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# Prologue

To FASHION *v. a* [*façonner*, French, from the noun]

> 1 To form; to mould; to figure.
> 2 To fit; to adapt; to accommodate.
> 3 To cast into external appearance.
> 4 To make according to the rule prescribed by custom.
>
> Samuel Johnson, *A Dictionary of the English Language*, 1755[1]

That intellectual property's modern refashioning in the 'long nineteenth century' coincided with the rise of the professional press in Britain and its present and former colonies should hardly surprise. A host of powerful new technologies drove the expansion of a mass print culture in the period stretching roughly from the first days of the French Revolution to the end of the First World War.[2] These included steam printing, cheap paper production, the railway network and the telegraph which shaped the contours of distribution.[3] At the same time, the subject matter of the press expanded to include a stream of literature pouring off the printing presses, both legal and illicit; while the emergence of lithography, photography and other visualisation technologies enlivened the media's content for an audience that over the course of the period became and remained thrilled by the 'beauty and terror of science'.[4]

[1] Samuel Johnson, *A Dictionary of the English Language in which the Words are deduced from their Originals, and Illustrated in their Different Significations by Examples from the best Writers*, printed by W. Strahan for J. and P. Knapton; T. and T. Longman; C. Hitch and L. Hawes; A. Millar; and R. and J. Dodsley, 1755.

[2] This is the period that Eric Hobsbawm calls the 'long nineteenth century' in his foundational history of the period beginning with and following the French Revolution (although Hobsbawm himself draws the line at the beginning of the First World War): see Eric Hobsbawm, *The Age of Revolution: Europe 1789–1848*, Weidenfeld and Nicolson, 1962; *The Age of Capital, 1848–1875*, Weidenfeld and Nicolson, 1975; *The Age of Empire 1875–1914*, Weidenfeld and Nicolson, 1987.

[3] For an excellent background, see generally Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet*, 3rd edn, Polity Press, 2009.

[4] Nicely captured in Richard Holmes, *The Age of Wonder: How the Romantic Generation Discovered the Beauty and Terror of Science*, Harper Press, 2008.



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As well, discussions of new technologies of 'rational amusement'[5] with which the public engaged first as amateurs and later on also in more professional capacities (photography being one of the leading examples) supplemented the press's normal conversations about politics, business and the proper conduct of a person's life.

The legal device of the patent monopoly supported some of these new technologies, and impeded others, raising certain questions about the relationship between this area of law and innovation in the emerging media-communications industries. By contrast, the rising value of branding for the trading operations of the mainstream press and also those of its substantial advertisers meant that there were obvious benefits to be found in the new system of registered trade mark protection introduced towards the end of the century. But the greatest transformations occurred on the supply side, a result of the eighteenth century's radically new copyright system which, instead of restricting the use of the printing press to privileged printers, permitted those who 'authored' the printing press's subject matter the freedom to find success in their markets. Beginning with the revolutionary Romantics, followed by the Victorians and later the war-centred Modernists, this was an age of unprecedented expression, especially in literary and artistic (as well as musical and theatrical) forms – with little sometimes to distinguish the creative from the journalistic voice.

The press and the domain of published writing more generally also featured prominently in wider debates about how intellectual property laws were being and should be framed during this period. In the course of little more than a century these laws developed a more systematic utilitarian 'modern' form – utility being the general principle introduced into the law by (among others) the radical rationalist legal philosopher Jeremy Bentham, writing around the time of the French Revolution, and refined and given a more nuanced liberal, humanistic and popularly democratic dimension by his errant disciple John Stuart Mill, social reformer and editor of the *Westminster Review*, in a series of remarkable writings on utility, liberty, political economy and democracy.[6] Indeed, the most vocal advocates in the intellectual property

[5] To use an expression of 'Georgian England', updated by Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, University of Chicago Press, 2009, p. 250.

[6] Especially Mill's groundbreaking *On Liberty* (1859) and *Utilitarianism* (1861, 1863) collected in Mary Warnock (ed.), *John Stuart Mill, Utilitarianism, On Liberty and Essay on Bentham*, Collins, London, 1961, pp. 126 and 251 as well as numerous editions of his popular economic textbook *Principles of Political Economy* (1848, 1849, 1852, 1857, 1862, 1865, 1871), further edited and with an introduction by Sir William Ashley, Longmans, Green and Co., 1909.

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debates of the nineteenth century included philosophers, essayists, poets, novelists, economists, lawyers, scientists and entrepreneurs as well as (of course) politicians. Some of them formed their own newspapers and journals, and many wrote to inform and shape public opinion – fashioning themselves as 'legislators of the age'.[7]

Their first forays were on issues of statutory copyright and the additional protection offered by the so-called common law property right unpublished works (and, some argued, albeit unsuccessfully, also to published works) which was eventually brought under the statutory rubric, although its companion action for breach of confidence lived on and later became an important basis of modern privacy protection in cases that recanvass debates from the mid-nineteenth century. Later they extended their attention to other fields, including patents. In the middle decades of the nineteenth century they brought the antiquated patent system's dysfunctional and elitist attributes to the public's attention, comparing it unfavourably to the democratic and meritocratic character of the massive international exhibitions that were in some respects the most defining features of the Victorian age. In the century's later years, with the benefit of further experience of patented inventions at the exhibitions, they supported the British patent reforms of the 1880s which helped to establish patenting in a more 'modern' democratic form. They had less to say about the rise of advertising that accompanied the success of the exhibitions and the trade mark registration system brought in to support that, their interests here perhaps too closely aligned to those of their advertisers to allow free debate in a period when there was a growing sensitivity about the real independence of 'the Fourth Estate', reliant as it was on advertising. But, as their own interests in producing and disseminating 'news' came into question, they did not hesitate to engage vocally in public discussions about whether those who collect news should be considered authors, in the same way as others used the available media to vent their own claims of 'authorship' in photography, fashion and even brands.

This book is not a complete account of the complex relationships between exhibitions, advertising, the press and intellectual property between 1789 and 1918, in Britain and the rest of the common law world. Nor indeed do we attempt a fuller survey of the modernising law pertaining to intellectual property in the period. Here William Cornish's excellent recent history of nineteenth century intellectual property's

[7] Percy Bysshe Shelley, 'A Defence of Poetry' (1821), in Mary Wollstonecraft Shelley (ed.), *Essays, Letters from Abroad, Translations and Fragments*, Edward Moxon, London, 1840, Vol. I, 1 at p. 57.

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legal development is a key point of reference,[8] as is Sam Ricketson's earlier groundbreaking study of the history of the Berne Convention[9] and the current extended version co-authored with Jane Ginsburg.[10] We owe a tremendous deal also to Brad Sherman and Lionel Bently's anti-teleological study of the 'grammar' and 'vocabulary' of the law in intellectual property,[11] and to a generation of creative, revisionist scholarship, including David Saunders,[12] Mark Rose,[13] Catherine Seville,[14] Eva Hemmungs Wirtén,[15] Ronan Deazley,[16] Kathy Bowrey,[17] Justine Pila,[18] Adrian Johns[19] and Isabella Alexander.[20] We do not attempt to recanvass their ground but rather draw liberally on their historical work along with other historical and contemporary sources. If we reach different conclusions from some writers it is, in part, because we have come to see intellectual property law in our period as less a fully systematised and modern body of law, a product of particular strategies carried through to a logical conclusion by *circa* 1900 or 1910 or 1920 (and then disrupted again in later years). Rather, our impression is of law, or rather laws, throughout the period functioning as a loosely joined and

[8] See William Cornish, 'Personality Rights and Intellectual Property', *Oxford History of the Laws of England*, Vol. XIII, Oxford University Press, 2010.
[9] Sam Ricketson, *The Berne Convention For the Protection of Literary and Artistic Works 1886–1986*, Centre for Commercial Law Studies, Queen Mary College, London, 1987.
[10] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond*, 2nd edn, Oxford University Press, 2006.
[11] Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law*, Cambridge University Press, 1999.
[12] David Saunders, *Authorship and Copyright*, Routledge, 1992.
[13] Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, 1993.
[14] Catherine Seville, *Literary Copyright in Early Victorian England*, Cambridge University Press, 1999 and *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, Cambridge University Press, 2006.
[15] Especially, Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization*, University of Toronto Press, 2004.
[16] Especially, Ronan Deazley, *On the Orgin of the Right to Copy,* Hart, 2004; and *Rethinking Copyright: History, Theory, Language*, Edward Elgar, 2006.
[17] For instance, Kathy Bowrey, 'On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating "the Humble Grey which Emerges as the Result of Long Controversy"' in Lionel Bently, Catherine Ng and Giuseppina D'Agostino (eds.), *The Common Law of Intellectual Property: Essays in Honour of Prof David Vaver*, Hart Publishing, 2010, and (with Catherine Bond) 'Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?' (2009) 4 *Intellectual Property Quarterly* 399.
[18] Especially Justine Pila, *The Requirement for an Invention in Patent Law*, Oxford University Press, 2010.
[19] See Johns, *Piracy*.
[20] Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century*, Hart Publishing, 2010.

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in some ways somewhat disconnected set of strategies that were never wholly complete, or successful, or coherent. These were strategies that were messy and subject to constant adaptation in the way one might expect of strategies for formalising, organising and systematising the many and variable transactions that may occur between authors and their readers, inventors and the users of inventions, and producers and consumers of goods, and so on.

Therefore, this book is not the story of the law on its own terms, but a story of the shifting relations within one vital area of modern law and the economic, social and cultural technologies and circumstances that surrounded it and provided its subject matter. We examine how the law fashioned, and was fashioned in turn, by this experience in a partly deliberative and self-conscious process. Our focus is on emblematic cases and legislative developments, and wider debate about the existence and shape of the law that were pursued in the context of some spectacular new forms of 'creativity' and 'innovation', expressions that should be understood in the broadest possible terms. Along the way we notice how much the long nineteenth century perception that intellectual property's protection of creativity and innovation provided a central vehicle for improvements in knowledge was a perception not only observed and reflected but actively shaped by the press in its various iterations. The engagement in our own time between intellectual property law and the communication industries remains volatile and unsettled. In our epilogue we wonder whether, capitalising on the fresh opportunities for artistic diversity, expression and communication that the new 'new media' offers, the place of intellectual property in the scheme of law will be reinvented once again.

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*Part I*

# The journalism age

Copyright law did not emerge in a vacuum and neither did the common law that grew up around it. In fact, the pivotal cases of the first hundred or so years of the long nineteenth century show that the common law as much as the statute was fashioned out of the dynamic but fractious print culture of the period. Here, in short, we see law responding to what some have called the 'journalism age'.[1]

The common law (including that part developed in the equitable jurisdiction of Chancery) was initially drawn on to fill an obvious gap that the copyright statute had left – or at least one that was obvious to an emerging category of professional writers seeking to escape dependence or the patronage of others. Their persistent interest lay in their ability to control the market for their works and their reputations as authors. Since the latter proved difficult to separate from their individual identities in an age dominated by the idea of writing as biography, their desire for control extended ultimately to the framing and understanding of their public personalities as well. While it was never possible to determine a book's reception by an audience, authors claimed a legal entitlement that included the initial act of launching the work into the public arena. In some cases this could mean deciding not to make it public, or to circulate it in a restricted 'private' domain. Eventually, around the mid-nineteenth century, a distinct claim of 'breach of confidence' developed to cover an author's privacy interests, responding to arguments that privacy was an author's right.

Such authorial concerns can also be seen as a reaction, in part at least, to those who, seeking a critical voice that did not depend on the control of original authors, before and especially after the French Revolution, produced much anxious examination of existing social hierarchies and norms. A familiar theme in the cultural history of the period is the tension between the tradition of classical rhetoric that formed part of the

[1] See Laurel Brake, Bill Bell and David Finkelstein, 'Introduction' to *Nineteenth-Century Media and the Construction of Identities*, Palgrave, 2000, 1 at p. 5.



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early liberal arts education of gentlemen and, to a lesser extent, ladies, and the 'miscellaneous print world of "Grub Street" (the fictional abode of literary hacks)'.[2] In the interregnum that marked the transition from revolutionary romanticism to early Victorian ideas of professional status and control over markets, the *demimonde* of Grub Street – of squibs, satire, sedition, slander, forgery, piracy and hackery – existed in a state of volatile co-dependency with the respectable world of gentleman writers like William Wordsworth, Robert Southey and Samuel Taylor Coleridge. Eventually, a broader understanding emerged that markets might direct as much as serve authors' activities. Even from the beginning, Grub Street was an idea at least as much as a place, and one that could be hard to pin down. It encompassed notable authors, such as Samuel Johnson, who managed to occupy a place on the margins of respectability, and William Hazlitt, who wrote bitterly that:

> There is not a more helpless or more despised animal than a mere author, without any extrinsic advantages of birth, breeding, or fortune to set him off … The best wits … are subject to all the caprice, the malice, and fulsome advances of that great keeper, the Public – and in the end come to no good … Instead of this set of Grub Street authors, the mere *canaille* of letters, this corporation of Mendicity, this ragged regiment of genius suing at the corners of streets in *forma pauperis*, give me the gentleman and scholar … the true benefactors of mankind and ornaments of letters.[3]

In our readings of eighteenth- and nineteenth-century cases on letters, etchings and other biographical material, we see a new language replacing older notions of 'propriety'. First the 'property right' and then, rather later, the 'privacy right', were framed to ward off the encroachments of Grub Street. Eighty years after the Act of Anne,[4] authorial propriety was recast into a proprietorship of authored works by the professionalised authors of the post-Revolutionary decades. In the Victorian years it was refashioned again by notions of privacy and publicity, which sought to respond to the particular interests that celebrity authors claimed in controlling the extent of their public exposure. However, surprisingly enough, not everything in law was on one side. Although the concerns of 'gentlemen authors' and their publishers may

[2] Denise Gigante (ed.), *The Great Age of the English Essay: An Anthology*, Yale University Press, 2008 at xvii. Gigante suggests that these two important strains of influences 'shaped our sense of criticism and the arts' in this period: *ibid*.

[3] William Hazlitt, 'On the Aristocracy of Letters', *Table-Talk: Essays on Men and Manners*, 1822, reprinted Bell & Daldy, 1869, 284 at pp. 292–3.

[4] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned (*Copyright Act 1710*), 8 Anne c 19 (1710).

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have been the most obviously influential, ideas about the social value of free speech that were eventually dignified by the liberal utilitarian writer (and editor of the *London and Westminster Review*) John Stuart Mill also gathered a certain influence. Throughout the process, the battles between 'authors' and 'Grub Street hacks' – with the divisions between them sometimes more apparent than real – potently influenced the shape of the law.

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# 1 Grub Street biographers

The problem of Grub Street pirating of biographical works long predated the Revolution and its Romantic literary progeny. As early as 1741, in *Pope* v. *Curl*,[1] Alexander Pope, the distinguished and celebrated poet, brought an action in copyright against notorious and despised Grub Street biographer Edmund Curll, objecting to Curll's publication of *Dean Swift's Literary Correspondence*.[2] As Mark Rose points out, because Pope had just published his own volume of letters he could rely on the Act of Anne[3] – which by its terms protected published works – although the fact that Pope's own volume had been clandestinely published and was not referred to in the Bill of Complaint already made this a marginal case.[4] Rather, Pope claimed Curll's 'surreptitious and pyrated edition' violated his statutory right of 'printing, reprinting, vending and selling', the author 'having never disposed of the copy right of such letters to any person or persons whatsoever', implicitly suggesting the Act extended to works that were not merely published as it stated but to unpublished ones as well.

Why had the Act not contemplated the situation of unpublished works? Was it because the idea of an author's biographical writings finding a ready market had not occurred at the time it was framed? Rose characterises Pope's suit against Curll as 'an action that takes place between two worlds, the traditional world of the author as a gentleman

[1] *Pope* v. *Curl* (1741) 2 Atk 342.

[2] Although the report referred to the volume as *Letters from Swift Pope and Others*, the Bill of Complaint states it to be *Dean Swift's Literary Correspondence, for twenty-four years: from 1714–1738: Consisting of original letters to and from Mr Pope, Dr Swift, Mr Gay, Lord Bolingbroke, Dr Arbuthnot, Dr Wotton, Bishop Atterbury, Duke & Duchess of Queensbury*, printed for E. Curll, 1741. Curll's name is misspelt in the report.

[3] See Mark Rose, *Authors and Owners: The Invention of Copyright*, Harvard University Press, 1993, p. 60. The clandestine volume (which appears to have been published in London just before the Dublin edition) is *The Works of Mr Alexander Pope in Prose*, Vol. II, printed for J. and P. Knapton, C. Bathurst and R. Dodsley, 1741: see George Sherburn (ed.), *The Correspondence of Alexander Pope*, Clarendon Press, 1956, Vol. I, p. xviii.

[4] The Bill of Complaint is reproduced by Rose, *Authors and Owners*, Appendix A.



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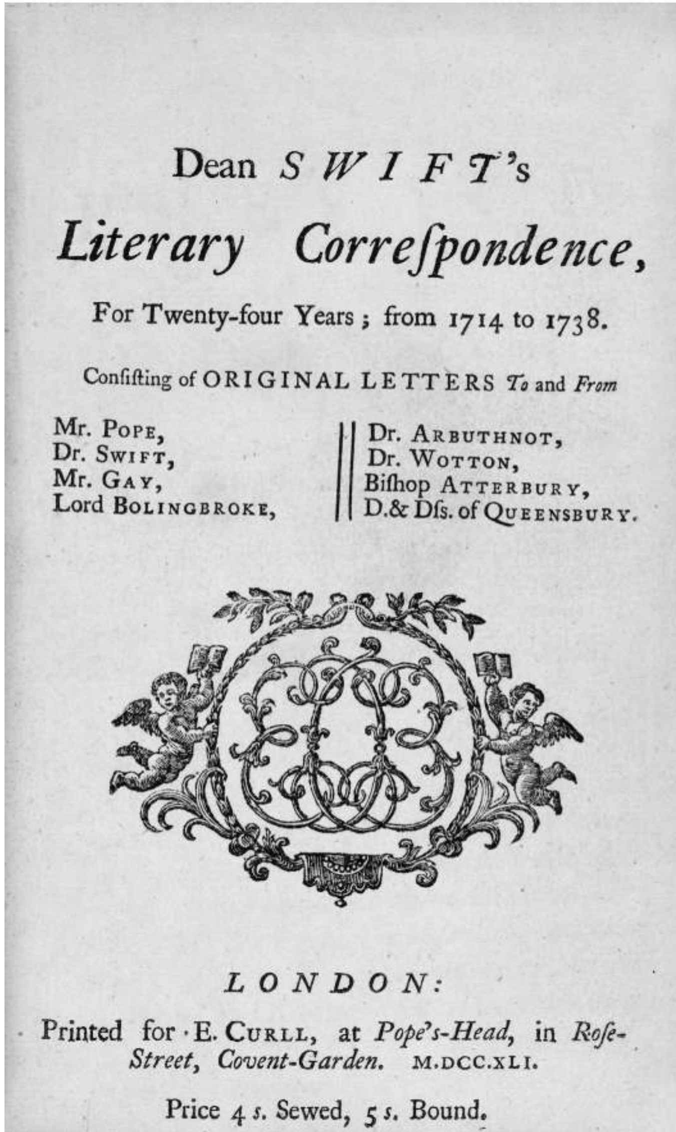

Dean *SWIFT*'s

*Literary Correſpondence,*

For Twenty-four Years; from 1714 to 1738.

Conſiſting of ORIGINAL LETTERS *To* and *From*

Mr. Pope,
Dr. Swift,
Mr. Gay,
Lord Bolingbroke,

Dr. Arbuthnot,
Dr. Wotton,
Biſhop Atterbury,
D.& Dſs. of Queensbury.

*LONDON:*

Printed for E. Curll, at *Pope's-Head*, in *Roſe-Street*, *Covent-Garden*. M.DCC.XLI.

Price 4 *s.* Sewed, 5 *s.* Bound.

Figure 1 Title page *Dean Swift's Literary Correspondence for Twenty-Four Years, from 1714–1738*, printed by Edmund Curll, courtesy National Library of Australia.

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