

Book Review

Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author

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Copyright, Creativity, Big Media and Cultural Value is a wide-ranging work of immense erudition and archival research, combining several historical studies of the 'incorporation' of the author in different sectors of the 'creative industries'.¹ The book's subtitle, '*Incorporating the Author*', astutely encompasses multiple meanings, whose implications the book works through. These include the author as an initiating participant in a larger economic structure (Chapter 3 (print publishing)). But also, the author as a bit player enveloped by a larger economic structure (Chapter 5 (film industry)). And the author (or performer) as an autonomous object of economic value (Chapters 6 (recording artists and industry) and 7 (contemporary creators of literature, music and art)), as Bowrey explores the evolution from copyright to brand.

The book offers 'a business history of copyright'² whose 'aim is to critically examine [through review of contracts and business correspondence] the role of authorship and its connection to copyright in the emergence of concentrated

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¹ Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author* (Routledge, 2021) 3.

² *Ibid.*

corporate control'.³ It also presents a contentious critique of international copyright: far from realising the humanistic universality to which copyright's natural rights advocates aspire, international copyright instead enabled Britain to 'throttle' independent publishing in the Empire's domains, Bowrey claims.⁴ International copyright 'remains imperial by design',⁵ and, Bowrey urges, when authors work with publishers to achieve copyright law reform, they are 'helping sustain ongoing imperial power imbalances into the 21st century'.⁶

Bowrey sets the stage for her examinations of the creative industries by summarising theories of authorial property, particularly as they emerged during Romanticism. Consistent with her focus on 'business history', she also sketches the emergence of 'the author as businessman'⁷ in the 19th century, a general description that serves as a prelude to the next Chapter's analysis of how three authors in the emerging genre of detective fiction managed (or failed to manage) their copyrights. In Chapter 3, we learn of the publishing trajectories of two now-obscure writers, the pseudonymous Hugh Conway (*Called Back* (Arrowsmith, 1884)) and Fergus Hume (*The Mystery of a Hansom Cab* (Kemp & Sons, 1886)), as well as of the immensely successful Arthur Conan Doyle (whose *Study in Scarlet* (Ward Lock & Co, 1887) initially lagged behind the sales of Doyle's predecessors). Bowrey accounts for the divergent outcomes by examining the rise of the mass market for literature, the concomitant expansion of the late 19th-century publishing industry, and, especially, Doyle's and his agent's understanding that the object of commercial value was no longer the individual book, but the series of future works developed from recurring characters. Holmes, Watson, and other characters

provided a hook that could sustain a multi-vocal and inter-generational conversation between Doyle, his publishers, and multitudes of readers, theatre goers, film and television audiences across the globe. The form and content of his stories produced a copyright value that exceeded confinement to any particular material form or cultural product.⁸

Bowrey explains that as Doyle would sell rights to as-yet unwritten works, 'the literary property could only be defined with reference to the recurring fictional characters, and the author's name'.⁹ Inquiring, 'How did Doyle understand his copyright?'¹⁰ Bowrey responds that Doyle's great, and profitable, insight was to treat his literary property like a trademark. Foreshadowing her concluding chapter on authorship as a brand, Bowrey assesses:

[What] accounted for his early success ... was his recognition of the commercial value of the ephemeral properties associated with the story — the author's name, story titles, characters, stock elements. Though not directly protected by copyright law, these characteristics were integral to the

³ Ibid 1.

⁴ Ibid 7.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid 22.

⁸ Ibid 32

⁹ Ibid 55

¹⁰ Ibid 57.

generation of a reliable, distinctive identity that enhanced recognition of the author's name and creations in a mass market flooded with cheap literature.¹¹

Doyle 'played the publishing game to benefit from the greatly expanding opportunities for exploitation of copyright.'¹² Those opportunities not only traversed different media, but also, and especially, international borders. Bowrey's next, and perhaps most controversial, chapter accordingly turns to 'Imperial copyright and its costs' (Chapter 4).¹³

Colonial sensitivities (resentments?) pervade this chapter; its Australian author's perception of international copyright far darker and insidious than the European, and even American, celebration of the *Berne Convention*.¹⁴ In the European and American view, international copyright agreements advance 'the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works';¹⁵ uniformity furthers authors' rights by facilitating international trade. For national copyright markets to play by the same rules is a good thing, enlarging authors' audiences, while pervasively consecrating creators' fundamental literary and artistic property rights. In this bracing chapter, Bowrey tells a different story. She recounts the deprivation of 'copyright sovereignty',¹⁶ which reduced Canadian publishers to serving as 'agents of British firms'.¹⁷ Bowrey charges that in accounts of Australian publishing history,

the international copyright infrastructure is always taken as a given without any discussion of power asymmetries, how they came about and how they continue to be justified. The enduring rhetoric of the universal right of authors fabricated in the late 19th century masks contemporary recognition of how historical disadvantage is perpetuated.¹⁸

Bowrey berates 'celebrity authors', such as Peter Carey and Richard Flanagan, for serving as skills 'fronting campaigns to retain the imperial status quo',¹⁹ '[t]hey have no special insight into copyright in general and advocacy of the universal right of authors stems from an anachronistic imperial confection.'²⁰

At the same time, however, Bowrey also illustrates how international copyright could bolster national cultural and commercial interests. British authors and publishers lamented cheap, unauthorised, American editions, but their appeals to universal morality would have gained them few adherents had American authors, publishers and public figures not perceived the self-interest in enlisting in the international copyright cause. As Catherine Seville has also shown in her account of

¹¹ Ibid.

¹² Ibid 60–1.

¹³ Ibid 69.

¹⁴ *Berne Convention for the Protection of Literary and Artistic Works*, as amended, opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972), as amended on 28 September 1979: <<https://wipo.lex.wipo.int/en/text/283693>> ('*Berne Convention*').

¹⁵ Ibid Preamble.

¹⁶ Bowrey (n 1) 76.

¹⁷ Ibid 94.

¹⁸ Ibid 95.

¹⁹ Ibid 103. See also at 99.

²⁰ Ibid 104. See also at 99.

the tortuous route of the United States ('US') to protecting foreign copyrights,²¹ pirated editions of British authors undersold copyright-protected editions of American authors, with deleterious consequences both economic and cultural. While Bowrey contends that international copyright kept the colonies under British cultural control, she nonetheless brings to the fore American sources who saw international copyright as the means of cultural emancipation from the former Motherland. The unfair competition from cheap copies of British works overexposed American readers to 'feudal ideas and superstitions and survivals of which we [Americans] have been striving for a century to rid ourselves'.²² Even preachers railed that foreign books were 'both cheap and bad ... [leading to] the failure of that lawful pride in American institutions and principles which alone can preserve the freedom of our republic'.²³ Of course, lofty republican sentiments enhanced the 'missionary'²⁴ rhetoric of international copyright advocacy, but US publishers principally sought to open protected markets abroad while leveling price competition at home. Bowrey's next chapter, on films as 'work[s] of industrial authorship' (Chapter 5) and their international marketing, introduces nuances into an expected tale of US cultural hegemony.

Chapter 5 first takes us through the legal doctrine of dramatisation and film rights in literary works, emphasising the initial uncertainty of authorial control over film adaptations of books and plays given silent films' absence of appropriated dialogue. That changed with the 1908 Berlin revision of the *Berne Convention*, whose art 12 (now art 14(1)) explicitly extended authors' rights to 'cinematographic adaptations'. National laws followed suit. But authors of adapted works soon came to be displaced by screenwriters, who were employees of the film production company. Films, as 'work[s] of industrial authorship', enrol multiple creators, few of whom own copyrights in their own right. Rather, copyright vests in (or is presumed to be transferred to) the corporate entity film producer, a legal manoeuvre that facilitates the film's domestic and international commercialisation. 'With the shift to international corporatism, authors came to be excluded from the most important sites where the broader terms of their participation in the new cultural markets was being determined.'²⁵ In this instance, the author is 'incorporated' to the vanishing point.

Copyright was not the only attribute concentrated in the film production companies; before effective antitrust enforcement, the practice of blind and block booking enabled these, predominantly American, companies to control which and what kinds of films movie theatres in the US and Australia could show. But the tale takes a different turn with the advent of Australian censorship and Australian film editors' responses: to meet government demands, but also to satisfy the 'local box

²¹ Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2006).

²² Bowrey (n 1) 8, quoting Brander Matthews, 'Analysis of Book Titles Published in the USA, 1882–1886' in 'Will Copyright Raise the Price of Books?' (1887) *Century Magazine* republished in 21 January 1888 (No 834) *The Publishers' Weekly* 77.

²³ Bowrey (n 1) 82, quoting Reverend Henry van Dyke, *The National Sin of Literary Piracy* (Scribner, 1888).

²⁴ Bowrey (n 1) 81, quoting George Haven Putnam, *The Question of Copyright* (GP Putnam's Sons, 1891).

²⁵ Bowrey (n 1) 135.

office', they cut, re-edited and retitled the 'flag-waving out of American pictures',²⁶ and thus diluted 'the American imagery and ideals screened across the British Empire'.²⁷ Nonetheless, the vertical and horizontal integration of the film industry, and the cooperation (or 'industry collusion'²⁸) of trade associations 'expanded the global footprint of Hollywood while standardising international terms of trade'.²⁹

Chapter 6 turns to the recording industry, chronicling its emergence through the participation of international opera star Dame Nellie Melba. It 'offers a critical feminist reading of the history of the international recording industry and the role of intellectual property rights in supporting innovation'.³⁰ The critical feminist perspective comes from ascribing the rise of the recording industry to Melba's extraordinary celebrity, enlisted by the Gramophone Company in its successful (and occasionally underhanded) campaign to persuade Melba to become a recording artist. According to Bowrey, Gramophone sought to capitalise on Melba's audience appeal and artistic credibility because 'association with her would provide the Company with a valuable means of communicating the artistic merit of the sound technology to an international market from a London base'.³¹ By contrast, 'conventional histories of the sound recording industry ... present the view that the industry developed from the creativity and efforts of male protagonists, including composers, music publishers, men of science and entrepreneurs'.³² The story of Melba's dealings with the recording company, including her savvy exploitation of her fame to dictate economically and artistically advantageous contract terms, makes for the most engaging reading of the book.

The chapter's second strand, the role of intellectual property rights, addresses a paradox: performers had no copyrights in their performances. Their compensation depended on contractually-negotiated fees for service. Nor, at the outset, were sound recordings copyright-protected. That Parliament, in s 19(1) of the 1911 *Imperial Copyright Act* extended the subject matter to 'records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works'³³ owes much to the Gramophone Company's rhetorical assimilation of recording artists' performances to intellectual creations. As one of the Company's executives testified to the parliamentary committee considering copyright law reform, 'the saleability of the phonogram depends almost exclusively on the reputation of the artiste who *created* the record, and on its setting and quality'.³⁴ And, returning to the feminist legal history that informs this chapter, the 'artistes' who enabled the record producers to recast a 'contrivance' — a product previously seen as a mere technological output — as equivalent to a musical work were Melba and other female performing artists.

²⁶ Ibid 134, quoting Graham Shirley, Interview with Ken Hall (2 August 1976).

²⁷ Bowrey (n 1) 134.

²⁸ Ibid 135.

²⁹ Ibid.

³⁰ Ibid 141.

³¹ Ibid 158.

³² Ibid 143.

³³ *Copyright Act 1911* (Imp) 1 & 2 Geo 5, c 46, s 19(1).

³⁴ Bowrey (n 1) 174, quoting Minutes of Evidence to Law of Copyright Committee 1909 (Mr John Drummond Robertson on behalf of the Gramophone Co Ltd) (emphasis in original).

In this advocacy [for a sound recording copyright], the Company leans heavily on the contributions of their female performers, helping further blur the distinction between a technology company and a creative endeavour. ... [A]n association with artistes is highly influential in reconceiving the technology company's inventorship into a contribution equivalent to authorship.³⁵

Many factors contributed to the recording industry's becoming a "vested interest", alongside the large music publishers',³⁶ but, Bowrey contends, 'without it having first established mutually beneficial relationships with celebrity artistes such as Melba, it is doubtful that the industry or the [Gramophone] Company would have achieved this result'.³⁷ I know too little about the history of the recording industry to question this conclusion, but Bowrey's alternative narrative of the rise of the recording industry is coherent, and at the least compels us to take into consideration the influence of players beyond the (male) inventors and dealmakers who, according to Bowrey, feature in the standard accounts. The chapter concludes with a much less sanguine view of the role of women in today's recording industry, in which women are vastly underrepresented at all levels: as performing artists, as songwriters, and as producers.

The final chapter (Chapter 7) elucidates the copyright attitudes of three leading contemporary creators in literature, music and visual art. Titled 'Why Margaret Atwood, Radiohead and Banksy are not anti-copyright', the chapter identifies these creators as critics of the cultural industries, yet cognisant of 'the ongoing importance of copyright to artists, in the face of commodity culture'.³⁸ A work of authorship may be more than 'a commodity with a money value, to be bought and sold like a potato',³⁹ but neither is it a free gift, even in a supposedly frictionless digital world. Margaret Atwood lowered the debate from lofty philosophical heights to more mundane considerations: 'if works of art are gifts and nothing but, how are their creators to live in the physical world, in which food will sooner or later be needed by them?'⁴⁰ Atwood's rhetorical query echoes the sardonic rejoinder of 18th-century English author Catharine Macaulay to Lord Camden's insistence, in his speech in *Donaldson v Beckett*,⁴¹ that glory should be the sole reward of authorship. As Macaulay wryly observed in her defence of copyright, the need to pay the 'sordid butchers and bakers ... are evils which the sublime flights of poetic fancy do not always soar above'.⁴²

Ironically, rather than becoming submerged by 'commodity culture', creators' 'copyright position has begun to function more as a brand'.⁴³ Harking back to her description of Arthur Conan Doyle's relationship to copyright, Bowrey observes that 'authorship is also starting to be described as a creation without any

³⁵ Bowrey (n 1) 175.

³⁶ *Ibid.*

³⁷ *Ibid.* 176.

³⁸ *Ibid.* 189 (referring to Margaret Atwood).

³⁹ *Ibid.* 196, quoting Margaret Atwood, 'Introduction' in Lewis Hyde, *The Gift: How the Creative Spirit Transforms the World* (Canongate Books, 2012) ix.

⁴⁰ *Ibid.*

⁴¹ *Donaldson v Beckett* (1774) 1 ER 837 (HL).

⁴² Catharine Macaulay, *A Modest Plea for the Property of Copy Right* (R Cruttwell, 1774) 15.

⁴³ Bowrey (n 1) 190.

fixed content, merely a branding choice that assembles fans for particular commercial purposes'.⁴⁴ 'Copyright branding'⁴⁵ encompasses decisions, such as those recording artists like Radiohead make, about whether to distribute works according to traditional revenue models, or for free, or for 'tips' (pay what you want), or to bundle content with fan merchandise, or some combination of all of these. According to Bowrey, 'copyright exclusivity is no longer thought as essential to the terms of cultural and economic exchange'.⁴⁶ In fact, however, as Bowrey subsequently demonstrates, copyright's conferral of control — including the determination whether or not, or how, to exercise exclusive rights — remains fundamental.

In support of the assertion that exclusivity no longer is essential, Bowrey summons the example of Banksy, but her analysis illustrates the opposite. One might think a 'guerilla artist' like Banksy resists traditional copyright constructs. But if Banksy's unsigned ephemeral art might seem copyright-irrelevant, 'a product of illegality and vandalism, and sitting outside of commodity relations',⁴⁷ Bowrey explains that contemporary means of mass reproduction and dissemination capture the work in commercialisable form, thus returning copyright, and trademark, to the calculus. As Banksy's 'labour is appropriated and reappropriated by others he periodically intervenes and asserts himself back into the terms of exchange to disrupt the orderly reproduction of commodity relations and the predictability of commercial calculations underlying transactions'.⁴⁸ Bowrey characterises this disruption as 'a political act — not merely a branding technique'.⁴⁹ This anarchic conduct nonetheless is a carefully curated branding practice, and it relies on the copyrights that become enforceable when third parties memorialise otherwise ephemeral creations. As Bowrey recognises, in the digital era 'the distribution choices available to artists ... permit far quicker, more reflexive decision-making in building, refreshing and renewing these relationships [with their audiences] — *if the artist has retained control of their copyright*'.⁵⁰

While much of the book details detrimental dealings between authors and corporate exploiters, Bowrey concludes more hopefully that 'all creators have travelled more comfortably, commercially, and in artistic terms, where they have exercised a higher degree of agency and considered the terms of the incorporation of their authorship into commodity relations'.⁵¹

⁴⁴ Ibid.

⁴⁵ Ibid 202–5.

⁴⁶ Ibid 205.

⁴⁷ Ibid 207.

⁴⁸ Ibid 210.

⁴⁹ Ibid.

⁵⁰ Ibid 211 (emphasis added).

⁵¹ Ibid.

