debate was continually extended into the next century. In denying an author's perpetual rights, opponents (often provincial booksellers, who were denied the London Stationer's Company's historical privileges) challenged the legitimacy of the property to which the claim was made. In so doing, they forced their opponents to delineate a conception of the literary "work" and foreshadowed the dimensions of the public interest in limiting copyright protection:

Thus the representation of the author as a creator who is entitled to profit from his intellectual labor came into being through a blending of literary and legal discourses in the context of struggles over perpetual copyright. The literary-property struggle generated a body of texts . . . in which aesthetic and legal questions are often indistinguishable. What constitutes a literary work? How is a literary composition different from any other form of invention such as a clock or an orrery? What is the relationship between literature and [the] ideas [it expresses]?. . .

[T]he focus of my discussion is not on *subjectivity* but on *discourse*. I am not concerned with the production of the author as a consciousness so much as with a representation of authorship based on notions of property, originality, and personality. The production of this representation involved, among other things, the abstraction of the concept of literary property from the physical book and then the presentation of this new, immaterial property as no less fixed and certain than any other kind of property. . . . (Rose, 6-7)<sup>5</sup>

Rose remarks upon the rhetorical attempts to build a concept of literary property upon the model of the landed estate, and the complex metaphorical work that was necessary to "establish copyright as an absolute right of

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4. *Donaldson v. Beckett*, 4 Burr 2408, 98 ER 257 (1774).

5. All textual page notations for Rose's work refer to Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993).

property, a freehold 'grounded on labour and invention.'" (Rose, 8).<sup>6</sup> Ultimately, Rose argues, these attempts were unsuccessful because real property is no more real, fixed, or certain than other forms of property, but socially created in a nexus of human relationship: "All forms of property are socially constructed and, like copyright, bear in their lineaments the traces of the struggles in which they were fabricated"(Rose, 8).

A number of such struggles are addressed, commencing with the seventeenth-century cases involving the Stationer's Company, and the first assertions of author's rights. Rose demonstrates the extent to which the state conditioned its recognition of authors with a system of press regulation intended to hold authors and printers accountable for publications deemed libelous, seditious, or blasphemous. Only the Stationer's Company could publish works and control the production of copies. Although an author might be paid a fee for the manuscript, the author's proprietary rights, as rights to commodities with an exchange value, were unacknowledged. As a matter of *propriety*, the Stationer's Company had developed a practice of not publishing books without the consent of the writer and of identifying the author on the title page (a custom affirmed by a Parliamentary edict of 1642). The Stationer's Company nonetheless regarded books as their own works and properties—devolving from the work of publishing itself. Rose finds scant evidence of the assertion of an author's property rights, but in Milton's works, he sees the germination of ideas of authorship that Locke would further develop. Such nascent notions of property still, however, seemed very much embedded within convictions of propriety to which they were to remain bound until well into the eighteenth century (Rose, 27-30).

The struggle over defining the bookseller's rights continued in the 1690s as the Stationer's Company battled to renew the Licensing Act and preserve its monopoly over printing. Those arguing against further state controls reflected an increasing opposition to monopolies of any kind. Locke was the first to recommend that the bookseller's property be limited, either to a fixed term defined from the date of printing, or to a certain number of years after the death of the author. There is, however, little evidence that he considered this an author's right; the author here, as for many years thereafter, was a means to limit the bookseller's rights.

Daniel Defoe and Joseph Addison made stronger claims for authors, stressing the complementarity of punishment and reward. If the state held an author responsible for his writings, the state should also reward him for his noble labors. Ironically, these arguments became the means by which the booksellers were at once deprived of the perpetual rights to copy books,

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6. Quoting William Blackstone, *Commentaries on the Laws of England* (1765-69; reprint, Chicago: University of Chicago Press, 1979), 2:405.

and granted further extensions of their traditional privileges. Examining the original manuscript bills and the processes of amendment, Rose shows how a limited term of copyright (fourteen years with the possibility of a fourteen-year renewal) was for the first time introduced as a means of ending a traditional monopoly. The figure of the author as the person in whom rights were being “vested” or “secured” (an ambiguity that was later to prove contentious) also served to provide the booksellers with a potent means of continuing to press their own claims. Contemporary practice ensured that authors transferred all rights to copy with the physical manuscript; any right recognized in an author, therefore, would accrue to the benefit of the booksellers. Although the legislators drew back from asserting that the author had an “undoubted property” in his writings (Rose, 48), the ground had been laid for this argument to become persuasive. The Statute of Anne “constituted the author as well as the bookseller as a person with legal standing” (Rose, 50), even though existing trade practices and market relations limited the author’s bargaining power.

Indeed, in Chapter Four, Rose shows how even in cases that did involve authors, such as *Burnet v. Chetwood*,<sup>7</sup> issues of propriety were at least as significant as issues of property. The nature of the author’s right remained amorphous. Burnet had written a book in Latin, discussing the story of Genesis, containing a facetious conversation between Eve and the serpent which became quite celebrated. When parts of it were published in English without his consent, this segment of his work caused Burnet no little embarrassment. Taking measures to prevent future reprintings, Burnet succeeded in suppressing the story until a group of booksellers decided to make the notorious book available in English after his death. His executor sought an injunction in Chancery.

Rather than address the questions of whether the author’s property extended to translations or whether these were to be considered new works, Lord Chancellor Macclesfield based his decision on the Court of Chancery’s superintendence over all books, and the inappropriateness of such a work getting into those “vulgar” hands from which the author had attempted to conceal it by writing in Latin (Rose, 50). The concern with regulating the press combines here with a sensitivity to an author’s sense of propriety, precluding any recourse to economic questions or even to considerations of whether a translation was a new work or the work of the original author. No insight was afforded into the boundaries of the “work” and thus into the nature of the property that copyright protected.

When specifically asked to address questions about the property rights bestowed by the Statute of Anne, the Court of Chancery evaded them. Former members of the Stationer’s Company, however, were usually

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7. *Burnet v. Chetwood*, 2 Mer 441, 35 ER 1008 (1720).



successful when they attempted to secure injunctions against reprinters of books to which the members had long assumed they held exclusive rights. Even though the statutory term of copyright had long since expired, the Court of Chancery was apt to grant such injunctions on the basis of the original transfer of title from the author (Rose, 51-52). In other words, literary property was treated like other forms of property, and the limitation term in the Statute was simply ignored. Such Chancery injunctions provided further ammunition for the booksellers to argue later in the century that the author had a perpetual common law right recognized in equity if not in courts of law. The Statute, they asserted, simply provided a new field of remedies for a right that preexisted its passage.

The 1730s saw renewed agitation for an extended term of copyright, which the House of Lords was in no way inclined to grant. The arguments made by booksellers on behalf of an extended copyright term for authors illustrate the developing idea of the author's connection to his work. In the 1735 *Letter from an Author to a Member of Parliament*, a common law author's right was asserted in these terms:

For if there be such a Thing as Property upon Earth, an Author has it in his Work. A Father cannot more justly call his Child, than an Author can his Work, his own. Every Reason, for which Property was at first introduced, and has since been maintained in other Cases, holds equally in this (Rose, 55).

Rose takes metaphor seriously as the means by which cultural significance is conveyed and he capably explores the tropes of paternity, theology, horticulture, and real estate that pervaded the arguments on behalf of literary property in the eighteenth century. The patriarchal notion of a father begetting his book and the book as his child is significant here, for it suggests a notion of creation and paternity that goes far beyond a simple notion of property as possession or commodity. A father's child is his own, not because he owns it or has invested in it, but because this child will carry the father's name and likeness. The child is the means by which the father's immortality is to be realized. The literary work is a very specific and peculiar form of property. The mixed metaphors used to justify it suggest that issues of the author's persona and reputation, his fame (or infamy), in addition to his fortune, were understood to be fundamentally at stake.

Alexander Pope, who recognized this, forced the courts to enforce the Statute (Rose, 59) and attend more seriously to the nature of the property in which an author could claim a right. The emphasis of the debate shifted from the bookseller's pecuniary rights to what we might today deem the author's rights of publicity. His 1741 suit against Edmund Curll is

illustrative.<sup>8</sup> Pope had tricked Curll into publishing a volume of his personal correspondence in an era when to publish one's own letters was considered excessively vain. Once an "unauthorized" version was circulating, however, a gentleman would be excused for wanting to ensure that he was fairly represented. This ruse enabled Pope both to publish an "authorized" version of his letters and to use Curll as an example of an irresponsible bookseller. The tactic dramatized the limitations of the bill, concurrently pending in the House of Lords, to extend the bookseller's term of rights. The eventual lawsuit against Curll also clarified an author's rights in his writings and extended the scope of literary property. Again, Pope's use of the statute indicates how a commercial regulatory statute was deployed to pursue matters having as much to do with propriety as with commerce:

Pope's preface to the 1737 edition of his letters is dominated by the genteel discourse in which he displays his indignation as a man of honor against booksellers' violation of his privacy. But what we can call the "discourse of property" makes itself felt as well in the preface, as when Pope complains that the booksellers' practice of soliciting copies of authors' letters leads to petty thievery. . . . Moreover, if the quantity of material procured falls short, the bookseller will fill out the volume with anything he pleases, so that the poor author has "not only Theft to fear, but Forgery." And the greater the writer's reputation, the greater will be the demand for the books and so the greater the injury to the author: "[Y]our Fame and your Property suffer alike; you are at once expos'd and plunder'd" (Rose, 62).

This complex discourse of property and propriety underscores the mercurial instabilities of literary property in an era marked by the shift in the author's role as gentleman and scholar to that of a professional trading in a new form of commodity. Moreover, the question of whether an individual's personal and private correspondence should be protected under a statute "for encouraging learning" and "for the Encouragement of Learned Men to Compose and Write useful Books" compelled the court to consider the scope of literary property as distinguished from the physical property in which it was fixed. Rose includes Pope's Bill of Complaint (drafted by William Murray, later Lord Mansfield) and Curll's Answer (neither of which have been previously printed) in an Appendix, transcribing them from the original documents in the Public Record Office (Rose, 145-53). These documents reveal that Lord Chancellor Hardwicke was faced with the first but certainly not the last occasion in which a court was asked to make a literary-critical distinction between "works of learning" and other

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8. *Pope v. Curll*, 2 Atk 342, 26 ER 608 (1741). An earlier version of Rose's account of the case may be found in Rose, "The Author in Court." A version of this article was also published in *Cardozo Arts and Entertainment Law Journal* 10 (1992): 475-93.

writings. The eighteenth-century Court of Chancery felt in no way inhibited from recognizing "learned works," even in less familiar forms, and the court deemed it "certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this that makes them so valuable . . ." (Rose, 63-64). Questions of commercial value had not yet been separated from issues of social merit and public utility. Just as the courts might deny protection to immoral works, however profitable, so they might extend protection to works of recognized merit, however personal and private they might seem.

Pope's suit posed a more fundamental challenge to the court, for it forced an authoritative resolution of *where* the author's property lay. The court made a distinction between the physical letters, possessed by the recipient or his assigns, and the author's right to copy, which did not accompany this right of physical possession. Parliament had left it far from clear what nature of property they were protecting through the Statute of Anne. Books were statutorily recognized as physical in nature, but in the developing discourse of literary property, the author's right "was moving away from its old foundation in the materiality of the author's manuscript" (Rose, 65). Until the end of the eighteenth century it remained plausible to argue that the author could have no property in ideas; he relinquished any property he had with the conveyance of the manuscript and its publication. It took decades to develop and refine the concept of the literary work and the idea of intangible property.

The heart of Rose's work lies in his account of the battles between the London booksellers and their competitors that took place between 1740 and 1774. In arguing for and against the author's natural rights to the fruits of his labor, the era's leading lawyers, jurists, judges, and men of letters defined the central principles of copyright and its necessary limitations. From an examination of primary sources, Rose demonstrates how this debate articulates themes of liberal possessive individualism, the rhetoric of natural rights, traditions of gentlemanly conduct, codes of honor and respect for reputation, empirical psychology, religious imagery, and Augustan and Romantic ideals of composition, along with more suppressed themes of republican virtue. This debate, moreover, was evidently an international one, for it keyed national rivalries between England and Scotland (still regarded by many English as a colony populated by rude and savage peoples), and pitted the claims of a growing Scottish intelligentsia and a profitable provincial book trade against the traditional privileges of a wealthy and well-connected London elite.<sup>9</sup>

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9. For an excellent discussion of this rivalry and its manifestations in questions of literary property, see Kathryn Temple, "Johnson and Macpherson: Cultural Authority and the Construction of Literary Property," *Yale Journal of Law & the Humanities* 5 (1993): 355-88. A fine explication of the growth

Readers will enjoy the drama in Rose's account of the public excitement surrounding the arguments and the decision of *Donaldson v. Beckett*,<sup>10</sup> legal scholars will appreciate the care with which he attends to the ambiguities of the historical record. He clearly articulates the central paradox of this momentous case. The House of Lords managed to "settle" one of the most hotly debated legal questions of the eighteenth century, but it manifestly failed to provide any rationale for its decision. In voting against the author's perpetual rights, the House of Lords went against the advisory opinion of the majority of the twelve common law judges, and determined that copyright would henceforth be limited to the statutory term. The historical record renders little insight, however, into which of the available doctrines supported this decision (if, indeed, it was a single doctrine):

[A]lthough the struggle concluded with a rejection of the London booksellers' claim that copyright was perpetual, it by no means concluded with a rejection of the powerful representation of authorship on which that claim was based—and this affected the way in which the Lords' decision came to be understood. . . . [Samuel] Johnson understood the decision in *Donaldson* as a compromise between the author's claim and the broader needs of society, but the peers themselves had articulated no such theory. As we have seen, they simply resolved the practical question of the perpetuity. . . . [I]n the longer run it was necessary to make some sense of their vote. . . . (Rose, 107-8).

Due to a clerical error, contemporaneous reports of the case made it appear that the House of Lords decision followed the advisory opinion of the judges, rather than reversing it. *Donaldson* was interpreted as an affirmation of the author's common law right, followed by a decision that the perpetuity was taken away by the statute. Although such a reading of the decision can no longer be sustained, its influence at the time was substantial. The author's "natural right" continued to be argued. Claiming that their properties had been expropriated, the booksellers continued to press Parliament for an extension of the term. Authors like Southey, Wordsworth, and Coleridge protested the "loss" of their natural inheritance well into the nineteenth century. Their arguments were reinforced by Romantic ideas about the relation between an author and his work, and the nature of originality and genius. These arguments provided the discursive

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of British, as opposed to English, nationalism may be found in Linda Colley, *Britons: Forging the Nation 1707-1837* (New Haven: Yale University Press, 1992). Gerald Newman's *The Rise of English Nationalism* (New York: St. Martin's Press, 1987) also provides an important context for the eighteenth-century literary property debates.

10. 4 Burr 2408.

resources with which proponents successfully pressed Parliament for extensions of the terms of copyright in 1814 and again in 1842.

*Authors and Owners* takes the challenge of interpretive analysis and cultural critique seriously, situating copyright developments historically, politically, economically, and aesthetically within a field of contemporaneous and often conflicting discourses—the cultural realm within which authority and legitimacy were negotiated in eighteenth- and early-nineteenth-century English society. The complex relations between property and propriety that were forged in this period continue to influence contemporary legal regimes.

In *The Author, Art, and the Market*, Martha Woodmansee adds significant new dimensions to our understanding of this historical trajectory by interpreting the relationship between the growth in reading publics and the development of the discourse of aesthetics. Although aesthetic philosophy traces its origins to eighteenth-century German intellectual life, it drew upon English and French sources. It was to have a profound impact on the very Romantic writers most fully engaged with issues of copyright in early-nineteenth-century Britain. Woodmansee describes the development of the modern idea of art as a distinct domain of activity and the artist as a distinct kind of person with special capacities as historically contingent cultural creations rather than universal categories of concern. To rebut contemporary philosophers of aesthetics who continue to treat art as if it were a timeless or universal category for inquiry,<sup>11</sup> Woodmansee considers the underlying social and economic conditions that motivated and shaped the development of the fine arts as a separate discipline in philosophy in the late eighteenth century. She then links the contributions of this discipline to the legitimation of developing copyright regimes in both the German states and in England (via the influence of Romantic poets).

The major scholarly contribution of Woodmansee's work lies in her translation from the German of many previously underappreciated or overlooked eighteenth-century discussions of aesthetics. Precisely because they were rhetorical and pedagogic, and thus deemed nonphilosophical, these texts have been marginalized in aesthetic theory. Woodmansee demonstrates, however, how such texts illuminate the historical conditions, cultural politics, economic pressures, and social anxieties that shaped an

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11. Woodmansee cites Morris Weitz, ed., *Problems in Aesthetics* (London: Macmillan, 1959 and 1970) as exemplary of a larger tendency in the philosophy of art that includes Monroe Beardsley, *Aesthetics from Classical Greece to the Present: A Short History* (Birmingham: University of Alabama Press, 1966); Peter Kivy, "Recent Scholarship and the British Tradition: A Logic of Taste—The First Fifty Years," in George Dickies and R.J. Sclafani, eds., *Aesthetics: A Critical Anthology* (New York: St. Martin's Press, 1987); Jerome Stolnitz, "On the Origins of Aesthetic Disinterestedness," *Journal of Aesthetics and Art Criticism* 20 (1961): 131-43; Arnold Berleant, "The History of Aesthetics," *British Journal of Aesthetics* 26 (1986): 101-11, 195-203.

emergent authoritative discourse on aesthetic judgment. Such texts create a social framework within which we can recognize a work like Kant's *Critique of Judgement* not as a timeless statement expounding universal principles, but rather as an artifact of a particular social situation.

The British origins of German aesthetics were recognized in the eighteenth century. Addison's papers in the *Spectator* are often described as a point of departure for a discourse that constructed the acts of reading and appreciation in the cultivation of the self. It is clear that eighteenth-century British writings influenced those German formulations of art, authorship, originality, genius, literature, and the propriety of reading that were to become so ubiquitous in the latter half of the century,<sup>12</sup> in what became known as the "battle of the book." Addison, Woodmansee argues, was not so much explaining a preexisting practice of consuming art, as *producing* a new practice: connoisseurship. Thus he engaged in a pedagogical activity, defining and promoting beneficial activities for the leisure of a middle class (Woodmansee, 6).<sup>13</sup> Similarly, the late-eighteenth-century discourse of aesthetics aimed to promote a set of attitudes and inculcate characteristic dispositions towards those products of human endeavor we now designate as fine arts. In short, this discourse attempted to forge new forms of subjectivity and new sources of value in a market-oriented society with a growing middle class.

In Woodmansee's analysis, then, discourses do not simply reflect or represent realities, but play a constitutive role in shaping the realities we recognize. In this sense, her work might be defined as poststructuralist or pragmatist in its orientation—it is attentive to the fashion in which new

12. According to Thomas McFarland:

From about 1700 to the Romantic era, cultivated Germans read and were profoundly influenced by things English . . . but the British did not read the Germans in return. It was Hume who woke Kant from his dogmatic slumber, but the only foreign culture Hume himself was interested in was French. After the advent of Romanticism, the stream of influence almost completely reversed its direction of flow. Except for a fascination with Byron (and of course with Scott), it is astonishing how little the German intelligentsia after 1800 were aware of any of the English Romantic writers. By this time, however, the cultivated English were virtually scrambling to imbibe German culture. Shelley embarked on a translation of Goethe's *Faust* even though he did not know German; Coleridge translated Schiller's *Wallenstein*, though he made mistakes and found the labor "soul-destroying." Carlyle built the greater part of his reputation as a mediator of German culture to the English, and his angry reaction to Coleridge was at least in part conditioned by his unwillingness to accept him as a competitor priest in the ministrations of German sacraments.

By the 1840s, it was suggested that no learned gentleman could afford not to learn German, considered a cultural necessity in cultivated circles, whereas in the 1770s and 1780s, German philosophers and Romantic writers regarded England as their spiritual home.

Thomas McFarland, *Originality and Imagination* (Baltimore: Johns Hopkins, 1985), 47-49. It would thus appear that English ideas about literary property (and perhaps even the arguments made in the battles of the booksellers) made their way into German aesthetic philosophy in the last half of the eighteenth century, and this German aesthetic philosophy was then incorporated into the arguments made by, and on behalf of, English Romantic writers to extend the term of copyright in the first half of the nineteenth century, which Woodmansee mentions.

13. All textual page notations for Woodmansee's work refer to Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994).

forms of knowledge emerge historically to create the possibility of new ways of being human. Moreover, such possibilities may enable some segments of society while they exclude others; the discourses of self-creation that circulate in any society often sustain relations of social inequality. So, for example, in the emergent bourgeois public spheres of the eighteenth century, the subject that engages the newly created concept of the "public" is culturally constructed as both male and literate.<sup>14</sup> Similarly, Woodmansee shows that the subject-position of "author" was a decidedly gendered one; women could write, they could publish, but they were not as a consequence recognized as "authors." If Woodmansee's position might be taken to be poststructuralist in its recognition of the constitutive power of discourse, there is little overt "theorizing" in her book. Her arguments emerge with great clarity from judicious readings of primary texts conscientiously situated in relevant social and historical contexts of inquiry.

Woodmansee's central thesis is that men of letters created the concept of "art" during a period of intense social change. In late-eighteenth-century Germany, the mass increase in literacy and the growth of reading publics threatened the social and economic position of these gentlemen scholars. In what "cultivated" elites regarded as a cultural crisis, more "serious" writings failed to compete successfully with the "light" entertainment that middle-class readers were so indiscriminately consuming. The prospects for having "serious" works published were diminished by widespread practices of piracy which discouraged publishers from risking investments in books unlikely to find a quick and ready market. Aesthetic philosophy was thus forged in a context where the increasing commercialization of literature failed to reward or sustain poets, philosophers, or historians. Woodmansee suggests that the discipline of aesthetics was a discourse of compensation for writers in German-speaking states who found themselves without the sources of income and prestige that networks of patronage provided elsewhere. Aesthetic philosophy elevated the status of literature, refined criteria for the proper mode of judging aesthetic merit, and counseled a more refined and cerebral mode of reading. In so doing, it separated art from life. Judgment became autonomous from social and historical contexts.

Interpreting (and often providing original translations of) theories of art developed by Abbe Charles Batteux, Moses Mendelssohn, Karl Phillipp Moritz, Friedrich Schiller, and Johann Adam Bergk in the latter half of the eighteenth century, Woodmansee contributes a host of new insights into the

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14. For a longer discussion of this point see the essays contained in Bruce Robbins, ed., *The Phantom Public Sphere* (Minneapolis: University of Minnesota Press, 1993); Craig Calhoun, "Civil Society and the Public Sphere," *Public Culture* 5 (1993): 267-80, as well as the other essays contained in that issue.

historical emergence of “the work” as a philosophical and legal concept. Neoclassical theorists believed art intervened directly in human life. It affected and moved human audiences, communicated truths, and imparted beliefs. The excellence of art lay in its instrumental success in serving human purposes (Woodmansee, 12). Beginning with the reception of Batteux’s treatise *The Fine Arts Reduced to a Common Principle* (1746), and Edward Young’s *Conjectures on Original Composition* (1759), German writers moved away from an instrumentalist theory of art towards one that stressed its self-sufficiency. They stressed the need to contemplate art “disinterestedly.” Aesthetic judgment would no longer devolve from the affective workings of art but from the inner perfection of its form.

In 1785, for example, Karl Philipp Moritz asserted that the ultimate end of the fine arts derived from “the principle of pleasure” and not the “principle of imitation” of the truths of nature. What provided pleasure was the work’s perfection:

Moritz asserts that the *craftsman* alone is constrained by principles of instrumentality. Objects of *mechanical art*—knife and clock—“have their purposes outside of themselves in the person who derives comfort in their use; they are thus not complete in themselves.” . . . The *artist* by contrast, is under no such constraints, for a work of *fine art*, “does not have its purpose outside of itself, and does not exist for the sake of the perfection of anything else, but rather for the sake of its own internal perfection.” It follows that the effects of a work of art on its audience are irrelevant to its value. Now a function of purely internal relationships, the value of art is intrinsic. . . . The artist’s sole end or purpose in Moritz’s model of art consists in the creation of a perfectly “coherent harmonious whole” [*übereinstimmendes harmonisches Ganze*] (Woodmansee, 18).

This new understanding of aesthetic judgment accorded well with certain quietist brands of German Pietism which demanded a distanced, disinterested contemplation of a perfect, pure, and self-sufficient Deity regarded as “an end in Himself” (Woodmansee, 20). By arguing that “[i]n its origins the theory of art’s autonomy is clearly displaced theology” (Woodmansee, 20), Woodmansee moves into intriguing, if not fully mapped territory. We are given insufficient sociological information to determine if the persuasiveness of the new discipline of aesthetics resulted from these theological dispositions. Although Woodmansee makes a strong argument about the personal, professional, and economic motivations of those who disseminated aesthetic philosophy, we gain far less sense of why other Germans found these arguments compelling. Nor do we glean any understanding of the social composition of those networks through which this aesthetics became influential in German juridical discourse.

Material impulses motivated the valorization of an autonomous realm of art that could not be appreciated by a “vulgar” middle-class audience



lacking the skills necessary to appreciate beauty. Insufficiently appreciated works were indicative, then, not of an imperfect work, but of imperfect sensibilities (Woodmansee, 21). Due to the economic repercussions of the massive growth in the German reading public, the rapidly expanding number of “vulgar” writers, and new forms of reading material, aesthetic discourse attacked the readers for their shallow interests and publishers for their desire for quick profits:

For the chief goal of this philosophy was to sever the value of a work from its capacity to appeal to a public that wanted above all to be diverted. . . . By shifting the measure of a work’s value from its pleasurable effects on an audience to such purely intrinsic considerations as “the perfection of the work itself,” Moritz arms his own and all difficult writing against the eventuality of a hostile or indifferent reception. An answer has thus suggested itself to the question with which I began this discussion: how to account for the momentous shift from the instrumentalist theory of art to the modern theory of art as an autonomous object that is to be contemplated disinterestedly. . . . As literature became subject to the laws of a market economy, the instrumentalist theory, especially in the affective formulation given to it by the generation of Mendelssohn, was found to justify the wrong works. That is, it was found to justify the products of the purveyors of strong effects, with whom more demanding writers could not effectively compete. The theology of art fashioned by Moritz offered such writers not only a convenient but a very powerful set of concepts with which to address the predicament in which they found themselves (Woodmansee, 32).

If the philosophy of aesthetics attempted to rescue art from the determination of the market by formulating a new concept of the work, a new disposition towards art also needed to be inculcated. In Schiller’s letters of the 1790s that comprise *On the Aesthetic Education of Man*, the philosopher argued that aesthetics had the power to bring men to freedom. Over the course of the letters he recommends that men’s attentions shift from politics to a contemplation of beauty in art. This tendency in Romantic thought is well-known, although perhaps more telescoped in Schiller’s personal thinking—in the violent aftermath of the French Revolution, a personal cult of art replaces a political commitment to human emancipation (Woodmansee, 58-59). Arguing against any insistence on accessibility in poetry but rather for a poetry that would uplift people and challenge them to transcend the everyday and to encounter the ideal, Schiller urges the cultivation of a new form of reading. This endeavor would engage all of man’s faculties, integrate and reunite him with his self, and restore the whole person to the fullness of his being: “[P]oetry acquires the task of healing the wounds inflicted on man by life in the modern world” (Woodmansee, 72).

Woodmansee digs to find the root of Schiller's extravagant claims for art, not in "an impassioned interest in human emancipation by peaceful means, but [in] the very material existential considerations of a professional writer in Germany at the end of the eighteenth century" (Woodmansee, 59). By attributing Schiller's vision of "aesthetic education" wholly to the self-interest of professional writers, Woodmansee may be less than generous. Raymond Williams's remarkable book, *Culture and Society, 1780-1950*,<sup>15</sup> suggests that in England, Romantic ideologies were complex and potentially humane responses to the economic devastation and social misery visited upon English society by the Industrial Revolution. At least a brief consideration of the German social and economic situation and the impact of wage labor and its cultural significance would seem necessary before the discourse of aesthetics could be persuasively dismissed wholly as a matter of compensatory self-interest foisted upon a society by a marginalized elite.

If the nature of the artistic work and the appropriate manner of its reception were central features of the modern drama of aesthetics, the concept of "authorship" played a strong supporting role in this performance. In the eighteenth-century German states, professional writers found themselves in precarious positions. Without the traditional networks of patronage that existed in England and France, without the legal safeguards of copyright or even the conventional standards of propriety that Rose alludes to, writers who refused to cater to popular tastes found themselves unable to sustain a livelihood and unable to protect themselves against piracies. In Germany, the notion of the author as "an individual who is solely responsible—and thus exclusively deserving of credit—for the production of a unique, original work" (Woodmansee, 35) had to be laboriously constructed. This was especially so in a cultural milieu which viewed writers as mere vehicles for received truths or divine inspiration. They were masters of traditional strategies, deploying common materials to achieve prescribed effects in a respected craft. The elevation and internalization of inspiration in the notion of "original genius" is, of course, one of the main achievements of German Romanticism, as is the idea that the work of art was imprinted with the personality of its creator. As articulated in the theories of Herder, Goethe, Kant, and Fichte, such ideas elevated the status of serious writers and legitimated and established their claims to property in their writings.

The notion of the literary work had to be refined before copyright laws could be passed in the German states. In Britain the literary property debates took place in legal forums. In Germany the same questions were probed in philosophical discussion. How could the book be anything more

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15. Raymond Williams, *Culture and Society, 1780-1950* (New York: Columbia University Press, 1983).

than a physical object? How could property subsist in an immaterial entity? How could ideas be owned? Where could an author's property be seen to lie? The German debate, which attracted the energies of poets, philosophers, publishers, and jurists to address the status of "the book," took place primarily between 1773 and 1794. It produced no less than thirty-five publications on the topic. Woodmansee's examination of these documents demonstrates how imbricated the issue of the propriety of piracy was with the salient philosophical questions of the era. Was there an ethical and religious obligation to share ideas? Was the intellect of man an individuated one? How was the author of the work and the parameters of that authorship to be evaluated? Answers to these questions drew upon and consolidated the ascendancy of formalist aesthetics. The German resolution of the question of copyright (which finds its clearest expression in Fichte's 1793 essay, "Proof of the Illegality of Reprinting") is not in substance much different from the doctrines formulated by Warburton and Blackstone in England a few decades earlier. By distinguishing between the physical object, the ideas it presents, and the form in which those ideas are presented, the author's right is justified by the individuality of the form that is his own expression (Woodmansee, 51-52).

Woodmansee does not explore the circulation of ideas between England and Germany in this period, although she makes a strong case in her final chapter for the influence of German Romanticism on those English poets who pressed for copyright reforms in early-nineteenth-century Britain (notably Southey, Wordsworth, and Coleridge). Attention to how ideas developed in one context became influential in another is commendable and especially necessary in historical legal scholarship. One wonders, however, whether English jurists might not have had a prior influence on German philosophers, given the intense German interest in English intellectual life during this period.

David Saunders's *Authorship and Copyright* is a work that demonstrates none of the original scholarship or attention to detail that characterize both the Rose and Woodmansee volumes. Unlike those two efforts to sustain interpretive theses through original readings of primary materials, Saunders's book is a survey of the history of copyright in five jurisdictions. Saunders attempts to provide a comprehensive history of the origins and development of copyright and author's rights laws, to refute theoretical perspectives toward the history of copyright that deny law's "positivity," and to argue that laws of copyright and regimes of author's rights are conceptually and categorically autonomous. The book fails to fulfill these objectives.

*Authorship and Copyright* cannot serve as a comprehensive survey of the field of copyright history. It is, unfortunately, wholly reliant upon readily available secondary sources. Moreover, even as an overview of the secondary literature, the book is inadequate. Although the book was

published late in 1992, the author seems unaware of the many social and historical studies in intellectual property that appeared in the late 1980s and early 1990s.<sup>16</sup> These omissions have the unfortunate effect of making his treatise seem anachronistic. If the book had been published a decade earlier, it would have been a welcome contribution to the field. Were Saunders to have analyzed the primary historical sources, his inattention to recent secondary sources would have been less serious. Saunders, however, is content to connect and paraphrase arguments from older secondary surveys readily available elsewhere. If these labors had resulted in an engaging and accessible survey of the historical development of copyright law and author's rights, the book might still have been a welcome resource for classroom use. Regrettably, it cannot serve even this purpose adequately, due to the obscurities of Saunders's rhetoric. In his own words, he is deliberately engaged in "positivities and polemics" (Saunders, 10)<sup>17</sup> that make the book far from accessible. His pugnacious prose and intemperate tone detract from what might have been an adequate, if conventional, consideration of the origins and development of copyright and author's rights laws in Great Britain, France, Germany, and the United States.

Although Saunders purports to produce "a work of history that reconnects a phenomenon of print literate cultures—authorship—to its legal conditions, and a legal phenomena—ownership of copyright—to its historical and cultural conditions" (Saunders, vii), it is symptomatic of his text that he fails to historically contextualize the central terms of his subject matter. Not recognizing, as Woodmansee and Rose so clearly do, how historically contingent the underlying concepts of copyright are, he begins his book with the four words: "This is a work . . ." (Saunders, vii). In any other context, this would be an unobjectionable and common use of language. However, in a volume concerned with the emergence of copyright law, such a phrase takes for granted precisely what should be at issue—the modern idea of the work as a discrete and autonomous entity. As Rose and Woodmansee so carefully demonstrate, the concept of the work emerged over decades of concrete struggle, and continues to perplex artists and lawyers with the complexities of its potential meanings.

The theoretical agenda of Saunders's book is a rather difficult one to follow. Saunders wishes to refute positions that deny the law's positivity or see the law as the consequence of other historical forces unfolding. He creates two theoretical positions from which he distinguishes his own approach. The first he calls "Romantic Historicism," the second he deems "Poststructuralism." The first glorifies the birth of the author as an

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16. See the books and articles cited in note 1.

17. All textual page notations for Saunders's work refer to David Saunders, *Authorship and Copyright* (New York: Routledge, 1992).

inevitable event in the unfolding history of mankind, while the second celebrates the death of the individualist author in a *jouissance* of linguistic intertextuality. Both positions, he suggests, undervalue the law and its autonomy. The following extended quotation demonstrates the lack of clarity and specificity with which Saunders makes this argument:

This study is intended also to illustrate what a practical and pluralist form of literary and cultural studies might look like—not least as an alternative to the poststructuralist ascendancy in literary and cultural theory. Crudely put, this means a return to historical information . . . in [a] milieu [in which] the emergence of the literary author has been taken to exemplify how aesthetic self-production is achieved: hence the importance accorded to a Romantic theme—the “birth” of the author. The presumed mundanity of legal matters allowed practical conditions of authorship such as ownership of copyright to be reduced to small change, regardless of the fact that in the actual world of book publishing they were big money. More recently, in what has seemed a powerful theory-based breakthrough, a poststructuralist (or deconstructionist) account of authorship has popularized a counter-theme—the “death” of the author. This second account offers a critique of the author as the origin and end of meaning, and presents itself as an emancipation—there are tones of an epochal shift in cultural politics—from the individualized authorial subject of Romanticism. The preconditions of all possible forms of personhood (and meanings) is now to be “language,” “discourse,” or “writing.” Yet once again the status of institutional conditions—including legal arrangements—is trivialized, this time by an enthusiastic dismissal of positive fact as a discursive fiction arbitrarily imposed on linguistic possibility (Saunders, viii).

It is difficult to know to whom Saunders is referring because he so seldom names his targets when making these sweeping characterizations. Nor does he demonstrate *how* other scholarly interpretations of the historical data actually fit his categories of denigration. In short, he never clearly engages the work of other theorists or demonstrates that his own interpretation of the historical record is superior. Instead, he occasionally makes reference to the work of others by an annoying use of scare-quotes (around phrases often taken out of context) that indicates his distance from and distaste for the scholarly work of others. At no point does he engage the arguments of others directly, using the historical materials to argue for an alternative reading of the record. This is especially disturbing given his failure to examine any of the original sources or to engage in primary research; not having done the spade-work, he is hardly in a position to assume such a churlish attitude towards the labors of others.

The categories of Romantic Historicism and ahistoric Poststructuralism that he evokes as counterpoints to his own position are endlessly repeated

but never fully developed. Saunders names Ian Watt's 1957 *The Rise of the Novel* as the exemplar of his first category—a work now more than thirty years old, and not without its critics. For Saunders, the Romantic Historicist approach is suspect because it “establishes the author as the necessary consciousness of history,” whereas the Poststructuralist is guilty of positing the author “as the necessary preliminary for the dissolution of consciousness into its real—that is, nonconscious—linguistic and textual determinations” (Saunders, 1).

One can be sympathetic to Saunders's desire for comprehensive studies of copyright that are grounded in concrete historical contexts and still criticize his casting of all other scholars of copyright into these two caricatured categories. He refuses to define poststructuralism (Saunders, 3), and thereby precludes a determination of whether there actually *are* any copyright historians that fit the category as he defines it. Nonetheless, Saunders attacks his anonymous adversaries by evoking well-known poststructuralist theorists:

On the question of authorship, it seems to me, authorities such as Roland Barthes, Jacques Derrida and Michel Foucault have not spoken with a single voice. Although an impression has formed that they have all equally embraced the image of “transgressive” language as “author,” this impression is false. For Foucault in particular, as I will argue . . . there was no lasting commitment to a notion of language or writing as the antecedent condition of all social being.

This is not to say that—among the epigones—extravagant formulations of the discursive “death” of the author were not proposed. On the contrary, we have grown familiar with the figure of the author no longer as the origin of the work but as the imaginary discursive effect thrown up by discourse. We are familiar too—and sometimes not a little weary—with the “critical politics” that has been assumed to flow from this turn to language. It is as if we were asked to believe that an adequate historical account of copyright law could be written entirely in terms of linguistic profusion, textual subversion and unbounded plasticity of being (Saunders, 3).<sup>18</sup>

For a reader unfamiliar with the work of Barthes, Derrida, or Foucault, these passages are incomprehensible; for one who is, they simply lack specific referents. We are not told who has formed such an impression of transgressive language, whom he considers “the epigones” to be, or where or in what contexts familiarity with the author as “imaginary discursive effect” has been felt. The identities of those who might be urging “an

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18. Saunders conflates deconstruction and poststructuralism, as well as discourse, language, and writing. Throughout the book he assumes that the poststructuralist term “discourse” is simply equivalent to language, without recognizing the concept's dominant referent—systems of signification operative as regimes of power/knowledge that are based in and disseminated through institutions and realized in institutional practice.

adequate historical account of copyright law . . . in terms of linguistic profusion" remain clouded in mystery. Readers unfamiliar with literary theory will soon find themselves confused. Those who are comfortable with such theory will find themselves annoyed by Saunders's failure to name his antagonists and actually engage their scholarship.

There are no deconstructionist studies of copyright law, and those works that might loosely be deemed poststructuralist are also resolutely historical—attentive to a wide range of material and social contexts. In addition to Rose's and Woodmansee's works above, Mary Poovey's sparkling essay, "The Man-of-Letters Hero: *David Copperfield* and the Professional Writer,"<sup>19</sup> comes to mind. Poovey effectively adopts a poststructuralist approach to consider the construction of a new form of gendered personhood and new forms of identity and psychology in both law and literature during the period 1837-1842, a period marked by an intense struggle to extend the term of copyright. If Saunders ignores the historical nature of many scholarly works with poststructuralist orientations, he similarly ignores a wide range of scholarship that historicizes German and English Romanticism and links it to global and domestic social forces.<sup>20</sup> In other words, poststructuralist studies may be attentive to historical detail, just as works about Romanticism are not necessarily universalizing and may make historically specific claims. In short, Saunders simply avoids any scholarship that transgresses the artificial categories he has created.

Despite his pleas for historical specificity and attention to the contingency of context, Saunders does not carry out his announced agenda. For example, his account of the battle over the book (the struggle to gain copyright protection for authors and prevent piracy) in eighteenth-century Germany relies upon a single source—a French text published in Stockholm.<sup>21</sup> He does not appear to have examined any of the massive German literature published in the eighteenth century, or even the published collection of the debates, and ignores much of the relevant secondary literature. Saunders takes large chunks from Woodmansee's early article

19. In Mary Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Chicago: University of Chicago Press, 1988), 89-125.

20. In addition to Williams, *Culture and Society*, see Jonathan Arac and Harriet Ritvo, eds., *Macropolitics of Nineteenth-Century Literature* (Philadelphia: University of Pennsylvania Press, 1991); Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983); Marjorie Levinson et al. eds., *Rethinking Historicism: Critical Readings in Romantic History* (Oxford: Basil Blackwell, 1989); Jerome J. McGann, *The Romantic Ideology* (Chicago: University of Chicago Press, 1985); Thomas Pfau, "The Pragmatics of Genre: Moral Theory and Lyric Authorship in Hegel and Wordsworth," *Cardozo Arts and Entertainment Law Journal* 10 (1992): 397-422; Marlon B. Ross, *The Contours of Masculine Desire: Romanticism and the Rise of Women's Poetry* (New York: Oxford University Press, 1989); Andrew Rutherford, ed., *Byron: Augustan and Romantic*, (London: Macmillan, 1990); and Clifford Siskin, *The Historicity of Romantic Discourse* (New York: Oxford University Press, 1988).

21. S. Stromholm, *Le droit moral de l'auteur en droit allemand, francais et scandinave, avec un aperçu de l'évolution internationale*, in *Etude de droit comparée*, vol. 1, *L'évolution historique et le mouvement international* (Stockholm: P.A. Norstedt and Soners Forlag, 1966).

"The Genius and the Copyright"<sup>22</sup> to build his own case, but later dismisses it as yet another example of the Romantic Historicist dialectic rise of "man's" subjectivity (Saunders, 219-20). Not having translated or interpreted the vast range of eighteenth-century German literature on the topic,<sup>23</sup> or even making the effort to discuss the full range of Woodmansee's own published work, Saunders cannot counter her arguments by positing an alternative proposition using the historical evidence. Nonetheless, he feels justified or compelled to cast her within the categories he has fabricated.

To transcend the theoretical categories he finds so inadequate, Saunders declares a need "to do justice to the historical positivity of certain legal-cultural arrangements relating to authorship" (Saunders, 4). The parameters of this endeavor lack clarity, unless we take this as an imperative to mere description. It is not at all certain what Saunders takes "historical positivity" to be. He does not distinguish between specifying historical concepts (statuses, dispositions, institutions, and relationships) and adopting the stance of social-scientific positivism. It is quite possible to engage in historical specification but nonetheless regard such phenomena as socially contingent, humanly constructed, culturally shaped, and implicated in relations of power and knowledge. It is not necessary to see phenomena as objectively necessary or historically inevitable to regard humanly constructed historical forms positively, that is, as lived realities. In the matter of copyright law, we can explore terms like authorship and the work in a fashion that is sensitive to the full dimensions of the historical conditions of their emergence and social movement. This is the nature of the project in which both Rose and Woodmansee have attempted to engage, and one to which Saunders, given his professed desire for historical contextualization, should be sympathetic.

The historical context that frames Saunders's own purview of positive law is limited. He considers the relevant "coordinates for such a history" to be (i) the growth of print literacy; (ii) "a historical anthropology of personhood" (that recognizes the historical specificities of the modes of being a person); and (iii) a recognition of the determining role of law "as an independent and variable phenomenon of culture" (Saunders, 6). Unfortunately, Saunders fails to develop at least two of these three themes. In several of his chapters he successfully draws upon the cultural historiography of the spread of print. The promise of "a historical anthropology of personhood" is, regrettably, an empty one. We get little

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22. *Eighteenth-Century Studies* 17.

23. Saunders reveals a lack of facility in German by his incorrect use of an umlaut in the German term for book (Saunders, 109, 111, 114)—not a crime, but certainly a telling error for an author who implies a familiarity with the "explosion of doctrine" and begins his argument, "[a]s the German literature of ideas shows . . ." (Saunders, 108).



sense of the cultural contexts that created the role of the author, the socially constructed personas, or the culturally mediated consciousness of writers, publishers, lawyers, or judges.

Similarly, his insistence upon the independence of law is simply that; Saunders cites none of the theoretical literature on the relation between law and society, the debates about law's relative autonomy, or its constitutive nature. His assertions that "the law" has historically particular objects both reifies law and simplifies its social consequence. To recognize the law as determinative does not require that we see it in splendid isolation from other social forces, including other systems of thought which may well influence its social meaning and interpretation. The law, for example, shapes subjectivities or offers subject-positions that individuals may occupy; but it never operates in isolation from other discourses which afford other possibilities and opportunities to challenge legal hegemonies.<sup>24</sup>

If the theoretical positions adopted by *Authorship and Copyright* are difficult to discern, the substantive thesis at least is clear. Saunders's central claim is that "in copyright regimes the general object has been to provide a remedy against unauthorized reproduction of a protected commodity; in *droit moral* regimes, to protect the integrity of an authorial personality" (Saunders, 8). Saunders chooses his evidence very selectively to buttress this thesis; to make his argument he must ignore vast amounts of legal evidence and important parts of the historical record. A few examples will suffice. As Rose's reading of the eighteenth-century British cases has revealed, issues of propriety and reputation—matters of "authorial personality"—were litigated through the use of the copyright statute on a regular basis. Similarly, the late-eighteenth-century literary property debates were waged in public pamphlets and petitions that valorized particular forms of authorship and evoked new ideas of genius and originality. The historical record shows that public arguments on behalf of copyright connected property, propriety, originality, personality, and posterity in ways that undermine Saunders's rigid dichotomy between copyright and *droit moral* regimes.

In the nineteenth century, Romantic ideals of authorial persona were crucial to the arguments for a longer copyright term. Saunders conveniently ignores the efforts of Romantic poets like Southey and Wordsworth in the literary property debates and the specific social significance accorded to the labors of the author in this period. He must do so to maintain his characterization of British copyright law as entirely concerned with the regulation of a simple commodity. The passions and polemics that circulated publicly in both the eighteenth and nineteenth centuries around

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24. I discuss this point in greater detail in "Room for Manoeuver," and "Contesting the Self."

issues of copyright suggest that representations of personhood were forged in legal struggles and that the law provided institutional forums for the legitimation of new personae.

Saunders's insistence on separating property and personality in legal regimes cannot be maintained.<sup>25</sup> In his claims for the pristine purity of English common law from all concerns with "personality," Saunders attempts to make the concerns of Anglo-American copyright laws and Continental regimes of author's rights categorically distinct. Unfortunately, the reasoning of moral rights may be found in the texts and subtexts of Anglo-American and Canadian copyright discourse as easily as compromises between author's personality rights and economic interests may be found in Continental legal discourse.<sup>26</sup> The extended historical research in which Rose and Woodmansee have engaged make Saunders's assertions about autonomous laws with singular objects less than tenable and raise other serious questions about the form that future historical scholarship of intellectual property should assume.

If we are to seriously engage in the effort to historically contextualize intellectual property laws, one of the central organizing strategies of Saunders's book serves as an obstacle rather than a vehicle for promoting creative thought. The presentation of each jurisdiction as having its own autonomous law belies the complex interrelations of legal regimes in the historical periods under examination. Woodmansee comes closest of these three authors to addressing the transnational flow of ideas in this period, but even her account is less than complete. Rose makes no attempt whatsoever to look outside of England, or even to the eighteenth-century cultural struggles to make Great Britain a predominantly English (rather than Welsh, Irish, Scots, or Celtic) nation-state. Modern nation-states developed legal systems in relation to one another, often in relations marked by an anxiety of influence. English law, for example, was a "national" institution to the extent that it was distinguished from French law in the eighteenth century and ideologically constructed as the source of the Englishman's greater freedoms and the English Empire's moral superiority.<sup>27</sup> But every identity contains traces of the differences that constitute it, and the law is no exception.

Both Rose and Woodmansee have written truly impressive studies of the interplay between legal, philosophical, political, and aesthetic discourses in national contexts. But given our increasing knowledge of the ways in

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25. Because Saunders's book was written at the time the Australian government was considering the inclusion of moral rights in its copyright regime, it is difficult not to infer a political subtext in its content.

26. I thank Peter Jaszi for this observation.

27. See John W. Cairns, "Blackstone, an English Institutionist: Legal Literature and the Rise of the Nation State," *Oxford Journal of Legal Studies* 4 (1984): 318-60; Colley, *Britons: Forging the Nation 1707-1837*; Newman, *The Rise of English Nationalism*.

which global involvements shaped European knowledges and institutions in the eighteenth and nineteenth centuries,<sup>28</sup> we might hope that future studies will be less insular and less contained by the genealogies of current nation-states. Rather than identify the founding fathers and search for the origins of the central premises of modernity in each and every nation, we might well consider the international contexts and concerns in which these ideas were developed and exchanged. There is a strong need for interdisciplinary historical scholarship that attends to domestic legal developments in a fashion attentive to global forces and struggles. We might hope for histories of copyright, trademark and patent, for example, that consider the complicated interrelationships among colonial expansion, trade relations, and geopolitical influence.

Our histories of intellectual property are histories of some of European modernity's greatest artifacts. But as we become aware of how profoundly ideological and historical these purportedly universal phenomena are, we need alternative histories that trace the cultural significance of legal forms in a fashion more fully sensitive to their social functions within multiple realms of meaning and power.

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28. For discussions see Eric Wolf, *Europe and the People without History* (Berkeley and Los Angeles: University of California Press, 1982); Jean and John Comaroff, *Ethnography and the Historical Imagination* (Boulder: Westview Press, 1992); Jean and John Comaroff, *Modernity and Its Malcontents* (Chicago: University of Chicago Press, 1993); Nicholas B. Dirks, ed., *Colonialism and Culture* (Ann Arbor: University of Michigan Press, 1992); Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992); Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Cambridge: Harvard University Press, 1993); Javed Majeed, *Ungoverned Imaginings: James Mill's The History of British India and Orientalism* (Oxford: Clarendon, 1992); Sidney W. Mintz, *Sweetness and Power: The Place of Sugar in Modern History* (New York: Viking Penguin, 1985); Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1963); Gauri Viswanathan, *Masks of Conquest: Literary Study and British Rule in India* (New York: Columbia University Press, 1989); Viswanathan, "Raymond Williams and British Colonialism," *Yale Journal of Criticism* 4, no. 2 (1992): 47-66.