

Copyright and the commodification of authorship in 18th and 19th Century Europe

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Summary

The modern concept of authorship evolved in parallel with the legal recognition of the author as the subject of certain property rights within the marketplace for books. Such a market was initially regulated by a system of printing privileges, which was replaced by copyright laws at the juncture of the 18th and 19th centuries. The inclusion of copyright under the umbrella of property and the dominating economic discourse marked the naissance of a new figure of the author, namely the author as supplier of intellectual labor to the benefit of society at large. In this sense, products of authorship became fully-fledged commodities to be exchanged in the global market place.

The transition between the privilege- and the copyright-systems, and the prevailing economic rationale for the protection of works of authorship, leaves on the background a more original understanding of authorship as rooted in the human need of reciprocal communication for the sake of truth. Modern authorship, as grounded in a narrow utilitarian understanding of authors' rights, detaches itself from both the economic logic of the privilege system and the rational foundation of copyright.

Keywords

Printing press, privilege, copyright, intellectual property, Kant, freedom of the press, economic thought, authors.

Law as a culture-shaping factor

How is authorship affected by the laws that apply to it? In the last decades, a rich body of studies at the intersection of law, history and literature has emerged, addressing the relationship between legal systems and the birth and development of the figure of the "author" in various national and cultural contexts.¹ One of the points that have been focused on in these studies is the idea that, as Martha Woodmansee has put it, "one of the most powerful vehicles of the modern authorship construct was provided by the laws which regulate our writing practices".² The most prominent law, in this respect, is copyright.

From a historical perspective, the laws that regulate writing practices present two main systems that succeeded one to another. The first one, dating back to the age of the invention and diffusion of the printing press (late 15th Century), is the system of book privileges. The state, or other authorities, conferred to publishers the exclusive right to publish and distribute a given book. The second one, with its origins in the Enlightenment culture (mid-18th Century), is based on the notion that authors—and not publishers—have certain specific rights in their own creations. In the English-speaking world, the resulting legal system took the name of the most prominent of those rights, namely “right to copy” or, simply, copyright. From the mid-19th Century onwards, the copyright system was then incorporated into a broader family of rights that took collectively the name of “intellectual property rights”. As the name suggests, those rights are construed as fully-fledged *property* rights over “immaterial” objects such as works of the mind.

The intellectual property paradigm

A common way of relating to books, and more generally to the writings of both classic and modern authors, is based on certain more or less explicit assumptions. The first is that books themselves are fundamentally a particular category of “product”. They differ from other industrial products insofar as they are *creative works*. The second assumption is that the only real and legitimate individual responsible for the realization of a creative work is the *author*. The third assumption follows from the second, by arguing that the author is also the only real and legitimate *proprietor* of the work which he has created. Finally, as the owner of the work that he or she has created, the author should have the right to make *free use* of his property. This implies the right to dispose of it in all possible forms, including transferring its property in whole or in part.

Taken together, these assumptions define an ideal space, which can be termed the “intellectual property paradigm”.³ Within this paradigm, the author, as the legitimate and sole proprietor of the work he or she has created, can make what use of it he or she thinks best. The author is free to transfer, in whole or in part, his or her ownership of the work. Accordingly, the creative work becomes an exchangeable good. It becomes, in the full economic sense of the word, a “commodity”. The relationship between the writer and society thus takes the particular form of an “exchange”. It is an exchange in which the commodity exchanged is not just a product, but the *creative* product of an *author* who *freely* sells his *own* property.⁴

It is not by chance that, from the 1850s onwards, when the key elements of the intellectual property paradigm began to crystallize in the legislation of Western countries, the traditional legal doctrine progressively moved towards the concepts and language of economics. As Sherman and

Bently observe in their landmark study on the making of intellectual property in the British world, “While pre-modern law utilised the language, concepts and questions of classical jurisprudence, modern intellectual property law employed the resources of political economy and utilitarianism”.⁵ This shift from classical legal reasoning to utilitarian arguments is more than just an exterior change of language; it is, rather, the symptom of an in-depth transformation of the very notion of authorship.

Products of authorship as fictitious commodities

From the point of view of economic theory, the laws protecting intellectual property are justified by the particular nature of the “goods” they apply to, namely the so-called products of human ingenuity: artistic, scientific or even technical ideas. The economists of the first half of the 1800s defined these goods “immaterial products”. The term was probably first introduced by Jean-Baptiste Say in his *Treaty of political economy* of 1803,⁶ and became immediately popular in the economic discourse. The peculiarity of these kind of products, in the words of the Italian economist Melchiorre Gioia, is that:

The room supplied by the landowner and the materials supplied by the capitalist are always restricted within certain boundaries; on the contrary, the idea of the scholar crosses the borders of the farms, spreads freely upon all the executors, goes about from town to town, relieves toil and enriches labors from one end of the globe to the other⁷.

The key point with these peculiar products was clearly expressed by Léon Walras in a landmark article of 1859.⁸ In Walras’ terms, while immaterial products can certainly be considered useful goods in the same way as any other product of industry or manual labor, they lack an essential condition which makes a useful good capable of being an object of exchange, namely: they cannot be made available in a *limited* quantity. In economic terms, the limited availability of useful goods is also known as “scarcity”. There can only be a demand for the purchase of relatively *scarce* useful goods, as no one would ask to purchase items that are either useless or freely available to everyone, such as air or sunshine. As a result, only scarce useful goods can be privately owned. The characteristic of immaterial goods, however, is that they are never economically scarce. Once they are made available to the public, they are free to everyone to share without losing any of their utility value. No law of the market can convert an idea, or a poem, or a piece of music into a scarce commodity. Anyone who wishes to benefit from them can freely do so, unless a superior authority intervenes to make them *artificially* scarce, “making a naturally free item into an artificial monopoly”.⁹ Intellectual property law transforms immaterial products into exchangeable items,

which can pass from hand to hand not freely and without limit, but on the basis of an economic exchange relationship. In other words, it is a specific act of authority that adds a “value in exchange” to the “utility value” that these goods may have. It is an institutional act of *artificial creation of scarcity*.

As an effect of this artificial creation of scarcity, works of ingenuity, although they are not *naturally* commodities, they can nonetheless be treated *as if* they were commodities. This “as if”, this “fiction”¹⁰ must be guaranteed by an authority which remains above the individual actors of the economic exchange. No natural law of the market (no “invisible hand”) is capable of producing this fiction by itself. The fiction must be established and maintained as such. From the economic viewpoint, the intellectual property-system is therefore a *way of establishing and maintaining the exchangeability of ideas*, and thus a way of giving life to the fiction according to which these are fully-fledged commodities like any other goods.

Acknowledging that such a fiction is to some degree necessary, a question arises: is what I have called the intellectual property paradigm the only possible way of establishing it? Or rather are there (there have been) any alternative systems that performed the same function in a different way?

Before intellectual property: the book-privilege system

Before the intellectual property paradigm took shape in the legal systems of Western countries, the exchangeability of intellectual creations was secured by a system of privileges.

Book-privileges are usually described in classical copyright treaties as “primitive” legal instruments that were certainly inadequate to give full and effective protection to the authors. The word *privilegium* itself means a *lex* made for a *privus*, i.e. for a specific individual: it denotes a favor, a concession, the recognition of an exceptional, nearly extra-legal status. In fact, a privilege is not just outside the law; it is an explicit *exception* to the law in favor of an individual or category of individuals. Not surprisingly, seen through the lenses of 19th-Century natural law theories, privileges appear as ineffective tools to protect the universal interests of authors. So, the Italian writer Cesare Cantù, complaining in 1839 of the absence of a copyright law in Italy, he wrote “we don’t want privileges, we don’t want any distinction, we are just looking for equality and respect of rights”.¹¹

However, legal historians must be cautious about interpreting the past through principles and notions that took shape only at a later stage. It is thus important to understand the ratio of the privilege system *in itself*, setting aside all comparison with subsequent systems.

Book-privilege is, in some respects, similar to patents for new inventions. As a matter of fact, the clear-cut distinction between “invention” and “creation” in the sphere of human ingenuity only dates back to the second half of the 18th century; up to that time, the sphere of invention had been wide enough to include what we nowadays call “aesthetic creations”.¹² It was only in the mid-19th century that the language of “creation” and “creativity” began to occur in the juridical lexis, and accordingly intellectual property split into the “copyright paradigm” on one side and the “patent paradigm” on the other.¹³ Thus, it is no wonder that book-privilege, from a legal point of view, had the same nature as a privilege granted, for instance, to exploit mineral resources or to the invention of a new loom.

The commercial rationale for privileges

The reasons for granting a book-privilege were basically the same as for all other privileges: the need to protect a *commercial* interest. As a matter of fact, economic arguments were frequently, if not always, put forward by the publishers to support their requests for privileges,¹⁴ and often the text of the privileges themselves explicitly made reference to commercial matters such as the “high costs of production” of that particular book. These included not only the costs of printing, but also the “cost of acquiring the manuscript” from the author.¹⁵

A significant economic investment was commonly required as the reason for granting a privilege; but because few books had this characteristic, privileges applied only to a small portion of library production. Of all the books published in Paris in the first quarter of the 16th century, only about 5% were privileged.¹⁶ A similar rate can be found in Venice during the same period,¹⁷ while in the middle of the 18th century privileged books amounted to 20% of the total.¹⁸ The use of privileges increased but it always applied to a minority of publications, precisely those with a striking commercial character. What kind of books were they? According to Mark Rose, in England, at least until the end of the 16th century, privileges regarded “almost exclusively classes of books such as law books, catechisms, Bibles, ABCs and almanacs”,¹⁹ namely books which represented a considerable investment for the printers and which were at risk of pirate editions.

Privileges and the public interest

The privilege system was thus designed to protect a commercial interest of a publisher. This does not mean, however, that the system could not address issues of general interest as well. There are

two ways in which the authority could balance private and public interests: by determining the *duration* of the privilege and the *conditions* upon which the privilege was granted.

In deciding the duration of the privilege, the authorities sought to maintain a certain proportion between the private and the general interest. In the initial period of the diffusion of printing, for instance, a longer privilege was usually granted to books requiring a larger investment (such as dictionaries and illustrated books), whereas considerations of the public interest could occasionally suggest the granting of shorter privileges. A good example is a privilege of only one year that was granted in Venice in 1509 to a booklet containing remedies against pestilence, in times when privileges were usually of five or ten years.²⁰ Clearly, the general interest of having such a book in public domain prevailed over the legitimate interest of the publisher to recoup the costs of production. Sometimes the common interest of the guild was taken into account, and privileges were used as instruments for redistributing resources among members of the guild: a Venetian rule of 1765 established that “common books” (i.e. books in the public domain) would be assigned to “needy printers” as a form of “compensatory monopoly for the losses suffered”.²¹ This same rationale can be found in the guild’s practice of treating as expired the privilege of out-of-print books.

Privileges were usually granted under certain conditions, failing which, the privilege would be lost. The commonest condition was that the book had to be sold *justo pretio*, “at a fair price”. In some cases, the privilege itself established the sale price, which was determined by an independent estimate taking into account the market conditions.²²

So, although the privilege system was mainly designed to protect commercial interests, it also incorporated other functions such as promotion of public welfare, wealth redistribution and market regulation. As a matter of fact, *justo pretio*-clauses and limited duration remained for three centuries the two pillars of the privilege-system of Venice. In 1780, the Venetian government established the perpetuity of privileges in order to cope with the heavy publishing crisis, but the following year the Venetian court, in a case called *Pezzana e Consorti*, declared the government’s law illegitimate because “the privilege can give the publisher only the necessary security of the capital invested in view of the profit”.²³ A similar pattern can be found some years earlier in England, where in the landmark case *Donaldson v. Beckett* (1774) the House of Lords rejected the claim of a London publisher for a perpetual common-law copyright.²⁴

Privileges as honours and rewards: the promotion of authorship

In the late period of the privilege system, another function emerged considerably, namely promotion of authorship. This last function is evidenced by the practice of granting privileges directly to the author(s) or editor(s) of works—a practice that dates back from the early years of the printing press, but which gained momentum in the 18th Century. It would be too precipitate, however, to see in this practice a foreshadowing of author’s right in the current sense. The author was not regarded as an individual bearing special rights, but rather as an actor in the book market having specific commercial interests to be safeguarded. Authors were protected by reason of the expenses and troubles they had undertaken, and it is no surprise to find, in their requests to sovereigns, an emphasis on the investment (in terms of time, money and labor) that the work had required. According to John Feather, privileges granted directly to authors in pre-Revolutionary England concerned books that “almost without exception [...] were learned works that had involved their authors in long periods of compilation, and sometimes great expense”.²⁵ In the 1700s, the author’s privileges granted in the kingdom of Savoy concerned only highly demanding works such as “dictionaries, translations of the Latin and Greek Classics, maps, etc.”.²⁶ This did not exclude the possibility that privilege could exceptionally be granted for reasons of prestige or to emphasize the particular value of a work. The celebrated papal privilege obtained by Ludovico Ariosto in 1516 for the first Ferrara edition of the *Orlando furioso* is a case in point. As Mark Rose comments, there were many other episodes where “the actions of [the authorities] are best understood in terms of ‘honor’ and ‘reward’ rather than ‘property’”.²⁷

The “honor”-function of the privilege system can only be understood on the background of another peculiarity of the system, namely the plurality of sources of law; that is, that granting and observance of privileges could be managed by *any* acknowledged power, and not only the State. Accordingly, there was a plurality of sources of privileges, which reflected the organization of powers in the *ancien régime*. In France, together with royal patents, there were a series of privileges accorded by parliament, by other sovereign courts (such as the *Cour des Aides* or the *Grands Jours*) and provincial parliaments as well as ecclesiastical hierarchies (religious orders, bishops), academies and guilds.²⁸ In Venice, throughout the 16th century, privileges were granted equally by the *Senato* and by the *Consiglio*.²⁹ The situation in Germany was even more multifaceted, and privileges were granted by a number of authorities, ranging from the Emperor to the *Reichsregiment*, as well as princes, dukes, and the Senates of different cities³⁰. To all these privileges, which had validity over a more or less wide territory, are to be added papal privileges, which incorporated an implicit moral dissuasion or even the explicit threat of excommunication of transgressors. Papal privileges, and in a different sense imperial ones, can be regarded as almost supranational juridical acts on the grounds of their universality.³¹

The privilege system and the structure of the book market

The privilege-system reflects a peculiar structure of the market for books and for creative works in general (including maps, charts, engravings). However, only few of these works were protected by privilege. Yet the distinction was not just between privileged and unprivileged books: depending on the *kind* of privilege obtained, the book market was also divided into a plurality of “circuits”, more or less connected with each other. The distinction between those circuits was both territorial and qualitative. From a territorial point of view, there were books whose diffusion was predominantly or exclusively in local marketplaces; then there were books which circulated within the boundaries of a national language (which did not necessarily coincide with state borders – as was the case of Italy and Germany). Finally, there were books destined for a refined and polyglot readership, and whose marketplace extended virtually over the whole civilized world. Only for this kind of books was it worthwhile to request a papal or imperial privilege, or even a sum of privileges, as, for instance, in the case of the *Pandette fiorentine*, printed by Lorenzo Torrentino in Florence 1553. This leading legal digest, which was distributed everywhere in Europe, obtained simultaneously the privilege of the duke of Florence, the pope and the kings of Spain, France and England.³² Other books received a lower level of protection, if any at all. In the sphere of the “high circuit”, i.e., the international book market, the unwritten rules of the book trade contributed to enforce the legal protection for the publishers. Febvre and Martin remark, with reference to the international book trade in the 16th and 17th centuries, that “bookmakers had no interest in competing against each other. In an epoch when every large publisher had business with foreign counterparts, the ruin of one would risk the ruin of many others. Every publisher, every city, had its own ‘assortment’ that commercial correctness and the interest of all those who were involved, would usually prevent to imitate”³³.

Besides the territorial scope, there were also qualitative differences, or rather a plurality of circuits corresponding to books of different genres and purposes. Thus, for religious books it was certainly useful to obtain an ecclesiastical privilege. This could have been granted not just by the papacy but also by the bishop or even by a religious order: in Germany, for instance, the Jesuits were authorized by the emperor to give special privileges.³⁴ Legal, medical and scientific texts, which generally circulated in the universities, could receive privileges directly from the academic authorities.

The market for books published under the privilege system was not global or uniform. Instead, it was a bundle of circuits, each operating independently of the other. Each circuit had its own rules and purposes. There was no common denominator. Privilege was a system for securing

the exchange value of books based on the kind of market in which this book was traded. The privilege-system was flexible enough to be modulated each time to precisely fulfil its intended scope. No need to extend indefinitely the value in exchange. No need to create scarcity where it was not necessary. As a consequence, the book's exchange value, which the privilege created with a free institutional act, remained determined and defined not only within tempo-spatial limits, but also within specific boundaries. The book ought to become a commodity *to the precise extent* that it served the needs of a buying-selling exchange. Precise boundaries to commodification were settled. Where there was no commercial interest, or where commercial interest was already met, no exchange value needed to be ascribed to the book. A book outside a buying-selling relationship, and thus outside a commercial circuit, no longer needed to be conceived and managed as a commodity. It was free to become a common-pool resource for a community.

It is not by accident that the privilege system entered a crisis when it lost its capacity to adapt to the many shades of the book market. In 1780 the Venetian government established the perpetuity of privileges in an attempt to deal with the profound crisis of its publishing industry.³⁵ In economic terms, the books' value in exchange, and hence its status as commodity, was extended infinitely, beyond the natural product cycle of books. In this loss of boundaries, the privilege system soon collapsed and a new juridical order took its place. It was the advent of the intellectual property paradigm, as imbued by the concepts of economic theory.

From privilege to right: the philosophical foundation of author's rights in Immanuel Kant

Between the privilege and the intellectual property paradigms, there is another discourse that emerged in between. It is a right-based (instead of value-based) approach, which bases its foundations in classical philosophy. The clearest expression of this approach can be found in the work of Immanuel Kant.

In his *Metaphysics of Morals*, 1797, Kant famously deduced the illegitimacy of counterfeiting books by starting with the question "What is a book?":

A book is a writing, which represents a discourse addressed by some one to the public, through visible signs of speech. [...] He who speaks to the public in his own name is called the author (*auctor*); he who addresses the writing to the public in the name of the author is the publisher. [...] The publisher, again, speaks, by the aid of the printer as his workman (*operarius*), yet not in his own name, for otherwise he would be himself the author, but in

the name of the author; and he is only entitled to do so in virtue of a mandate (*mandatum*) given him to that effect by the author.³⁶

The book is a speech that a publisher delivers in the name of the author. As such, it embodies a set of relationships, each of which has a specific legal basis. Firstly, between the author and the public; then, between the author and the publisher and between the publisher and the public; finally, there is a relationship between the publisher and the printer. The first of these relationships is a speech: the author addresses his or her own words to the public. The second (author-publisher) is a contract, and specifically a contract based on a *mandate*. The third relationship (publisher-public) is also a speech, but in this case the words are not those of the “speaker”. The publisher speaks only “in the name of the author”. His or her action consists in conducting a business on behalf of the author, and enjoys all the advantages that he or she legitimately can from this negotiation. The final relationship is between the publisher and the printer, and this is a contract of work done.

Before proceeding, it is worth noting that these relationships are not simply placed alongside each other at the same level. There is a *primary* relationship, namely the one between the author and the public, which underlies and regulates all the others, giving rise to a series of *secondary* relationships. A specific type of contract corresponds to each one of these secondary relationships (fig. 1).

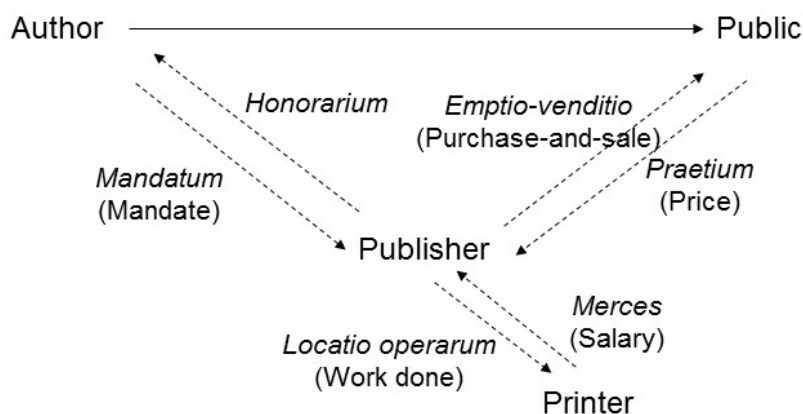


Fig. 1 [awaiting caption, credit, and larger file from author]

To define those contracts, Kant relies explicitly on the tradition of Roman law. As far as labor is concerned, Roman law makes a difference between the contract of work done (*locatio operarum*) and the contract of mandate (*mandatum*). Likewise, a distinction is made between these two kind of contracts on one side and the contract of purchase-and-sale (*emptio-venditio*) on the other.³⁷ Only in the purchase-and-sale contract is the other party obliged to pay a price equivalent

(*pretium*). The contract of work done is perfected by the payment of a wage (*merces*) that corresponds to the work performed (*opera*). Unlike the price, the wage has no direct relation of equivalence with a “thing” exchanged: the object of the contract is in fact one’s own work (*opera*) and not a piece of work as such (*opus*). By contrast, the contract of mandate does not need to be perfected by any act of payment. It is a perfect contract in itself, which is based on the trust (*fides*) of the two counterparts. Such a contract may—but does not have to—be followed by a grateful reward in the form of an *honorarium*. Compared to the other forms of payment discussed above (price and wage), the honorarium is not obligatory and, most importantly, does not imply any relationship—be it of equivalence or otherwise—with the work provided by the mandatory or the task entrusted by the mandator. As explained in *Universal-Lexicon* of J.-H. Zedler’s (1735):

Honorarium means acknowledgement or reward, recognition, favor, stipend; it is not in proportion to or equivalent to the services performed; it differs from pay or wages, which are specifically determined by contracting parties and which express a relationship of equivalence between work and payment.³⁸

What Kant argues in the passage quoted above is that the author is neither a performer of work (including intellectual work) nor a seller (of his or her own work). The relationship between the author and the publisher is strictly maintained kept between the precise boundaries of a mandate, with all the consequences that derive from this contractual figure. The publisher, as mandatory, is bound by a *twofold* duty to fulfil the author’s interests to speak to the public *and* the public’s interest in receiving the author’s speech. For instance, as explained by Kant in the article *On the Unlawfulness of Counterfeiting Books*, “should the publisher distribute the author’s work, after his death, mutilated or falsified, or let the necessary number of copies for the demand be wanting; the public would thus be entitled to force him to more justness or to augment the publication: otherwise the public could provide for this elsewhere.”³⁹ In other words, the publisher would contravene the author’s mandate, should he not fulfil the tasks implied by the author-public relationship.

On this background, Kant defines unauthorized reprint as a wrong committed against the author *and* the authorized publisher. The unauthorized publisher speaks, too, in the name of the author, but he does so without having a mandate to that effect. He or she speaks to the public either in virtue of an *intrusion* into another’s business, or by presumptuously forcing someone to perform an act against his will. As a consequence he commits a twofold wrong: against the legitimate publisher, as he deprives him of the profits he could have derived from the execution of the author’s

mandate; and against the author himself, since he undertakes a business in his name (namely, speaking to the public) without and against his consent.

Interestingly, in Kant's analysis, the wrong of unlawful reprint is neither a tort against property (such as stealing a chattel from the legitimate owner) nor a transgression of a state-created privilege. As a matter of fact, the Kantian foundation of author's right is beyond the dichotomy between the intellectual property and the privilege paradigm.⁴⁰

If, however, the contract between the author and the publisher is subordinate to a more fundamental, albeit implicit, deal between the author and the public, what is the ultimate purpose of an author-public relationship? In other words: why do authors write books?

Authors' rights, freedom of the press and the need for truth

In Kant's view, the book has, as far as thought is concerned, an analogous function to that of money in the commercial world. While money is "the universal means through which men exchange the products of their work",⁴¹ the book is the pre-eminent means for people to communicate and exchange what they think. The peculiarity of the book is thus the fact that it is the "medium for the exercise and circulation of thought".⁴² However, the relationship between thoughts and their communication is not of the same nature as the one between commodities and their circulation. A commodity remains a commodity even when it lies unexploited in a warehouse. Conversely, thoughts—unlike what is commonly assumed—*cannot* be real thoughts in the absence of communication. This is the key point of an article that Kant published in 1786 with the title *What Does It Mean: to Orient Oneself in Thinking?*:

It is often said that a superior power can deprive us of the freedom to *speak* or to *write*, but not of the freedom to *think*. But how much and how correctly would we think, if we didn't think, so to say, 'in common' with others, to whom we *communicate* our thoughts and who *communicate* theirs to us? Thus, one can really say that the power that removes people's freedom to *communicate* their thoughts publicly, also deprives them of their freedom to *think*, that is, the only treasure left us in the midst of social impositions, the only means which can still permit us to find remedies for the ills of human condition⁴³.

A power that limits the freedom of communication also prejudices the possibility of *thinking* as such. It is commonly believed that thinking is a solitary activity, an essentially individual performance which can either remain confined to the individual's mind or be shared with others at some stage. However, Kant draws the attention to the fact that thinking is *in itself* communication in

the highest sense. To understand this point it is enough to consider what thinking really means. In line with tradition, Kant sees any acts of thinking as essentially acts of *judging*. Judgment is certainly an operation that involves an individual as such. However, precisely in judging, that is in connecting a “predicate” (P) with a “subject” (S) in a proposition (S is P), every individual relies on something else, namely to that *to which* the proposition refers. Therefore, precisely in the individual act of judgment the individual is immediately de-individualized: he or she is already beyond himself and heading towards something other.⁴⁴ The most immediate form of this “being-by-otherness” is being with other human beings. This is why it is so necessary to have one’s own thoughts (i.e. judgements) tested by other thinking (i.e. judging) beings. Denying or undervaluing the importance of this comparison is for Kant a shifty form of absence of thought, a peculiar kind of selfishness. In his *Anthropology from the Pragmatic Viewpoint*, Kant uses the term “logical egoism” to distinguish this from the commoner form of “moral” one:

The *logical egoist* considers it unnecessary to test his own judgement by submitting it to others, as if he had no need for this touchstone (*criterium veritatis externum*). But it is so certain that we cannot give up this means to assure ourselves of the correctness of our own judgement, that this is perhaps the principal reason why learned people fight so hard for the *freedom of the press*. For if we are denied this freedom, we would be deprived from an utmost means for proving the correctness of our own judgements and we would be left to error.⁴⁵

No form of thought, including pure mathematics, can give up this means of testing the individual’s own judgement.⁴⁶ Yet to fully deploy the potential of this means, it is necessary that “the best instruments for the circulation of thought”, namely printed books, are left free to circulate. The freedom to publish and the freedom of the press are means for guaranteeing a much more fundamental freedom, namely the freedom from error. As both the philosophical and religious tradition instruct, humankind can only be free in the truth.⁴⁷ The freedom of the press is not an end in itself, but it is a necessary condition of the full and complete liberty of humankind.

From speech to commodity: authorship in the dominant economic discourse

In Kantian thought, the author is not the “owner” of an asset to be exchanged in the market as an “immaterial good”. He or she is rather, and above all, the one *responsible* for a “speech”, that is to say, an act of judgment explicitly offered to other human beings in order to test together its correctness and truth.⁴⁸ In its turn, the public, as addressee of the author’s speech, is not just a body of consumers (e.g. “cultural consumers”), but is the space in which judgements can be placed for

testing, and is thus the space in which the possibility of “being in the truth” is preserved. Consistent with Kant’s position are the following words of Vittorio Alfieri, who writes in his clear-sighted treatise *Il principe e le lettere* [*The Prince and Letters*], 1789: “Reading, as I intend it, means profoundly thinking; thinking means to hold on and hold on, it means to endure”.⁴⁹ The “public” is then an ensemble of *readers* in the whole sense of the word. Readers are not merely “consumers of books” but primarily thinking beings who are willing to endure and share with the author the search for the truth. It is only in this willingness to endure that the Kantian “right of the public to deal with the author” finds its ultimate justification.

To what extent are writing practices influenced by the legal systems and institutions that protect their activity? Is there a *substantial* difference in the relationship of author and public in the privilege and intellectual property systems?

The transformation of book-privilege into literary property – or, better, the move from one paradigm to another – thus has a clear significance: buying and selling becomes the determining form for *each* contract, including the primary and original contract between the author and the public. This does not mean, in general, that no other kind of relationship is possible, but these other relationships will always be considered as “deviant” or exceptional cases since they are not provided for in the paradigm. What happens in the move from the privilege to the intellectual property system is a real change of perspective, as a result of which the principle of exchange on the basis of sales, which had previously concerned *only one* – and non-essential – facet of the author-public relationship, is now not only central to the relationship but its *totality*. Historically, this change began in the 1750s and reached maturity about a century later.

In the first half of the 1800s, a crucial period of the rise of the intellectual property principles in national and supranational legislation, a wide debate took place in the intellectual world. Lawyers, men of letters, simply cultivated people, but above all economists, were questioning the foundations of the legal protection of works of the mind and its meaning. Very different positions emerged which reflected the diversity of interests, positions, and ideologies.⁵⁰ Beneath these differences, however, it is not difficult to see common responses coming together.

Among the founding fathers of classical economics, one of the first to concern himself in detail with questions of intellectual property was John Stuart Mill. His *Principles of Political Economy*, 1848, states:

It is generally admitted that the present Patent Laws need much improvement; but in this case, as well as in the closely analogous one of Copyright, it would be a gross immorality in the law to set everybody free to use a person's work without his consent, and without giving him an equivalent.⁵¹

Patent laws and copyright are closely analogous cases that belong to the family of intellectual property. The important point to note, here, is that no result of human work can be used without asking the permission of the person who has produced it, and without paying the latter *an equivalent*. To go against this principle, according to Mill, would be not only unfair but also immoral. In the traditional legal conception the payment of an equivalent is precisely that which *cannot* take place in the case of works of the mind. To these belongs a *honorarium*, i.e., a reward that is expressly separate from other kinds of payment (such as the *merces* or the *pretium*) on the grounds that it cannot enclose any "relationship of equivalence between work and payment".⁵² What Mill implicitly assumes is that the relationship between "everybody" and the "person's work" can be wholly resolved through a buying-selling relationship.

This largely implicit assumption in John Stuart Mill becomes explicit in the work of his contemporary, the Italian economist Gerolamo Boccardo. From the point of view of the history of economic thought, Boccardo is not a giant like Mill. His main work, the *Dictionary of Political Economy and Commerce*, was published in four volumes between 1857 and 1861, and is regarded by historians of economic thought as a great explanatory work, a *summa* in which the various themes of the liberal economic culture of the time are brought together. For just this reason, it is interesting to read what he writes in the entry "Artistic, industrial and literary property":

The author is a workman in science, civilization, progress, to whom society pays a salary, just as the factory-owner pays a salary to his employees. [...] So-called "literary property" is simply a wage for work, the price of a work done, the payment for a duty, in the form of a privilege that the civil law grants to the author in recognition of his work and service to the social community.⁵³

What is implicit in Mill's text is stated clearly here. The relationship between the "social community" and the author – a relationship regulated by literary property – is just a particular case of an economic relationship between a *giver* and a *supplier* of labor. The author is just a particular type of "workman", and society treats the author like a factory-owner treats his employees, by paying a salary for the work performed. The different nature of the relationships, which gave rise in the traditional concept to quite distinct contractual figures, is here flattened to one level – the "wage for work", the "price of a work done", "payment for duty". These latter are at last equivalent

formulae which are incapable of any substantial distinction. The author provides a service – and society pays a price for it.

Surprisingly similar words to those of Boccardo appear in the work of a writer of very different views, the socialist economist Pierre-Joseph Proudhon, author of the treatise *What is Property?* In 1868, he published a pamphlet against the proposed bill to extend the duration of literary property in France. He wrote:

The author is a trader, isn't he? And with whom does he trade? Neither with you, nor with me, nor with someone *in particular*; but he trades *in general*, with the public. [...] Between the author and society there is a tacit agreement, by virtue of which the author will be paid *à forfait* by means of a temporary privilege of sale. If there is a great demand for the work, the author will earn a great deal. If the work is refused, he will earn nothing. Let's allow him an agreement that lasts for 30, 40, or 60 years to cover the costs. I say that this contract is perfectly regular and fair, and that it satisfies all the needs, safeguards the rights, respects the principles, and responds to all objections.⁵⁴

Although coming from very different backgrounds—liberalism and socialisms—the two economists express almost identical views. The contract on the basis of which society pays the author a straightforward fee is a “perfectly regular and fair” contract. Proudhon does not and cannot find any objection that could demonstrate the opposite.

Who is the author?

There is an essential difference between authorship in the privilege- and intellectual property-systems: while in the first system the author-public relationship *can* be conceived of as a free liaison between thinking beings—a liaison from which some reciprocal obligations originate, such as the author's responsibility as regards to the truth, and the public's obligation to truthfully read—in the second system, this relationship *must*, in a way, be reduced to an exchange in which the author's credits are settled by requiring an equivalent. In fact, the purchase-and-sale contract is *concluded* by a payment. Can this contract really fulfil all the needs? For the 20th-century American writer Henry Miller, the author is not a “workman” in society's service nor a “trader”. He is rather a “beggar” – and not simply in the sense that he's begging *for cash*:

Writers, in a way, are like beggars. They are continually begging for a chance to give of their great gifts – which is the most heart-rending begging of all and a disgrace to any

civilized community in which it happens. Which is to say, almost the entire civilized world.⁵⁵

Review of the Literature

The idea that the modern notion of authorship is essentially intertwined with legal and economic structures has been prominently introduced by Martha Woodmansee in her 1984 article “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author”.⁵⁶ The article has opened a research field at the crossroad between literary studies, legal history and economic history, which has been consolidated in an edited book in 1994.⁵⁷ The perspective opened by research in this field has deeply transformed the study of copyright history by introducing in a hitherto narrow and highly specialized branch of legal history a fresh set of cross-disciplinary research questions.⁵⁸ The edited book of Sherman and Strowel *Of Authors and Origins* (1994) exemplifies this new trend in copyright scholarship,⁵⁹ which has then been developed—as far as Anglo-American copyright is concerned—in the works of (among others) Sherman and Bently,⁶⁰ Deazley,⁶¹ Seville,⁶² Alexander⁶³ and Bracha.⁶⁴ Literary studies on copyright and authorship, in both historical and contemporary perspectives, include the influential book of Mark Rose *Authors and Owners*,⁶⁵ as well as the works of Loewenstein,⁶⁶ Saint-Amour⁶⁷ and Hemmungs-Wirtén.⁶⁸ Cross-disciplinary research on copyright, authorship and commodification of culture has been consolidated in the edited books of Porsdam,⁶⁹ Lever,⁷⁰ and Biagioli, Jaszi and Woodmansee.⁷¹ A project by Martin Kretschmer and Lionel Bently, launched in 2010 and constantly updated, has made freely available online sources for copyright history in eight jurisdictions, with English translations and commentaries.⁷² Part of the research made possible by this resource has been presented in the edited book of Kretschmer, Bently and Deazley *Privilege and Property* (2010).⁷³

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Primary sources

Primary Sources on Copyright (1450-1900), eds Lionel Bently & Martin Kretschmer, www.copyrighthistory.org

Notes

¹ The seminal article of Martha Woodmansee “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author”, *Eighteenth-Century Studies*, 425 (1984) (now in Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics*. New York: Columbia University Press, 1994) has paved the way for a flourishing literary research in this field. See in particular Mark Rose, *Authors and Owners: The Invention of Copyright*, (Cambridge MA- London: Harvard University Press, 1993), Roger Chartier, “Figures of the Author” in Brad Sherman and Alain Strowel, eds., *Of Authors and Origins: Essays in Copyright Laws* (Oxford: Clarendon Press, 1994), Martha Woodmansee and Peter Jaszi, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994), Joseph Loewenstein, *The Author’s Due: Printing and the Prehistory of Copyright* (The University of Chicago Press, Chicago 2002), Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (New York: Cornell University Press, 2003), Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: University of Toronto Press, 2004), Mario Biagioli, Peter Jaszi and Martha Woodmansee *Making and Unmaking Intellectual Property* (Chicago: The University of Chicago Press, 2011).

² Martha Woodmansee, “On the Author Effect: Recovering Collectivity”, in Woodmansee and Jaszi, eds., *The Construction of Authorship*, 26.

³ In this context, we leave out of consideration the differences, some of them very relevant, between juridical traditions. Specifically, we should distinguish between the Anglo-American copyright system and the European-continental system of author’s rights (see, among many other works, Jane C. Ginsburg “A Tale of Two Copyrights: Literary Property in Revolutionary France and America”, 64 *Tulane Law Review*, 5 (1990) and William Fisher “Theories of Intellectual Property”, in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property*, Cambridge: Cambridge University Press, 2000).

⁴ Towse “Human capital and artists’ labour markets”. For an interesting case study see Jose Bellido & Kathy Bowrey, “From An Author’s To A Proprietor’s Right: Newspaper Copyright and The Times (1842-1956)” (2014) 6(2) *Journal of Media Law* (2014) 180.

⁵ Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999), 4. By “pre-modern [intellectual property] law”, Bently and Sherman refer to the English law and jurisprudence between 1760 and 1850.

⁶ The first edition was published by Crapelet, Paris, in 1803. See Jean-Baptiste Say, *Traité d'économie politique* (6th edition, Paris: Deterville, 1841), Ch. XIII, 123-132 (available from Wikisource: https://fr.wikisource.org/wiki/Traité_d'économie_politique).

⁷ Melchiorre Gioia *Nuovo prospetto delle scienze economiche* (1815), quoted in Maurizio Borghi, *La manifattura del pensiero. Diritti d'autore e mercato delle lettere in Italia (1801-1865)* (Milan: Franco Angeli, 2003), 67.

⁸ Léon Walras, “De la propriété intellectuelle, position de la question économique”, *Journal des économistes* 24(12) (1859), 392-407 (available from Wikisource: https://fr.wikisource.org/wiki/De_la_propriété_intellectuelle).

⁹ Walras, “De la propriété intellectuelle”, 58.

¹⁰ The term “fiction” is used here in a strict technical sense, not in a moral one (see in general the theory of “fictitious commodities” in Karl Polanyi, *The Great Transformation*. New York: Farrar & Rinehart, 1944).

¹¹ Quoted in Maurizio Borghi, *La manifattura del pensiero*, 50.

¹² In the Oxford Dictionary of English we can read an interesting quotation of 1575 by the poet Abraham Fleming: “Your braine or your wit, and your pen, the one to invent and devise: the other to write”. Still in 1850, Alessandro Manzoni entitled *Dell'invenzione [On Invention]* a treatise on the essence of artistic and literary work.

¹³ The most significant dates in this development are 1883 and 1886, where international agreements respectively on patents and on copyright were reached in the ‘Great Conventions’ of Paris and Berne, which sanction the bifurcation of the intellectual property rights into two distinct branches (see Jerome H. Reichmann “Legal Hybrids between the Patent and Copyright Paradigm”, *Columbia Law Review*, n. 94, 1994).

¹⁴ Elizabeth Armstrong, *Before Copyright: The French Book-Privilege System 1498-1526* (Cambridge: Cambridge University Press, 1990) 79 and 84.

¹⁵ Borghi, *La manifattura del pensiero*, 22-23.

¹⁶ Armstrong, *Before Copyright*, 78.

¹⁷ Borghi, *La manifattura del pensiero*, 23.

¹⁸ Mario Infelise, *L'editoria veneziana nel 700* (Milan: Franco Angeli, 1991), 289.

¹⁹ Rose, *Authors and Owners*, 11.

²⁰ Borghi, *La manifattura del pensiero*, 22.

²¹ Ibid.

²² Ibid. See also Christopher L. C. E. Witcombe, *Copyright in the Renaissance: Prints and the Privilegio in Sixteenth-Century Venice and Rome* (Leiden-Boston: Brill, 2004), 31-32.

²³ “Pezzana e Consorti” case: supporting documents, Venice (1780), *Primary Sources on Copyright (1450-1900)*, Lionel Bently and Martin Kretschmer eds., www.copyrighthistory.org. See Maurizio Borghi, “A Venetian Experiment on Perpetual Copyright”, in Ronan Deazley, Martin Kretschmer and Lionel Bently, eds., *Privilege and Property. Essays on the History of Copyright* (Cambridge: Open Book Publishers, 2010), 153.

²⁴ See Ronan Deazley, “Commentary on *Donaldson v. Becket* (1774)” in *Primary Sources on Copyright* www.copyrighthistory.org; Rose *Authors and Owners*, 92-110.

²⁵ John Feather, “From Rights in Copies to Copyright: The Recognition of Author’s Rights in English Law and Practice in the Sixteenth and Seventeenth Century”, in Woodmansee and Jaszi eds., *The Construction of Authorship*, 193.

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- ²⁶ Luigi Carlo Ubertazzi, *I Savoia e gli autori* (Milan: Giuffr  2000), 131.
- ²⁷ Rose *Authors and Owners*, 17. Later we shall see why the *honorarium* is the suitable method for remunerating the author.
- ²⁸ Armstrong *Before Copyright*, 21 and 62.
- ²⁹ Borghi *La manifattura del pensiero*, 23.
- ³⁰ Ludwig Gieseke, *Die geschichtliche Entwicklung des deutschen Urheberrechts* (G ttingen: Verlag Otto Schwartz, 1957) 24-37.
- ³¹ This refers, clearly, to Catholic and imperial “universality” which remained more or less in vigour until the end of the 1700’s.
- ³² Domenico Moreni *Annali della tipografia fiorentina di Lorenzo Torrentino impressore ducal* (Florence: Francesco Daddi, 1819), available from Google Books.
- ³³ Lucien Febvre and Henri-Jean Martin *L’apparition du livre* (Paris: Albin Michel, 1958), 308.
- ³⁴ Gieseke *Die geschichtliche Entwicklung des deutschen Urheberrechts*, 37.
- ³⁵ Borghi, “A Venetian Experiment on Perpetual Copyright”, 150-154.
- ³⁶ Immanuel Kant *Metaphysik der Sitten*, in *Kants gesammelte Schriften*, ed. K nigl. Preu . Akademie der Wissenschaft, (Berlin-Leipzig: De Gruyter, 1907) Vol 6, 404. For a discussion of Kant’s argument on copyright see Abraham Drassinower “Copyright infringement as compelled speech”, Laura Biron “Public reason, communication and intellectual property” in *New Frontiers in the Philosophy of Intellectual Property*, Annabelle Lever ed. (Cambridge: Cambridge University Press, 2012), Maurizio Borghi, “Copyright and Truth”, *Theoretical Inquires in Law* 12(1) (2011), Anne Barron, “Kant, copyright and communicative freedom” *Law and Philosophy*, 31 (1) (2012).
- ³⁷ See Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1953), available on Internet Archive: https://archive.org/details/bub_gb_oR0LAAAAIAAJ.
- ³⁸ Quoted in Woodmansee *The Author, Art and the Market*, 42.
- ³⁹ Immanuel Kant, *Von der Unrechtm ssigkeit der B chernachdrucks*, in *Kants gesammelte Schriften*, Vol 7, 134. See Kant: On the Unlawfulness of Reprinting, Berlin (1785), *Primary Sources on Copyright*, www.copyrighthistory.org.
- ⁴⁰ This point is thoroughly developed in Abraham Drassinower, *What’s Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2015).
- ⁴¹ Kant *Metaphysik der Sitten*, 401.
- ⁴² *Ibid.*, 400.
- ⁴³ Immanuel Kant, *Was hei t, sich im Denken orientieren?* in *Kants gesammelte Schriften*, 144-5.
- ⁴⁴ See Immanuel Kant, *Kritik der reinen Vernunft* A 69, B 84
- ⁴⁵ Immanuel Kant, *Anthropologie in pragmatischer Hinsicht*, in *Kants gesammelte Schriften*, vol. 7, 128-9.
- ⁴⁶ “If there was an initial lack of perception of the fact that the judgement of the land-surveyor regularly agreed with the judgement of all those working diligently and carefully in the same domain, mathematics itself would not be able to be free from the fear of falling into error” (Kant, *Anthropologie in pragmatischer Hinsicht*, 129).
- ⁴⁷ “The truth shall make you free” (John 7:32).
- ⁴⁸ Borghi “Copyright and Truth”, 13.
- ⁴⁹ Vittorio Alfieri *Del principe e delle lettere* [1789] (Milan: Rizzoli, 1986), 212.
- ⁵⁰ See Borghi, *La manifattura del pensiero*, 55-99, Fritz Machlup and Edith Penrose “The Patent Controversy in the Nineteenth Century”, *Journal of Economic History*, 10/1 (1950), Gillian Hadfield, “The Economics of Copyright: An Historical Perspective” in *The Economics of Intellectual Property*, Ruth Towse and Rudi W. Holzhauser eds. (Cheltenham: Elgar, 2001).

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- ⁵¹ John Stuart Mill, *Principles of Political Economy* [1848] (New York: Oxford University Press, 1994) 305. See also Saint-Amour *The Copywrights*, 57-59.
- ⁵² Woodmansee *The Author, Art and the Market*, 42.
- ⁵³ Quoted in Borghi *La manifattura del pensiero*, 98.
- ⁵⁴ Proudhon “Les Majorats littéraires”, Paris (1868), *Primary Sources on Copyright* www.copyrighthistory.org.
- ⁵⁵ Henry Miller, *Stand Still Like the Hummingbird* (New York: New Directions, 1962), 75.
- ⁵⁶ Martha Woodmansee “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author”, *Eighteenth-Century Studies*, 425 (1984) (now in Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics*. New York: Columbia University Press, 1994).
- ⁵⁷ Martha Woodmansee and Peter Jaszi (eds.) *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham: Duke University Press, 1994.
- ⁵⁸ Kathy Bowrey, “Who’s Writing Copyright’s History?” 18(6) *European Intellectual Property Review* (1996) 322; Martin Kretschmer, “The History of Copyright History: Notes from an Emerging Discipline”, in M. Kretschmer, L. Bently and R. Deazley (eds.) *Privilege and Property: Essays on the History of Copyright* (Oxford: Open Books, 2010).
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- ⁶⁰ Brad Sherman and Lionel Bently. *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999).
- ⁶¹ Ronan Deazley, *On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775)* (Oxford: Hart Publishing, 2004), and Ronan Deazley, *Rethinking Copyright. History, Theory, Language* (Cheltenham: Edward Elgar, 2006).
- ⁶² Catherine Seville, *The Internationalisation of Copyright Law. Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006).
- ⁶³ Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford: Hart Publishing, 2010).
- ⁶⁴ Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909*. (Cambridge: Cambridge University Press, 2016).
- ⁶⁵ Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge MA- London: Harvard University Press, 1993).
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- ⁶⁹ Helle Porsdam (ed.), *Copyright and other Fairy Tales* (Cheltenham: Edward Elgar, 2006).
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- ⁷¹ Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds.) *Making and Unmaking Intellectual Property* (Chicago: The University of Chicago Press, 2011).
- ⁷² *Primary Sources on Copyright (1450-1900)*, <http://www.copyrighthistory.org>. The database currently comprise sources from France, Germany, Italy, Jewish Law, Netherlands, Spain, United Kingdom and United States.

⁷³ Martin Kretschmer, Lionel Bently and Ronan Deazley (eds.) *Privilege and Property: Essays on the History of Copyright* (Oxford: Open Books, 2010).