

**Abstraction and Registration: Conceptual innovations and supply effects in Prussian and British copyright (1820-50)<sup>1</sup>**

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<sup>1</sup> *Intellectual Property Quarterly* 2003(2): 209-228. The authors are cited in alphabetical order and contributed equally to the argument advanced. The article includes historical material drawn from Friedemann Kawohl's recently published PhD thesis: *Urheberrecht der Musik in Preußen 1820-1840* (Tutzing, Schneider, 2002). Where sources are not easily accessible, they are cited in the original German in the footnotes. A version of this paper was presented at the 12th International Conference on Cultural Economics (ACEI), Erasmus University Rotterdam, 13-15 June 2002. Particular thanks to Lee Marshall, University of East Anglia, for helpful comments on an earlier draft.

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### **Abstract**

It is one of the orthodoxies of modern copyright law that the enjoyment and the exercise of the rights granted “shall not be subject to any formality” (Berne Convention 1886, Berlin revision 1908, Art.4), such as a registration requirement. In this article, we trace the origins of this provision to a conceptual shift that took place during the early 1800s. Specific regulations of the book trade were superseded by the protection of all instantiations (such as performances, translations and adaptations) of abstract authored work. For two seminal copyright acts of the period, the Prussian Act of 1837 and the UK Act of 1842, we show there was considerable concern about the economic implications of this new justificatory paradigm, reflected in a period of experimentation with sophisticated registration requirements. We indicate market responses to these requirements and plea for a reconsideration of “formalities” as redressing justificatory problems of copyright in the digital environment.

### **Introduction**

Empirical links between copyright legislation and the shape of particular markets have remained elusive. Economic theory has allowed academics to construct models of copyright both as a successful response to market failure in the production of cultural goods<sup>2</sup> and as an unsuccessful stimulant of authors’ supply<sup>3</sup>. Historical research offers one way of enriching theoretical assumptions, and may even isolate legislative intervention as a parameter of change.

In this article, we investigate some early 19th century copyright laws in Prussia and Britain. During this crucial period, the rubicon was crossed between specific regulations of the book trade (characteristic of 18th century laws) and the general protection of creative works typical of modern copyright law.<sup>4</sup> The Prussian

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<sup>2</sup> E.g. William M. Landes & Richard A. Posner, “An economic analysis of copyright law”, *Journal of Legal Studies* 18 (1989), 325-366

<sup>3</sup> E.g. Arnold Plant, “The economic aspects of copyright in books”, *Economica* 1 (1934), 167-195.

<sup>4</sup> Various strands of literature have recognised this seminal moment. Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law, The British Experience, 1760-1911*, (Cambridge University Press, 1999), at 2-6, locate the transformation within the British tradition from what they call a “pre-modern” to a “modern” intellectual property law “during the middle period of the 19th Century”: Intellectual property became a separate area of law, widening its focus above the “things” and “objects” it was immediately concerned with, shifting its attention from the “labour” embodied in a specific object to the “object” itself, abandoning the metaphysical for an economic level of discussion,

Copyright Act of 1837 and the UK Copyright Act of 1842 take the author as the benchmark of protection (*post mortem auctoris* terms were introduced systematically), and protection was extended to previously largely unchallenged acts, such as performing in public, and making adaptations. These cultural activities were re-conceptualised as proprietary exploitations of abstract authored works.

In particular, we are interested in one contested feature of the copyright regulations of that period: the requirement to register a right for it to take effect. This feature is in conflict with the abstraction implicit in the new concept of authors' rights. Furthermore, it appears to limit some of the undesirable economic consequences of extending the scope and duration of copyright.

The paper proceeds in three parts. We first sketch the philosophical and institutional backdrop to the seminal copyright statutes of the early 19th century in Prussia and the UK. Secondly, we gather some evidence on the changing shape of cultural markets, focusing on the proprietary exploitation of music as a possible result of these legal interventions. Thirdly, we re-assess the economic rationale for the registration requirement. Finally, registration is suggested as a policy option in the context of contemporary copyright laws under pressure from digitization.

### **The institutional roots of copyright**

Copyright law grew out of at least two distinct historical practices: (1) The unsystematic granting of feudal privileges to authors favoured by the late medieval and early modern courts.<sup>5</sup> (2) The monopolistic control of the publication and

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while the registration process became focused on a representation of the protected subject matter rather than the object itself. Authors within critical literary theory, e.g. Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'", *Eighteenth-Century Studies* 17 (1984), 425-448, Martha Woodmansee & Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Durham, Duke, 1994), and the sociology of copyright, e.g. Lee Marshall, *Losing One's Mind: Bootlegging and the Sociology of Copyright*, (PhD thesis, University of Warwick, 2001), have associated the transformation with the emerging romantic conception of the author around the turn of the 19th century. We offer a different account, emphasizing a process of abstraction that has an important source in Idealist philosophical thought.

<sup>5</sup> Crown privileges had to be obtained for each jurisdiction separately, the most important covering the trade fairs around which early modern commerce was structured. Letter patents, granting exclusive printing rights, were common in England and Germany by the late 16th century and persisted into the second half of the 18th century, in Germany even into the early 19th century - the period discussed in this article. §36 of the Prussian Act of 1837 offers the proprietor of existing crown privileges the choice, "if he wishes to make use of these, or enjoy the protection of the statute". Cf. Hansjörg Pohlmann, *Die Frühgeschichte des musikalischen Urheberrechts (ca. 1400-1800): Neue Materialien zur Entwicklung des Urheberrechtsbewußtseins der Komponisten*, (Kassel, Bärenreiter, 1962); David Hunter, "Music Copyright in Britain to 1800", *Music and Letters* 67 (1986), 269-282; Elmar Wadle, "Privilegienpraxis in Preußen", in: Barbara Dölemeyer & Heinz Mohnhaupt (ed.), *Das Privilegium im europäischen Vergleich*, Vol. 2, (Frankfurt a. M., 1999), 335-362.

distribution of printed materials via guild type institutions, sometimes related to the exercise of state censorship.<sup>6</sup>

In an environment of increased trade and consumption, the incumbent London book trade (the *Stationers*) found these practices insufficient in preventing competing editions from entering the market. Lobbying induced the English Parliament to pass the worldwide first copyright statute. The so-called Act of Anne came into force on 10 April 1710 and protected “Books and other Writings” against reprints for 14 years from first publication, renewable once. The preamble of the Statute suggests “An Act for the Encouragement of Learning” incentivising “learned Men to compose and write useful Books” by requiring consent of the “Authors or Proprietors” for printing, reprinting, sale and publication (sec. 1). The wording remains ambiguous about where the incentive should bite precisely: at the point of creation (author) or investment into publication and distribution (Stationer).

**[insert Table 1]**

The debate about the character and purpose of copyright was rekindled in a series of court cases during the middle of the 18th century. In *Donaldson v Becket*<sup>7</sup> London publishers argued for copyright as a perpetual “natural” property right under common law in order to prevent the sale of cut-price Scottish reprint editions after the term under the Act of Anne had expired. The main argument advanced was the possessive individualism of Locke’s classic labour theory (*Second Treatise of Government*, 1690). For literary property, the House of Lords rejected the argument in favour of a copyright approach, created and limited by statute. *Donaldson v Becket* was decided by a simple vote in the House of Lords; no authoritative reasoning was given.<sup>8</sup>

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<sup>6</sup> In England, there was from 1554 a formalised process under which stationers obtained the right to print a new book by stating their claim before the Stationers’ Company Warden, cf. John Feather, *Publishing, Piracy and Politics: A historical study of copyright in Britain*, (London, Mansell, 1994); Martin Kretschmer, “Intellectual Property in Music: A historical analysis of rhetoric and institutional practices”, special issue: “Cultural Industry” (ed. P. Jeffcutt), *Studies in Cultures, Organizations and Societies* 6 (2000), 197-223. In Saxony, crucial to the German book trade because of the annual Leipzig trade fair, a *Bücherkommission* governed by the Lutheran church formally controlled the trade since 1687, cf. Karl Friedrich Curtius, *Handbuch des im Königreiche Sachsen geltenden Civilrechts*, Vol. 4, 2nd ed, (Leipzig, Schwickert, 1831); Kawohl, note 1, at 331. In France, the Crown established in 1723 the *Code de la Librairie*, regulating the book trade via monopolies for the Paris Guild, cf. Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810*, (Berkeley, University of California Press, 1991).

<sup>7</sup> *Donaldson v Becket* [1774] 2 Brown’s Prerogative Cases 129.

<sup>8</sup> “Thus the peers gave an answer to the literary-property question, but they did not provide a rationale” Mark Rose, *Authors and Owners: The Invention of Copyright*, (Cambridge, Mass., Harvard University Press, 1993) at 103. For an example of the ambivalence of the debate see Samuel Johnson’s comments in 1773 (as reported by Boswell): “There seems (he said) to be in authours a stronger right of property

During the 18th century, the subject matter of UK copyright was extended to engravings (1735), music (1777), fabric designs (1787) and sculptures (1798) but its scope remained limited to reprints. Public performances of music or dramas, copies of paintings (for example onto copperplates), translations into different languages, or arrangements of compositions were permitted. 18th century copyright was practised as the sale of a manuscript from author to publisher against a one-off fee, and litigation between competing publishers.<sup>9</sup>

18th century Germany was an entirely different place to do business. Split into about 300 different legal entities (the notorious *Kleinstaaterei*), unauthorised reprint editions could easily be published in jurisdictions with low standards of protection and sold across the German speaking market. Austria and Württemberg in particular pandered to the reprinting industry in a reverse competition for the most permissive copyright regime.<sup>10</sup> Statutes that would have protected foreign products were also discouraged by the prevailing physiocratic theory, rejecting international trade because of capital outflow.<sup>11</sup>

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than that by occupancy [in Roman law the source of all property claims]; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual; but the consent of nations is against it, and indeed reason and the interests of learning are against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain circulation.” (James Boswell, *The Life of Johnson* (1799), quoted in Rose, op. cit. at 85).

<sup>9</sup> With the exception of *Bach v Longman* [1777] 2 Cowp 623, the great English copyright cases of the 18th century were all conducted between publishers; the series of cases *Tonson v Collins* [1760] 96 ER 180, *Millar v Taylor* [1769] 98 ER 201 and *Donaldson v Becket* [1774] 2 Bro PC 129 is also known as the “battle of the booksellers” (See chapter 5, Rose, note 8). For Victorian England, James Coover, *Music Publishing, Copyright and Piracy in Victorian England*, (London, 1985), shows that music copyright litigation was still almost exclusively conducted between publishers.

<sup>10</sup> The first bilateral copyright treaties on reciprocal protection were agreed on in 1827, 1828 and 1829 between Prussia and most other German States: the first, with Hessen and Oldenburg, were signed on 18/9/1827 and published in *Gesetzes=Sammlung für die Königlich Preußischen Staaten* (1827), at 125. However, Prussia could not reach an agreement with Austria and Württemberg.

<sup>11</sup> An Austrian Decree of 1775 only penalised reprints of domestic products and in 1781 it was explicitly held that “Reprinting of books entering the monarchy from foreign countries is allowed and regarded as an ordinary branch of commerce if the respective books are permitted [i.e. passed censorship] in their countries of origin.” (“Der Nachdruck der von auswärts in die Erbländer kommenden und in den selben zugelassenen Büchern wird gestattet und als ein bloßer Zweig des Kommerziums angesehen”), quoted in Elmar Wadle, “Der Weg zum gesetzlichen Schutz des geistigen und gewerblichen Schaffens. Die deutsche Entwicklung im 19. Jahrhundert”, in: Friedrich-Karl Beier, Alfons Kraft, Gerhard Schrickler, Elmar Wadle (eds.), *Gewerblicher Rechtsschutz und Urheberrecht in Deutschland. Festschrift zum hundertjährigen Bestehen der Deutschen Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht und ihrer Zeitschrift*, (Weinheim, VCH, 1991), Vol. 2, 93-181, at 117. Austrian empress Maria Theresia (1717-1780) personally encouraged reprints in communications with leading publisher von Trattner – Mozart’s landlord in the 1780s; see Ursula Giese, “Johann Thomas

The situation was confusing for authors, publishers and for the general public. For example, between 1797 and 1830 Ludwig van Beethoven's song *Adelaide* was published in 28 editions by 18 different publishers.<sup>12</sup> In 1841, a music publisher still complained that "of some composition there are dozens of editions of the most reputable publishing houses, so that even the most experienced music publisher does not know who the real proprietor of a composition is or whether it is even in someone's property."<sup>13</sup>

In this volatile publishing environment dominated by reprinters, it was the twin concepts of author and abstract work advanced by leading idealist philosophers which heralded a systematic statutory regime. Kant, Fichte, and Hegel's Berlin lectures in the philosophy of law (1818-1831) argued for a concept of individual rights (*Persönlichkeitsrechte*) under which literary property eventually became a manifestation of a person's free will, a prototype in legitimizing property rules in general.<sup>14</sup>

The next section will sketch the emerging abstract conception of an authored work, and its legal expressions in the Prussian and UK copyright acts of 1837 and 1842.<sup>15</sup>

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Elder von Trattner. Seine Bedeutung als Buchdrucker, Buchhändler und Herausgeber", in *Archiv für Geschichte des Buchwesens* 3 (1961), at 1019.

<sup>12</sup> Helga Lühning, "Adelaide und die Verleger der Beethoven-Zeit", in: Franz Krautwurst (ed.), *Augsburger Jahrbuch für Musikwissenschaft*, (Tutzing, Hans Schneider, 1990), 53-85, at 76.

<sup>13</sup> Carl Gaillard, "Über das Eigenthum des Componisten oder des Verlegers", in *Allgemeine Presszeitung* 2 (1841), 50ff, at 59. "[Es] existiren von manchen Compositionen Dutzende von Ausgaben, Ausgaben, die bei den angesehensten Handlungen erschienen sind, so daß selbst der erfahrenste Musikalienhändler nicht weiß, wer der wahre Eigenthümer einer Composition ist, oder ob überhaupt Jemand daran ein rechtmäßiges Eigenthum hat." The Napoleonic wars even aggravated the problems of jurisdiction. How should one deal with publishers in the occupied cities? Bonn, for example, was French for some years and its residents, including the music publisher Simrock, were regarded as French subjects. As Gaillard, op. cit. at 59, puts it: "every German had the right to reprint everything from what he [Simrock] had published". After the withdrawal of the French troops two different legal regimes continued within Prussia. The Western provinces (*Rheinland*) stuck to the French Law introduced by the occupants, whereas in the Eastern provinces the *Allgemeines Landrecht* of 1794 was still in force.

<sup>14</sup> Immanuel Kant, "Von der Unrechtmäßigkeit des Büchernachdrucks", in *Berliner Monatszeitschrift* (1785), 403-417. Johann Gottlieb Fichte, "Beweis von der Unrechtmäßigkeit des Büchernachdrucks", *Berliner Monatszeitschrift*, (1792), 443-483. Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, ed. Johannes Hoffmeister, (Hamburg, Meiner, 1995). Arguably it was the British debate surrounding the great copyright case of *Donaldson v Becket* [1774] which alerted German intellectual opinion to this new conception of property.

<sup>15</sup> The French revolutionary Acts of 1791 (regarding performances of theatre and musical drama) and 1793 (regarding the sale and dissemination of artistic works of any genre) replaced the old system of publishers' rights with a system of authors' rights. According to Hesse, note 6, these laws represented copyright as a reward to the author as public servant, not as the property right of liberal individualism. In the context of the argument advanced is this paper, the laws contain the important seeds of granting

### **The law of abstract works: the early 1800s**

18th century copyright in the UK had dithered between the Lockean claim to perpetual ownership from labour or occupancy and a limited incentives perspective, readopted in the case of *Donaldson v Becket*. During the early 19th century, the voice of Hegelian philosophical idealism privileging the author's claim over his personal expressions entered the British discourse from the European continent. The main conceptual invention was an abstraction: the subject of protection was thought to be an identical work to which all acts of exploitation were related, be they publication, engraving, reprinting, recital, translation or arrangement. Previously, each of these activities were subject to their own separate regulation (or non-regulation) according to specific circumstances.

The novel concept of an abstract work can be illustrated nicely for musical compositions. The Act of Anne did not cater specifically for music, though case law developed classifying sheet music as "writings" within the meaning of the Act. In *Bach v Longman*<sup>16</sup> the judge (Lord Mansfield) expressly confirmed the protection only against "multiplying copies" of printed material, while any "person may use the copy by playing it". No protection for the work itself whose identity was still uncertain!

With the growing commercial importance of arrangements, the abstraction came into legal focus. Consider the example of piano arrangements of Carl Maria von Weber's hugely successful opera *Der Freischütz* (1821). Within two years of its first performance at the Berlin Royal Opera House, it had been performed for the 50th time. Adolph Martin Schlesinger, Weber's publisher and a leading figure in Prussia's musical establishment, apparently sold 9,000 copies<sup>17</sup> of his piano version in only one year (Berlin had no more than 200,000 inhabitants at the time). Not surprisingly, there were other publishers who tried to participate in the success of *Der Freischütz*. Schlesinger filed complaints against at least two other arrangements. One was a piano

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rights without formalities including a right to public performance but not the abstraction of idealist theory. The Act of 19 January 1791 introduces for the first time a *post mortem* ownership of 5 years, while the decree of 19 July 1793 grants a general transferable life of author term (plus 10 years).

<sup>16</sup> *Bach v Longman* [1777], 2 Cowp 623; Cowper's report cited in John Small, "J.C. Bach Goes to Law", *Musical Times* cxxvi (1985), 526-9.

<sup>17</sup> Carl Friedrich Zelter, letter to Felix Mendelssohn Bartholdy, Berlin 25/09/1822, quoted in: Thomas Schmidt-Beste, "Briefe von Carl Friedrich Zelter an Felix Mendelssohn Bartholdy", in: Hans-Günter Klein & Rudolf Elvers (ed.), *Mendelssohn Studien. Zum 150. Todestag von Felix Mendelssohn Bartholdy und seiner Schwester Fanny Hensel*, (Berlin 1997), at 25.

score without the lyrics of Viennese provenience that had been sold in Berlin book shops.<sup>18</sup>

Schlesinger filed his complaint at the Berlin town court, and the judge commissioned an expert opinion from the famous poet and composer E.T.A. Hoffmann (1776-1822). E.T.A. Hoffmann, a lawyer by training and former Prussian civil servant, was asked whether the Viennese piano score was “arranged along” Schlesinger’s piano score. The Prussian statute book of 1794 (*Allgemeines Landrecht*) explicitly had included “musical compositions” under the subjects protected against reprinting. However, Hoffmann argued that the specific sections for arrangements shouldn’t be applied to musical composition, because

“it is impossible to extract musical compositions in the same way, as it can be done with books. Reprint of a composition would only take place when an original would be “reengraved”[as the German word here reads literally] and reprinted identically with the original.”<sup>19</sup>

Schlesinger’s piano score was arranged by the composer himself, and is regarded as a masterpiece of its genre. The Viennese piano score, by contrast, was made – as Hoffmann put it – along the normal “jog trot” (“ganz nach dem gewöhnlichen Schlendrian”) and thus it could not have been modelled on the Schlesinger edition. Schlesinger’s copyright did not involve claims to the abstract work *Der Freischütz*.

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<sup>18</sup> Judges were used to look at books. They understood what they read and were comfortable in deciding the scope of the reprinting restriction. Music presented a problem. One of Schlesinger’s complaints was caused by an arrangement of Gaspare Spontini’s *Preußischer Volksgesang*. Schlesinger had published a piano version. Only weeks later, a competitor came out with an arrangement for two flutes. The first judge qualified the arrangement as a reprint but the ruling was revoked on appeal. It was held that the arrangement was a separate, original (“eigenthümlich”, cf. note 22) product, not a reprint. The arrangement was conceptualised as a “translation”, and translations were not restricted at that time. Since there was no statutory protection available, Spontini sought - successfully - to obtain a crown privilege for the *Preußischer Volksgesang* and explicitly asked for publication of the privilege in *Amtsblättern* and *Staatszeitung*, Elmar Wadle, “Preußische Privilegien für Werke der Musik: Ein Kapitel aus der Frühzeit des Urheberrechts 1794 -1837”, in: María Jesús Montoro Chiner & Heinz Schäffer (eds.), *Musik und Recht: Symposium aus Anlaß des 60. Geburtstags von Prof. Dr. Detlev Merten*, (Berlin, 1998), 85-112, at 91.

<sup>19</sup> “Hier muß ich aber zuvörderst den Grundsatz aufstellen, daß nach meiner Ansicht, wenn von dem Nachdruck eines musikalischen Werkes die Rede ist, die gesetzlichen Bestimmungen §1025 und 26. Tit. 11 Ths. 1 des A.L.R., welche von Auszügen aus Druckschriften handeln, nicht zur Anwendung gebracht werden können, da es unmöglich ist, musikalische Compositionen auf die Weise zu extrahiren, wie dies bei Büchern geschieht. Ein Nachdruck einer Composition würde nur insofern stattfinden, als eine vorliegende grade so nachgestochen oder nachgedruckt würde, daß sie identisch mit dem Original erscheine; wo eigene Geistes=Thätigkeit des Bearbeiters eintritt, kann von Nachdruck oder Nachstich nicht mehr die Rede sein”, quoted in Wadle, note 18, and Kawohl, note 1, 313.

Schlesinger's copyright was confined to the singular piano score version that he had published. The subject matter of copyright was a work of print – a copper engraving.

Hoffmann drew a comparison to works of art. A copper engraving showing a painting was not infringing a copyright in this painting. Another engraving of the same painting was an infringing copy of the first copperplate only if it was a counterdraw, but not if it was modelled on the original painting. The key point in Hoffmann's argumentation is the denial of the abstraction which would soon be pervasive in Prussian law. Schlesinger's claim for damages was rejected. Between 1821 and 1837, Schlesinger filed at least six complaints in Prussian courts and made repeated applications for an amendment of the arrangement rules under the *Allgemeine Landrecht*. His wish was granted with an entirely new copyright law which came into force on June 11th, 1837.

Legal historians consider the Prussian Act of 1837 as the most influential Copyright Act in 19th century Germany,<sup>20</sup> integrating for the first time various regulations of the publishing industries into a comprehensive *Law for the protection of property in works of scholarship and the arts from reprint and reproduction*.<sup>21</sup> The Prussian Act figured as the model for Germany's evolving federal laws, differing from its predecessors in three main respects:

- (1) The author became the source of protection. The term calculation shifted from the date of publication to the life of the author (including a *post mortem* allowance of 30 years to cover the author's dependants).
- (2) Protected subject matter included more than printed books, namely literary, artistic and musical works. A threshold criterion of merit

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<sup>20</sup> E.g. Elmar Wadle, "Das preußische Urheberrechtsgesetz von 1837 im Spiegel seiner Vorgeschichte", in: Robert Dittrich (ed.), *Woher kommt das Urheberrecht und wohin geht es?* (Wien, 1988, 55-98), reprint in: Elmar Wadle, *Geistiges Eigentum. Bausteine zur Rechtsgeschichte*, (Weinheim, VCH, 1996), 167-222; Barabara Dölemeyer & Diethelm Klippel, "Der Beitrag der deutschen Rechtswissenschaft zur Theorie des gewerblichen Rechtsschutzes und Urheberrechts", in: Beier et al, note 11, Vol 2, 185-240, at 215.

<sup>21</sup> The translation of 15 Jan 1838 for the Board of Trade 1/227, No 6169/32a, reads "Law for the protection of Property in respect to Works of Science and Art against Counterfeiting and Imitation", see Sherman & Bently, note 4, at 166. Translating more literally, the original title "Gesetz zum Schutze des Eigenthums an Werken der Wissenschaft und der Kunst gegen Nachdruck und Nachbildung", aims at protection against "reprint" – of books – and "reproduction" – of works of art – rather than "counterfeiting" and "imitation". The original German text of the statute is quoted in Wadle, note 20.

was introduced, prejudicing “depictions which cannot be regarded as original [*eigenthümlich*<sup>22</sup>] works of art”.

- (3) Restricted acts referred to an abstract work identity rather than printed matter. A performing right was introduced for dramatic and musical works; adaptations, such as excerpts or instrumental arrangement, needed consent if they could not be considered “an original [*eigenthümlich*] composition”.<sup>23</sup> The term “Nachdruck”(reprint) was still part of the title of the law, but even for literary works infringing acts were conceived very broadly, to include transcriptions of sermons and lectures.

**[insert Table 2]**

By the early 1800s, the incentive rationale implicit in English copyright law under the Act of Anne (1709/10), and sustained in the great case of *Donaldson v Becket* (1774) had become diluted. The House of Lords ruling in *Donaldson v Becket* was increasingly seen as a compromise between those who denied author’s rights altogether and those who had asserted a perpetual property in the produce of labour. It was argued that even if perpetual copyright had been rejected, the author still had a natural right to his work. In this reading, the natural or common law right of the author and the statute became merged.<sup>24</sup>

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<sup>22</sup> “Eigenthümlich” was a buzzword of the romantics, denoting something individual, personalised, idiosyncratic, peculiar, singular, specific. Cf. Friedemann Kawohl, “Originalität, Charakteristik und Eigentümlichkeit. Zur Begriffsbildung in Ästhetik und Urheberrecht des frühen 19. Jahrhunderts”, in: Oliver Schwab-Felisch, Michael Polth, Christian Thorau (ed.) *Individualität in der Musik*, (Stuttgart, Metzler, 2002), 295-307.

<sup>23</sup> §20 reads: “It is regarded as a forbidden reprint if anybody publishes an excerpt, arrangements for any instruments, or other adaptations which cannot be considered as a original composition”. (“Einem verbotenen Nachdruck ist gleich zu achten, wenn Jemand von musikalischen Kompositionen Auszüge, Arrangements für einzelne Instrumente, oder sonstige Bearbeitungen, die nicht als eigenthümliche Kompositionen betrachtet werden können, ohne Genehmigung des Verfassers herausgiebt.”) Quoted in Wadle, note 20, Kawohl, note 1. The wise Prussian bureaucrats – Prussian law was made by officials not by parliament – did not want to saddle their colleagues in the courts with such problems: thus it was not the judge who should decide whether a disputed sheet of music contained a “eigenthümlich” composition or not. A so-called association of music experts (“Musikalischer Sachverständigenverein”) was established. It was a joint committee consisting of both music publishers and music practitioners, most of the latter being government and church officials. The legal status of this committee could be described somewhere between an advisory board of experts, a special copyright court and an arbitration tribunal, cf. Kawohl, note 1, 229-273.

<sup>24</sup> For a lucid discussion of this subsequent re-interpretation of *Donaldson v Becket*, see Rose, note 8, at 107ff. In 1814, a revised statute extended the copyright term to 28 years or life of the author, whichever was longer.

In 1837, the year of the new Prussian Act, a campaign was launched by Thomas Noon Talfourd, a member of parliament, lawyer, author and friend of leading figures of the romantic literary scene. Several draft bills were submitted to Parliament supported by letters and petitions from William Wordsworth, Robert Southey, Thomas Carlyle and Hartley Coleridge. Their main aim was an extension of the copyright term to author's lifetime plus 60 years (while existing copyrights would revert to the author after 28 years). The theoretical basis was an almost caricature version of Lockean possessive individualism, combined with a romantic understanding of original genius. As Talfourd put it in a speech to Parliament: why should literary property not "last as long as the works which contain truth and beauty live?"<sup>25</sup> Talfourd's disciple Lowndes wrote in a supporting Treatise:

"For the object of the Bill is not to give greater value to the light and trivial productions of the day, which either reap a sufficient and quick award from their admirers, or fall with well merited contempt into oblivion; but to secure to authors of genius and learning - whose works, although they become the classics of the country, often make their way but slowly into public favour - some slight pecuniary advantage, by extending their Copyright for a further period, at the very time it has commenced to be valuable, and to repay them for their long and unceasing labours."<sup>26</sup>

Talfourd's Bill reached the committee stage but never made it to a final vote before the general election of 1841 in which Talfourd lost his seat. A revised copyright bill was passed early in the next parliament, compromising on the *post mortem* term (now seven years *pma*) while preserving Talfourd's structure. British representatives reported to the Prussian government that the law in the United Kingdom had "undergone important changes which will have the effect of materially increasing the protection at present enjoyed in England by literary property".<sup>27</sup> The Act of 1842 concentrates on books, but extends the right of "representation or performance" to "dramatic pieces" and "musical compositions". The abstraction of authored works of art remains tentative, as reflected in ambiguous wordings about abridgements,

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<sup>25</sup> *A Speech Delivered by Thomas Noon Talfourd, Sergeant at Law, in the House of Commons*, (London, 1837), cited in Rose, note 8, at 111.

<sup>26</sup> John J. Lowndes, *An Historical Sketch of the Law of Copyright*, (London, Saunders & Benning, 1840), at 101.

<sup>27</sup> FO/64/242, quoted by Sherman & Bentley, note 4, at 116.

anthologies, translations and dramatizations. All rights were subject to entry in the Book of Registry at Stationers' Hall.<sup>28</sup>

[insert Table 2]

### **Countering the abstraction: the registration requirement 1840 and today**

In the first two sections of the paper we gave an overview of the roots of copyright law and early 19th century legislative changes, drawing on new primary material from the Prussian *Geheimes Staatsarchiv* and British law commentaries of the period. We argued for an interpretation of these changes from a perspective of idealist abstraction, a radical and problematic justificatory basis of copyright.

In this final section, we explore the registration requirement, including some transitional provisions linking legal protection to the actual commercial exploitation of works. Registration schemes of considerable sophistication acquired a new lease of life during the debates surrounding the Prussian and British Copyright Acts of the early 19th century. This is somewhat surprising. If the emerging rationale of copyright derives from the character of abstract, identical authored works (as opposed to the earlier incentive in the creation or dissemination of useful products), protection should coincide with the moment of creation. The additional hurdle of a registration requirement does not sit easily with the conceptual innovations we explained in the last section. Registration subverts the presumption that all works deserve protection *qua abstractum*.<sup>29</sup>

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<sup>28</sup> The general registration requirement was abolished with the Copyright Act of 1911 in response to the 1908 Berlin revision of the Berne Convention. After a rent seeking lawyer, Harry Wall, had acquired the copyrights of popular tunes from the estates of several deceased composers and began to sue for unauthorised public performances, the Copyright (Musical Compositions) Acts 1882 & 1888 required a specific notice reserving the performing right on printed copies. Since the consumer was less likely to purchase such copies, publishers rarely printed such notices, Gunnar Petri, *The Composer's Right*, (Stockholm, Atlantis, 2002), at 107. Some English music publishers retained a sceptical view of the performing right until the 1930s. William Boosey, *Fifty Years of Music*, (London, Ernest Benn, 1931), at 174, reports his earlier view before the debates leading to the 1911 British Copyright Act as: "I considered that the payment of a fee for the performance of new music, and even established music, was calculated to injure seriously the sales of established favourites, and was very detrimental to the popularising of new works." Boosey's competitor Novello still argued in 1929 (*Musical Times*, 1 Dec 1929, 1072): "As the chief object of the publication of music is to ensure performance, it does not seem reasonable to tax the performer for doing the very thing the publisher wants him to do. Messrs Novello therefore do not belong to the Performing Right Society", both comments quoted in Alan Peacock & Ronald Weir, *The Composer in the Market Place*. (London, Faber, 1975), at 46 and 72.

<sup>29</sup> For the case of copyright, this reading is at variance with Sherman & Bently's claim that a centralised registration process marks "a shift from protection of specific industries (or areas) to protection of more abstract legal categories" (Sherman & Bently, note 4, at 181). In fact, we argue that copyright registration is an indicator of political and economic uneasiness about the locus of protection,

Registration was part of many early copyright institutional mechanisms, initially as a permission to publish. As an economic burden, however, it was not very onerous. It involved a decision over which works warranted protection (creating some opportunity costs) and modest fees to the registrar.<sup>30</sup> In imposing opportunity and administration costs, registration increases the public domain to all works which creators or publishers do not consider valuable enough to offset these costs. Broadly speaking, any registration requirement reduces the number of works in copyright - by how much depends on the precise structure of the system. From the patent system, we may glean that there are at least two further ways of increasing the public domain effects of registration: increasing annual fees, and claims that specify the precise nature of the rights granted.

From a public policy perspective, this trade off is welcome. Protection is only granted to exploitations that are commercially valuable (and might not have occurred without protection), while future authors can make free and creative use of a larger number of cultural materials. This tallies with a widely accepted economic and political premise that access to information is central to innovation and the fabric of open societies.<sup>31</sup>

The main economic counter-argument to any registration requirement is the deadweight loss caused by a cumbersome system of administration, including the unproductive organisational bureaucracy needed to maintain a register and the transaction costs of using the system.<sup>32</sup> Beneficial secondary consequences from a comprehensive database of rights might extend to a reduced need for the collective

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regarding both subject matter and exclusive rights provided. Sherman & Bently propose that copyright law remained pre-modern in that “[o]nce the few [registration] options available at the bureaucratic level were exhausted the difficult task of formulating techniques that would enable the copyright work to be identified fell to the legislature and the courts” (at 192). We aim to show that registration remained a many faceted option.

<sup>30</sup> The Act of Anne required a payment of six Pence for every entry in the Register Book of the Company of Stationers (s.2). Entry could not be refused (s.3).

<sup>31</sup> This point cannot be argued here in detail. For further literature in libertarian legal theory and information economics, see James Boyle, *Shamans, Software & Spleens: Law and the Construction of the Information Society*, (London, Harvard UP, 1996); Stuart Macdonald, *Information for Innovation: Managing Change from an Innovation Perspective*, (Oxford, OUP, 1998); Peter Drahos, (ed.) *Intellectual Property*, (Aldershot, Dartmouth, 1999); Lawrence Lessig, *The Future of Ideas*, (New York, Random House 2001); Yochai Benkler, “A Political Economy of the Public Domain: Markets in Information Goods versus the Marketplace of Ideas”, in Rochelle Dreyfuss, Diane L. Zimmerman, Harry First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, (Oxford, OUP, 2001), 267-292.

<sup>32</sup> Cf. Michael Hutter, “On the Construction of Property Rights in Aesthetic Ideas”, *Journal of Cultural Economics* 19 (1995), 177-185.

administration of copyrights, since individual right owners could be traced quickly and accurately.<sup>33</sup> Infringements through ignorance will also decrease.<sup>34</sup>

Finally, there is an equitable dimension to the registration requirement. Creators who failed to register a copyright that belatedly turned out to be very valuable (e.g. after appearing as soundtrack on a TV advert) will not see any direct financial reward. Just societies may find this intolerable. Below is a table summarising the characteristics of registration systems.

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### **Table: Characteristics of Registration Systems**

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#### **Features:**

- introduces costs to right owners
- reduces the number of copyrights

#### **Effects:**

(a) economic

positive: increases public domain; more sources for creative products become available

less need for collective administration (transparent database of proprietary claims)

negative: bureaucratic costs of system administrating protection (deadweight)

(b) equitable

negative: author/producer may not benefit from belated commercial success

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In the period leading up to the Prussian Act of 1837, there were a number of intermediary regulations under the old system of individual feudal privileges which show an interesting ambivalence towards the emerging concept of abstract works. Publishers had to announce which arrangements of published works (in particular popular operas) they were intending to offer as a precondition for receiving protection. Thus in 1826, Schlesinger, the publisher of Weber's last opera, was granted "the right to exclusively publish ... arrangements of ... the opera *Oberon*, in particular as 1) a complete piano score, 2) a piano score without lyrics, 3) a piano score á quatre mains (for two players), 4) for military band, 5) for Duets and Quartets for brass or string instruments; 6) as a potpourri, 7) as an ouverture for Grand

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<sup>33</sup> For an analysis of the rationale of copyright societies, see Martin Kretschmer, "The Failure of Property Rules in Collective Administration: Rethinking copyright societies as regulatory instruments", *European Intellectual Property Review (E.I.P.R.)* 24/3 (2002), 126-137.

<sup>34</sup> This is the rationale for the registration requirement given in the Act of Anne (s.2): "whereas many Persons may through Ignorance offend against this Act, unless some Provision be made, whereby the Property in every such Book ... may be ascertained".

Orchestra.”<sup>35</sup> Other competing versions of *Oberon* could have remained entirely legitimate.

Within the Prussian ministry of justice the *Oberon* privilege was regarded as a model solution. When it came to a broad revision of the *Allgemeines Landrecht*, the *Oberon* privilege was explicitly referred to. The proposed procedure was the following: prospective arrangers applied for permission to publish scores for specified other instrumental combinations. The original publisher then had a right of first refusal (for four weeks) to offer these arrangements himself. These regulations had a positive influence on the supply side. Within weeks, Schlesinger had offered all arrangements for which he had obtained privileges, announced in letters to music shops all over Europe.<sup>36</sup>

[insert facsimile *Oberon*]

The Prussian Act of 1837 omitted these provisions in favour of a broader protection against all arrangements that did not pass the *eigenthümlich*<sup>37</sup> threshold as separate original works. §4 however introduced a related provision for book

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<sup>35</sup> “das Recht zum ausschließlichen Verlag der in seinem Verlage erscheinenden Arrangements der von dem Königlich-Sächsischen Kapellmeister Maria von Weber komponirten Oper ‘Oberon’ als: 1) eines vollständigen Klavier-Auszuges, 2) eines dergleichen ohne Worte; 3) eines dergleichen zu vier Händen; 4) eines Arrangements für Militär-Musik; 5) eines dergleichen zu Duetten, Quartetten, für Streich- und Blase-Instrumente; 6) eines dergleichen zu Potpourri’s und 7) der Ouvertüre für das große Orchester”, in *Gesetz-Sammlung für die Preußischen Staaten 1826*, Nr. 1021, 76, quoted in Kawohl, note 1, at 55. See facsimile of the title page of the *Oberon* overture, pre-announcing various arrangements.

<sup>36</sup> The draft reads: “Not only books, but also ... musical compositions ... can be a subject matter of a publishing rights. ... A publishing right for a musical composition means, that any reproduction of the composition, even if its form has changed, when it is undertaken without consent of the publisher, is regarded as reprint. If any other person wants to bring out the same composition in modified form, be it a modification of the accompaniment, be it a transposition in a different key, or for an other instrument, he has to acquaint the first publisher with his plan, and when he does declare, not to be willing to provide this specific modification himself or does not come out with it within six months, the composition can be published in the modified form.” “§997a. Nicht blos Bücher, sondern auch musikalische Kompositionen, und Abbildungen, welche durch Holzschnitt, Steindruck oder Kupferstich vervielfältigt zu werden pflegen, können ein Gegenstand des Verlagsrechts seyn. §b. Das Verlagsrecht einer musikalischen Komposition hat die Wirkung, daß die Vervielfältigung dieser Komposition, selbst in veränderter Form, welche ein Anderer vornimmt, ohne sich mit dem Verleger darüber benommen zu haben, für einen Nachdruck zu erachten ist.– §c. Will ein Anderer dieselbe Komposition [fol. 150 r.] in veränderter Form z.B. veränderter Begleitung einer Singstimme, in einer andern Tonart, oder für ein anderes Instrument umgesetzt, herausgeben, so muß er von seinem Vorhaben dem Verleger Nachricht geben, und wenn dieser die Veränderung nicht selbst besorgen zu wollen erklärt, oder dieselbe nicht binnen sechs Monaten ausführt; so kann die Komposition in der veränderten Form herausgegeben werden”, draft legislation in Geheimes Staatsarchiv Preußischer Kulturbesitz Berlin (PK HA.I Rep 84 II 4 XIV, Nr 2 Bd. 3, fol. 149-152), quoted in Kawohl, note 1, at 281.

<sup>37</sup> Cf. notes 22, 23.

translations. Translations only fell within the scope of the exclusive *Nachdruck* right if they appeared within two years of the publication of the first edition, and a notice of intention for specified translations had been produced on the original title page.

Similarly, Talfourd's draft bill of 1837 contained a clause "allowing parties to print a book when out of print for five years, on advertising publicly their intention to do so, and suffering a year from the date thereof to elapse".<sup>38</sup> This provision was dropped from the 1842 Act, and replaced with a general review procedure in the case of suspected "suppression of books of importance to the public" (section 5).

Up to the 19th century, formal registration of works was part of very different copyright regimes. We find the registration requirement in a conservative climate, such as Austria<sup>39</sup> which, up to the late 1830s, tried to attach copyright regulation to censorship and thus prevented an agreement within the German federal assembly (*Bundesversammlung*) in Frankfurt; but we find registration, too, in more liberal regimes such as England and Saxony.<sup>40</sup> Formal registration could act in various ways,

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<sup>38</sup> Lowndes, note 26, at 107.

<sup>39</sup> In Austria and Württemberg, the most important countries of origin for unauthorised reprints, crown privileges could be easily obtained, e.g. a 6 years privilege of Württemberg for 16 fl., cf. "Gesetzgebung gegen den Büchennachdruck", in: *Wochenblatt für Buchhändler* 13 (Marburg, Krieger, 1828) at 401. In 1782 Austrian publisher Artaria had to commit himself to deliver 5 copies of each item in order to get a 10 year privilege for his products, Heinrich Maria Schuster, *Das Urheberrecht der Tonkunst*, (München, Beck, 1891), at 28. However, privileges could only be acquired by residents for domestic products. In encouraging domestic reprinters Austrian and Württemberg governments hoped both to prevent capital outflow and to promote education in making available cheap books on the domestic market. Additionally, the Austrian police state of chancellor Metternich used the registration system to suppress the import of liberal thoughts.

<sup>40</sup> Saxon privileges were administered by a so-called Books Commission ("Bücherkommission"). Like the London stationers the Leipzig Books Commission had to provide a body for both censorship and regulation of reprint. The Leipzig commission was composed of a councillor, a professor, a Books Inspector (i.e. a policeman), and a clerk all working under surveillance of the Kirchenrat, the local Lutheran Church board. It was the Books Commission that had to determine bans, confiscations or further investigations. Karl Friedrich Curtius, *Handbuch des im Königreiche Sachsen geltenden Civilrechts*, Vol. 4, 2nd edition, (Leipzig, Schwickert, 1831), 204f. §1505: "In Leipzig aber ist hierzu seit dem Jahre 1687 eine besondere Büchercommission errichtet, welche aus einem Deputirten des Raths, und einem ordentlichen Professor, einem Bücherinspector, und Actuarius besteht, und unter der Oberaufsicht des Kirchen=Raths, die nöthigen Verbote, Confiscationen, und Untersuchungen anordnet." The practice of the Books Commission had promoted the boom in the Leipzig publishing industry and the Leipzig book fare. In the 17th century it was its lax way of censorship allowing books to be brought out in Leipzig which would not have passed the censor in Frankfurt, the old, medieval center of book trade. In the 18th and early 19th century it was the registration practice of the Books Commission, which was to consolidate the preponderance of the Leipzig book industry. The procedure was simple and a Saxonian reprint and censorship decree of 1773 ("Chursächsische Nachdruck- und Zensurverordnung") explicitly granted protection for both domestic and foreign publishers, in Gottfried Schmieder (ed.), *Der Churfürstlich Sächsischen allgemeinen, der Residenzstadt Dresden besonderen Policeyverfassung*, (Dresden 1774), at 515: "ist verordnet, dass allen und jeden in- und ausländischen Buchhändlern, in Ansehung ihrer in denen gesammten Chursächsischen Landen gedruckten Büchern

as a means of an authoritarian regime to control the exchange of ideas among its subjects, as a means of an autonomous market regulation taken on by the publishers themselves, or as an explicit statutory requirement based on an incentive rationale of copyright.

Experiments in more specific “use it or lose it”<sup>41</sup> regulations flourished in the early 1800s, and show a particular unease about the emerging abstract concepts of work and author, and the far reaching legal provisions associated with this conceptual shift. Economically, “use it or lose it” appears to have the same characteristics as the general registration requirement. It is registration in a more specified form, reducing the number of copyrights by attaching greater costs to their grant (similar to patent claims), and making copyrighted works available in greater variety and at lower prices.

Copyright registration systems fell from favour with the international conventions of the late 19th century. The landmark Berne Convention of 1886 provided for a broad protection of all works within the creative domain but still extended its core principle of national treatment to the various registration requirements: Foreign works had to pass the registration threshold of a member country in order to receive protection in that territory. The Berlin revision of Berne (1908) eventually banned all registration formalities. The Berne process can be seen as the international seal on the abstraction we traced in this article. (See Appendix for a table on the nature and scope of author rights under Berne, indicating the conceptual distance over which copyright law travelled within barely 100 years).

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aller Art, gegen die Nachdrucker so ihre Waare in hiesige Lande einbringen, und damit ihr Gewerbe stören, auf Implorationen der ordentlichen Obrigkeit des Orts, wo solches geschieht, schleunige Justitz administrirt, der Verkauf des Nachdrucks sofort untersaget, und die Nachdrucker zum Ersatz des ihnen zugefügten Schadens durch die bereitesten Zwangsmittel angehalten werden sollen.” However, books could only be registered if offered at the Leipzig book fair. Since the presence in Leipzig at least for the Easter book fair was almost compulsive for German publishers – it was the annually pay off for mutual bills – the registration in the so called “Eintragrolle” was compulsive as well. Thus the Saxon policy intended to protect domestic industry against foreign reprints, and to promote the supreme position within the German book market of both the domestic publishing industry and the Leipzig book fair.

<sup>41</sup> We take the phrase “use it or lose it” from Jessica Litman, *Digital Copyright*, (New York, Prometheus Books, 2001), who proposes to restrict the scope of copyright protection to commercial exploitation. According to Lawrence Lessig, only 2 percent of 10,027 books published in 1930 in the US are still in print today. This was an important argument in Lessig’s unsuccessful Supreme Court challenge of the 1998 Sonny Bono Copyright Extension Act, extending the copyright term by 20 years (*Eldred v Ashcroft Attorney General*, 537 U.S. [2003] S.Ct.; see particularly Breyer J. dissenting). Using a copyright register, Lessig has suggested to withdraw copyright protection from works “trapped in a regulatory black hole” (“Copyright law and roasted pig”, *Red Herring Magazine*, 22 October 2002, available at [redherring.com](http://redherring.com); visited 11 February 2003). Our article shows that there have been historical precedents for this proposal.

The United States, a non-signatory of Berne until 1989, maintained a notice requirement (as a record of ownership) until the Copyright Act of 1976 although registration as specification, determining the precise scope of the rights claimed, was never high on the copyright agenda.

Interestingly, copyright registration reentered the policy debate briefly in the context of computer programs which in many respects do not fit into the Berne paradigm of abstract works. In the 1980s, Japan proposed a *sui generis* right for computer software that was rejected by the US.<sup>42</sup> It was one of the purposes in researching this article to open up some historical possibilities where a direct influence on the shape of markets could be indicated - as in the increased supply of authorised arrangements under Prussian rules pre-1837.

It is regrettable that the valuable current economic analysis of copyright has neglected the historical possibility of registration as specification.<sup>43</sup> Registration requirements could legitimize many contemporary cultural practices, such as sampling, bootlegging of live performances or the new digital form of bootlegging: ie mixing new records entirely from pre-existing materials.<sup>44</sup> Bootleg music, also known as “Bastard Pop” or “Mixed Business”, falls foul of the exclusive right to make adaptations prevalent in modern law protecting all instantiations of abstract works. Yet right owners could never have envisaged this use of their protected materials. A requirement to specify modes of exploitation might leave creative adaptations outside the scope of copyright law.

We have identified some sophisticated registration systems pioneered in the early 19th century context when a dramatic conceptual shift took place away from

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<sup>42</sup> Jerome H. Reichman, “Legal Hybrids between the Patent and Copyright Paradigms” special issue: “Towards a Third Intellectual Property Paradigm”, *Columbia Law Review* 8 (1994), 2432-58. In the same issue, Samuelson et al suggest “an opportunity to register innovative software compilations or subcompilations in order to get a longer period of blockage or a period of compensation under a standard licensing arrangement”, (Pamela Samuelson, Randall Davis, Mitchell Kapor & Jerome H. Reichman (1994), “A Manifesto Concerning the Legal Protection of Computer Programs”, *Columbia Law Review*, 8 (1994), 2308-2431, at 2417. Compare Lessig’s recent proposal, (Lessig, note 31) for an escrow deposit of program source code (to be released after five years) as a precondition for receiving software copyright protection.

<sup>43</sup> E.g. Landes & Posner, note 2; Richard Watt, *Copyright and Economic Theory*, (Cheltenham, Elgar, 2000); Ruth Towse, *Creativity, Incentive and Reward*, (Cheltenham, Elgar, 2001).

<sup>44</sup> Contemporary bootleg artist identities include Freelance Hellraiser, Frenchbloke, or Soulwax combining Madonna with Telex, Kraftwerk with Whitney Houston or Depeche Mode with Eminem (cf. Pete Rojas, “Bootleg Culture”, *Salon* (1 August 2002), available at [www.salon.com](http://www.salon.com) visited 03/08/02). For good analyses of the traditional form of bootlegging, see Marshall, note 4; Lee Marshall, “The Future of the Bootlegging: Current legal and technological pressures”, in 441-453 in Susanne Janssen, Marlite Halbertsma, Karlijn Ernst, Teunis Ijdens (eds.), *Trends and strategies in the arts and cultural industries*, (Rotterdam, Barjesteh & Co's, 2001); Lee Marshall (forthcoming), “The Effects of Piracy upon the Music Industry: A case study of bootlegging”, *Media, Culture and Society*.

specific regulations of printing towards a broad protection of abstract works. *Pace* Berne, these registration mechanisms should be subjected to a more far-reaching welfare analysis. Digital technology may not only facilitate copying, but also allow the creation and maintenance of databases defining modes of exploitation and rights claimed. Some of the energies of the entertainment industry's anti-piracy campaign may be fruitfully channelled into such an enterprise.

It may not be realistic to expect an imminent review of the international copyright regime following the integration of key parts of Berne into the TRIPS agreement of 1994 (now administered by the WTO). However, copyright enforcement in the digital environment depends on a certain level of normative consensus among its users. This could be achieved by a system of voluntary registration, specifying intended exploitation, with the aim to encourage unpredicted creative re-use of cultural materials.

**Table 1: Act of Anne (1709/10) for the Encouragement of Learning**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
“Books and other Writings” (s.1)	author, transferable to “Proprietor” (s.1)	[silent; s.1 suggests (emphasis added): “for the Encouragement of learned Men to compose and write <i>useful</i> Books”]	“print, reprint, or import, or cause to be printed, reprinted or imported”  “sell, publish or expose to Sale” (s.1)	14 years from publication date (s.1)  after expiry “sole Right of printing or disposing of Copies” returns to author for second term of 14 years (s.11)	“Register Book of the Company of Stationers” kept at Stationers’ Hall (s.2)

**Table 2: Prussian Act (1837) for the protection of property in works of scholarship and the arts from reprint and reproduction**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
<p>“works of scholarship and art” (preamble):</p> <p>writings (§1) incl. books, yet un-printed manuscripts, lectures &amp; sermons (§3) geographical topographical scientific &amp; architectural drawings (§18)</p> <p>musical compositions (§19)</p> <p>works of art (§§21-23)</p>	<p>author and “those who derive their authority from the author” (§1, e.g. heir, publisher)</p> <p>transferable wholly or in part (§9)</p>	<p><i>eigen-thümlich</i> as criterion for non-infringing derivative works (§20 and §23)</p> <p>determined by committee of experts (§17)</p>	<p>reprinting (§2), publication, distribution (§9)</p> <p>public performance prior to publication of dramatic and musical works (§32)</p> <p>publication of transcribed lectures and sermons, (§3)</p> <p>adaptation of musical compositions, (§20)</p> <p>reproduction (“Nachbildung”) of copper engravings, lithographs (of works of art, §29)</p>	<p><i>post mortem auctoris</i> life plus 30 years (§§5,6)</p> <p>works of arts 10 years <i>pma</i> (§27); public performance 10 years <i>pma</i>, (§32)</p>	<p>no formalities for works of literature and music</p> <p>works of art registered at the ministry for cultural affairs (§27)</p> <p>for translations: notice on title page for claim to produce within two years (§4)</p>

**Table 3: United Kingdom Copyright Act (1842)**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
<p>“books”, incl. “every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published” (s.2)</p> <p>dramatic pieces and musical compositions, incl. “every tragedy, comedy, play, opera, farce, or other scenic, musical or dramatic entertainment” (s.2)</p>	<p>author or “assigns” as personal property</p> <p>whether “derived from such author before or after the publication of any book”, by “sale, gift, bequest, or by operation of law” (s.2)</p> <p>publisher (if “projector” or “conductor” of “encyclopaedia, review, magazine, periodical work” (s.18)</p>	<p>[silent, preamble suggests (emphasis added) “literary works of <i>lasting benefit</i> to the world”]</p>	<p>“print or cause to be printed, either for sale or exportation”</p> <p>“import for sale or hire”</p> <p>“sell, publish, or expose to sale or hire, or cause to be sold, published, or expose to sale or hire, or shall have in his possession, for sale or hire” (s.15)</p> <p>representing or performing musical and dramatic pieces (s.20)</p>	<p><i>post mortem auctoris</i> life plus 7 years, but at least 42 years from publication (s.3)</p>	<p>“Book of Registry” kept at Stationers’ Hall (s.11)</p> <p>“proprietaryship in the copyright of books, and assignments thereof, and dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright”</p> <p>for dramatic and musical pieces in manuscript: registration only of title, name and place of author, name and place of proprietor, and time and place of first performance (s.20)</p>

**Table 4: Berne Convention (1886), Berlin revision (1908)  
for the Protection of Literary and Artistic Works**

protected subject matter	owner	criteria for protection	exclusive rights	term	registration
literary and artistic works, including “every production in the literary, scientific and artistic domain” (Art.2)	Author (Art.1) [silent on successor in title]	original intellectual creation (not “news of the day” and “miscellaneous information”; Art.9)	translation (Art.8) reproduction (Art.9) public performance (Art.11) indirect appropriations, incl. “adaptations, musical arrangements, novelisations, dramatisations” (Art.12)	<i>post mortem auctoris</i> life plus 50 years (Art.7)	the enjoyment and exercise of rights in respect of works “shall not be subject to any formality” (Art.4)