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The Struggle for Music Copyright

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Michael W. Carroll

Abstract

Inspired by passionate contemporary debates about music copyright, this Article investigates how, when, and why music first came within copyright's domain. Ironically, although music publishers and recording companies are among the most aggressive advocates for strong copyright in music today, music publishers in eighteenth-century England resisted extending copyright to music. This Article sheds light on a series of early legal disputes concerning printed music that yield important insights into original understandings of copyright law and music's role in society. By focusing attention on this understudied episode, this Article demonstrates that the concept of copyright was originally far more circumscribed than it is today and that music - which currently is treated as core copyrightable subject matter - presented a difficult case. A number of audiences will benefit from a better understanding of the struggle over music copyright, including scholars who advance general theories about the evolution of property rights and policymakers seeking to place the current disputes over music copyright in historical perspective.

THE STRUGGLE FOR MUSIC COPYRIGHT

Michael W. Carroll[*]

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I. INTRODUCTION

For intellectual property lawyers, the first decade of the twenty-first century is a period of history-in-the-making. This perception is reinforced on a daily basis by rapidly changing digital and biomedical technologies, an increasingly globalized economy, and growing public debate about the appropriate subject matter, scope, and duration of intellectual property rights. In copyright law, the issues generating the most heated debate continue to be those pertaining to the law's division of rights between producers, distributors, and consumers of music.[1] Indeed, music copyright owners, together with members of the motion picture industry, are the vanguard pushing for unprecedented expansion in the scope of copyright, and these owners are on the offensive on the Internet,[2] in the courts,[3] and in Congress.[4] Notably, the dispute at the heart of Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.[5] was instigated by the tens of millions of Internet users exchanging primarily music files over peer-to-peer networks.[6]

These copyright-owner initiatives have drawn passionate opposition from a broad coalition of technology companies, consumer activists, and artists' groups. The coalition argues that, to promote the progress of

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1. *See*, *e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 296 (2004) ("The battle that got this whole [culture] war going was about music, so it wouldn't be fair to end this book without addressing the issue that is, to most people, most pressing—music.").

2. *See* James Maguire, *Hitting P2P Users Where It Hurts*, WIRED NEWS, Jan. 13, 2003 (describing operations of Overpeer, a company hired by record labels and other copyright owners to use technological means to disrupt peer-to-peer networks), *at* http://www.wired.com/news/digiwood/0,1412,57112,00.html.

3. The Recording Industry Association of America (RIAA) has been engaged in an ongoing legal campaign against individual users of peer-to-peer networks. *See*, *e.g.*, Recording Industry Ass'n of America, *New Round of Lawsuits Against 717 Illegal File Sharers Includes Continued Focus on University Network Users Who Illegally Download Music*, Jan. 24, 2005, *at* http://www.riaa.com/news/newsletter/012405.asp. The recording companies also have pursued litigation against a series of online intermediaries, most notably Napster, Inc. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

4. The music and film industries pursued a number of initiatives during the 108th Congress. *See* U.S. Copyright Office, *Copyright Legislation*, *108th Congress*, *at* http://www.copyright.gov/legislation/archive/ (listing recent bills).

5. 125 S. Ct. 2764 (2005) (upholding the doctrine of *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984), and reframing secondary liability in terms of intentional inducement).

6. A peer-to-peer network is formed when two or more computing devices have roughly equivalent rights to request and receive information from other "peer" devices on the network. *See* DAVID BARKAI, PEER-TO-PEER COMPUTING: TECHNOLOGIES FOR SHARING AND COLLABORATING ON THE NET 5-6 (2001). Peer-to-peer networks frequently use the Internet's basic architecture and are defined at the application layer of the network. *See id.* at 4.

science, copyright law should be forward-looking and should not be designed to preserve the legacy business models of publishers and other distributors.[7] Moreover, the argument goes, even if incumbent distributors deserve special consideration, they cannot be trusted to know what legal regime would best serve their long-term interests. Exhibit A for both of these arguments is the 1980s dispute over the VCR, culminating in the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*[8] As is well known, film and television publishers considered the VCR to pose a dire threat to their revenues.[9] Jack Valenti, then-Chairman of the Motion Picture Association of America, famously pronounced, "[t]he VCR is to the motion picture industry and the American public . . . what the Boston strangler is to the woman alone."[10] As is equally well known, the studios' predictions about the economic effects of the VCR were drastically wrong.[11]

This Article focuses on a similar episode in the evolution of copyright law in which incumbent distributors resisted a legal change that ultimately inured to their benefit. For, ironically, although music copyright owners are among the most aggressive groups seeking to expand the concept of copyright today, their forbears in England resisted the very idea that copyright should apply to music. As this Article relates, music became copyrightable in England primarily through litigation brought by professional composers against music publishers during the eighteenth century. The capstone case was brought by the most famous composer in London at the time, Johann Christian Bach, youngest son of Johann Sebastian Bach and one of the important musical influences for young Wolfgang Amadeus Mozart. Nearly seventy years after copyright had been invented in England, the Court of King's Bench ruled that musical compositions also were subject to copyright protection.[12]

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7. *See generally* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004) (arguing that copyright law should be aligned with the communication law's competition policy).

8. 464 U.S. 417 (1984).

9. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 71 (2004).

10. *See id.* at 73.

11. *See id.* at 75-76, 81 (demonstrating that, by 1990, home video revenues were $5.1 billion without any diminution in other revenue streams).

12. *See* Bach v. Longman, 98 Eng. Rep. 1274, 1275 (K.B. 1777). The judicial extension of copyright to music copyright in England greatly influenced the subsequent legislative extension of copyright to music in the United States. The 1831 general revision to the Copyright Act generally was designed to bring United States law into greater harmony with English law, primarily by lengthening the term of protection. *See* Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436; *see also* 7 REG. DEB., at cxix (Dec. 17, 1830), http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=010/llrd010.db&recNum=548 (stating that goal of bill was "to place authors in this country more nearly upon an equality with authors in other countries") (statement by Rep.

Within legal scholarship, the struggle for composer's copyright has been underreported and understudied. Attention to the genesis of music copyright reminds us that copyright was invented to solve a particular problem for book publishers in eighteenth-century England and that the subsequent expansion of copyright's domain has been neither natural nor inevitable. The concept of author's rights embodied in copyright law need not extend to all forms of expression. Rather, periodic expansion of the subject matter, scope, or duration of rights under copyright represents outcomes of specific legal and political contests in which the interests of those seeking to broaden copyright generally have prevailed. Current contests, as well as past outcomes, should be evaluated in light of current circumstances, with due attention given to those who gain and lose from the law's expansion.

There are two other reasons why developing a better understanding of music copyright's evolution matters. A central question for how the law should respond to music copyright owners' initiatives is whether to focus on the future of copyright law generally or on the future of music copyright more specifically. History is relevant to how this question should be answered. Those engaged in contemporary debates about music copyright often assume that because digital technologies affect the distribution and creation of many kinds of copyrighted works, music is merely the canary in the coal mine for copyright law.[13] On this view, any changes in the law brought about by music disputes should apply uniformly to all forms of expression. Rights in music implicate a wide variety of interests, and copyright law has been tailored time and again to allocate rights in response to particular conditions prevailing in the music business.[14] For that reason, under current U.S. law, the most complex and ornate portions of the Copyright Act are those that apply to music.[15] An understanding of

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Ellsworth). Ellsworth was the son-in-law of Noah Webster who had been the principal advocate for revision and extension of the Copyright Act. *See, e.g.*, Letter from N. Webster to William Chancery Fowler (Jan. 29, 1831), *in* LETTERS OF NOAH WEBSTER 424-25 (Harry R. Warfel, ed. 1953) (taking credit for stirring Congress to action on copyright). The addition of "musical composition[s]" to the list of copyrightable subject matter was incidental to that effort. Act of Feb. 3, 1831, 21st Cong., 2d Sess., 4 Stat. 436.

13. *See, e.g.*, NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 76-95 (2000) (treating music as "[i]ntellectual [p]roperty's [c]anary in the [d]igital [c]oal [m]ine").

14. *See, e.g.*, 17 U.S.C. § 110(5) (2005) (declaring public rebroadcast of musical works in certain retail establishments to be noninfringing); *id.* § 115 (granting statutory license to record "cover" versions of copyrighted songs); *id.* § 114 (granting elaborate and ornate statutory license for noninteractive digital performances of sound recordings).

15. *See generally* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003) (describing the complexity of contemporary music copyright); Michael W. Carroll, *A Primer on U.S. Intellectual Property Rights Applicable to Music Information Retrieval Systems*, 2003 U. ILL. J.L. TECH. & POL'Y 313 (2003) (describing the basic structure of

this history supports arguments that current disputes concerning music copyright may be better resolved with tailored solutions rather than through broad changes in copyright law as a whole.[16]

History also supplies authority for arguments about how copyright has evolved and should evolve.[17] The importance of an accurate understanding of copyright history was brought into stark relief in the Supreme Court's recent decision in *Eldred v. Ashcroft*,[18] in which the Court relied almost entirely on its telling of copyright history to interpret the constitutional provision empowering Congress to create federal copyright law.[19] Rather than address the petitioners' structural arguments, the Court invoked a Holmesian quip—"a page of history is worth a volume of logic"[20]—to hold that Congress' "unbroken" practice of retrospectively extending the term of copyright rendered that practice constitutional.[21]

Importantly, the *Eldred* Court signaled that copyright history would continue to supply relevant authority in future cases, particularly with respect to any limits the First Amendment might place on rights under copyright.[22] Since disputes about music copyright rank among the most

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music copyright); *see also* R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 252 (2001) (discussing the complexity of law governing digital audio transmissions).

16. Some leading intellectual property scholars are advancing proposals recognizing that music copyright may require a different or more nuanced settlement with respect to uses of new technologies. *See generally* FISHER, *supra* note 9, at 9 (arguing that peer-to-peer distribution of music and film should be legalized through an alternative compensation scheme); *see also* LESSIG, *supra* note 1, at 296-303 (arguing that we should "[l]iberate the [m]usic—[a]gain" by reducing the scope and duration of copyright law and by adopting a supplementary, temporary alternative compensation scheme); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004) (advocating reconsideration of applying current copyright law to digital distribution).

17. As Roscoe Pound noted, the main sources used to explain and justify legal adaptations are authoritative, philosophical, and historical. *See* ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 2 (1923).

18. 537 U.S. 186 (2003).

19. *Id*. at 200-02, 204.

20. *Id.* 200 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

21. *Id.* at 204; *see also id.* at 213-14 ("Congress' unbroken practice since the founding generation thus overwhelms petitioners' argument that the CTEA's extension of existing copyrights fails *per se* to 'promote the Progress of Science.'").

22. Rejecting the need for an independent First Amendment defense to copyright infringement at this time, the Court concluded:

> To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." . . . But when, as in this case, Congress has not altered the *traditional contours* of copyright protection, further First Amendment scrutiny is unnecessary.

pressing issues of the day in contemporary intellectual property law, it is time that the nuances of music copyright's evolution be better understood. If the question presented in future cases entails copyright's governance of music, copyright law's traditional contours should be ascertained with acknowledgment and understanding of the distinct evolution of music copyright.

This Article begins to close the gap in the legal literature concerning the origins and evolution of music copyright by investigating three deceptively simple questions: (1) when did copyright law first apply to music; (2) how did this change in the law occur; and (3) why did it occur.[23] The inquiry proceeds as follows. Section II supplies a brief, theoretical framework for this history and explains the methodology used in gathering the historical data. Economic theory plays an important role in contemporary copyright discussions, and economic theories of how property rights evolve often are explicitly or implicitly relied upon in these conversations. These theories are functionalist and materialist in orientation, and this Article focuses on the relation between changing material circumstances and music copyright's evolution. While economic theories may partially explain relevant developments, I argue that the methodologies and focus of intellectual history also are deeply relevant to understanding how music became copyrightable subject matter. Section III revisits the invention of copyright in England in 1710[24] and the struggle for music copyright between professional composers and music publishers during the course of the eighteenth century. A series of unheralded equity cases led to *Bach v. Longman*,[25] in which the Court of King's Bench held that printed music was within the first copyright law, the Statute of Anne.[26] Finally, Section IV briefly analyzes certain aspects of the struggle for composer's copyright and relates these to contemporary debates about music copyright.

Id. at 221 (emphasis added) (citation omitted). Defining copyright law's "traditional contours," *id.*, necessarily will require a recitation and reliance upon copyright history.

23. This investigation follows on the heels of my earlier exploration of the initial commodification of music. *See generally* Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405 (2004) (recontextualizing the controversy over the exchange of music files on the Internet).

24. *See* An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Author's [sic] or Purchasers of such Copies, during the Times therein mentioned, 8 Ann., ch. 19 (1710). Under the consensus view, not challenged here, an essential element that makes a law a "copyright" law is that the creator of intangible expression, rather than a publisher or patron, receives the initial legal entitlement to control reproduction and distribution of the work.

25. 98 Eng. Rep. 1274 (K.B. 1777).

26. *Id.* at 1275.

II. METHODOLOGICAL FRAMEWORK

As the current struggle over the proper scope of music copyright unfolds, it is important to understand the historical baseline for this branch of the law.[27] Intellectual property scholars apparently are taking this point to heart, as academic interest in the history of intellectual property law is again on the rise.[28] Economic and cultural historians also have been drawn to the subject.[29] Reflecting this upsurge in interest, the University of

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27. As Max Radin admonished, lawyers should "consider[] carefully their legal ideas in the historical setting in which they were developed," for if they "do not take this task seriously, they will not cease to be historians. They merely will be bad historians." MAX RADIN, THE LAW AND YOU 189 (1948); *accord* Frederick Bernays Wiener, Selden Society Lecture, *Uses and Abuses of Legal History: A Practitioner's View* 32 (1962).

28. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY (2001) (discussing the application of old copyright laws to new technology); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996) (discussing the challenges digital technology poses to present concepts of intellectual property); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 391-92 (2004) (arguing that extension of copyright to photography should be understood in relation to social practices rather than as natural expansion of the idea of copyright); Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003) (discussing history and application of the copyright work-for-hire doctrine); Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property*, 1800-1920, 52 HASTINGS L.J. 441 (2001) (surveying development of corporate intellectual property law); Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do With It?*, 47 J. COPYRIGHT SOC'Y U.S.A. 209 (2000) (evaluating functions of past, present, and future copyright law); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990) (comparing and contrasting development of copyright law in France and the United States); Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763 (2003) (discussing technology's role in shaping copyright law); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187 (2000) [hereinafter Merges, *Hundred Years*] (discussing adaption of intellectual property law to technology in the twentieth century); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255 (2001) (providing intellectual history of early development of patents); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (suggesting that copyright law in digital age should develop to enhance a democratic society); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002) (providing a historical development of public domain in intellectual property law); Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425 (2004) (evaluating appropriateness of returns that authors receive for copyrighted materials); Rosemary J. Coombe, *Challenging Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397 (1994) (book review) (praising subject book's historical analysis of the development of copyright law); Robert P. Merges, From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation (Nov. 13, 2004) (unpublished manuscript, on file with author); Craig Allen Nard & Andrew P. Morriss, Constitutionalizing Patents: From Venice to Philadelphia (Apr. 2004) (unpublished manuscript, on file with author).

29. *See, e.g.*, B. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND

Wisconsin School of Law recently hosted an important and precedent-setting conference on intellectual property history.[30]

When explaining changes in the law, two sets of distinctions tend to emerge at a very high level of generality. One is between external and internal perspectives, which we might label functional and autonomist views. From a functional perspective, the law is instrumental and changes in response to changing needs or interests external to the law.[31] From an autonomist view, law and society develop along different paths, with the law striving for internal coherence. A second distinction is between material interests and conceptual categories, with the former being the subject of economic and other materialist histories and the latter being the subject of intellectual history. Materialist history focuses on the organization of the means and modes of production in society and holds that these primarily determine historical change. Intellectual history tends to give primacy to conceptual structures and the discourses that animate these.[32] Taken together, these distinctions form the following perspectival matrix.[33]

	Materialism	***Intellectualism***
Functionalism	Functionalist-Materialism Law is driven by changes in means and modes of production and concomitant social changes.	Functionalist-Intellectualism Law is driven by intellectual movements and conceptual changes outside the law.

COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920 (2005); JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT (2002); JOEL MOKYR, THE GIFTS OF ATHENA: HISTORICAL ORIGINS OF THE KNOWLEDGE ECONOMY (2002); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993).

30. *See* Owning Knowledge: The History of Modern U.S. Intellectual Property Law (Symposium Program, Nov. 13, 2004), *at* http://www.law.wisc.edu/ils/EventsattheInstitute.htm (last visited July 10, 2005). This conference was quickly followed by the Berkeley-Wisconsin History of Copyright Workshop. *See* Berkeley-Wisconsin History of Copyright Workshop (Workshop Agenda, May 20-21, 2005) *at* http://www.law.wisc.edu/ils/BerkeleyIPWorkshop.htm.

31. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60-61 (1984).

32. *See*, *e.g.*, *id.* at 88 n.77 ("In some of the very best recent work in legal history, even writers thoroughly committed to placing legal forms in social and economic context have stressed how important it is to understand the internal structures and logics of such forms on their own terms."); *id.* at 98-99 (describing the critique of evolutionary functionalism by historicizing consciousness).

33. Thanks to Oren Bracha for suggesting this organization.

Autonomism	Autonomist-Materialism Law is largely irrelevant to organization of means and modes of production, and these primarily drive social change.	Autonomist-Intellectualism Law strives for internal coherence and changes in response to intellectual movements within the law.

This matrix reflects analytical distinctions that can be drawn from various histories, but almost no historian subscribes rigidly to only one perspective. Instead, these categories are useful to illustrate points of emphasis.

The history of intellectual property law largely has been told from functionalist perspectives. For functional-materialist historians, particularly economic historians, the development of copyright is part of a broader story about the evolution of property rights.

Economic historians generally tell one of two tales about the evolution of property rights. The first is a tale of progress and is a form of Whig history[34] that finds support in the economic theory of property rights propounded by Harold Demsetz.[35] His is an efficiency story in which legal actors create and administer new property rights whenever resources become sufficiently valuable so that the incentive benefits that private property rights supply outweigh the transaction costs that a private property system imposes.[36] While developed to explain the increasing complexity of property rights in tangible property over time, the Demsetz theory readily can be translated for intangible property.[37] On this view, the episodic expansion in the scope, duration, and subject matter of intellectual

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34. *See generally* H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (G. Bell and Sons, Ltd. 1963) (1931) (arguing that Whigs developed a progressivist historical narrative that placed them at an evolutionary apex); C.T. MCINTIRE, HERBERT BUTTERFIELD: HISTORIAN AS DISSENTER (2004) (explaining how Butterfield came to his argument).

35. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967). The Demsetz tale of property echoes an earlier evolutionary theory propounded by Adam Smith. *See* PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 32-46 (1980) (describing unpublished series of lectures Smith gave on legal evolution, with particular attention to evolution of property rights and institutions needed to secure such rights); *id.* at 36 (describing the emergence of private property in land along with the emergence of courts and legislatures).

36. *See* Demsetz, *supra* note 35, at 350. For a more critical view of economists' efficiency assumptions regarding private property, see generally Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3 (J. Roland Pennock & John W. Chapman eds., 1982), *reprinted in* 39 TULSA L. REV. 663 (2004).

37. *See, e.g.*, Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 192-94 (2003) [hereinafter Levmore, *Property's Uneasy Path*] (explaining how the Demsetz story can be adapted for intellectual property).

property rights throughout history reflects the increased social value of information as an economic resource.[38]

From this progressivist perspective, copyright would apply to music at the point in time when music's value as a resource had risen sufficiently to make the administrative costs of copyright socially worthwhile. The reader may well ask how music functions as a resource. Most people experience music either by listening to or playing it, and music's value increases when people, on average, value more highly these experiences.[39] To measure such an increase in value, economists look for data showing a willingness and ability to pay higher prices or a larger share of one's financial resources for musical experiences. An economist looks not only at prices of direct musical experience, such as the price of concert tickets, but also at the prices of all inputs into musical experience, including musical instruments, musical education, and, most importantly for our purposes, new musical compositions to play or to hear.[40] As the value of music rises, a Demsetzian would expect property rights in all inputs to be created or to become better defined. Consequently, an increase in the value of musical experiences should be expected to lead to the extension of property rights in new musical compositions.

Other economically-oriented scholars tell a more skeptical counter-narrative. To them, the Whiggish character of the Demsetzian theory undermines it.[41] From the perspective of the new institutional economics, the Demsetz view is the "naive theory of property rights"[42] because it ignores the political process that forges such rights.[43] Once politics enters the picture, the progress of property law in general, and intellectual property law in particular, is better explained by the marginally successful

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38. *See* Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J.L. & TECH. 4, 3, 28-32 (2004) (advancing the neo-Demsetzian model); *see also id.* at 48 ("I argue that there actually is a degree of determinacy in the evolution of the laws of intellectual property.").

39. *See*, *e.g.*, F.M. SCHERER, QUARTER NOTES AND BANK NOTES 33 (2004).

40. *See id.*

41. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 412 (2003) ("If we think about the history of intellectual property law since the Middle Ages, we can, just as with Demsetz's theory of the emergence of property rights in physical property, easily tell a 'Whiggish' (history as progressive) story in which the growth of intellectual property rights is explained by reference to material and social changes that increased the social value of such rights."). On the Demsetzian view, it would be an increase in the social value of the underlying information that would drive the growth of intellectual property rights. *See, e.g.*, Gary DeLibecap, *Toward an Understanding of Property Rights*, *in* EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 31, 32 (Lee J. Alston et al. eds., 1996) ("[I]t is not actual rent, but rather potential rent, that drives the *demand* for property rights.").

42. *See* THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 271 (1990).

43. *See* Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857, 1867-68 (2000).

rent-seeking efforts of incumbent rightsholders.[44] On this view, the increase in the economic value of information during the twentieth century has led to increased investments in rent-seeking by intellectual property owners,[45] and many prognosticators expect this trend to continue unabated.[46] From this perspective, we should expect to see copyright invented when the creation of such rights would materially benefit a well-organized and focused interest group, such as authors or publishers, and we should expect copyright to be extended to music under similar conditions. As is discussed below, the historical record provides some support for this view, but its account is incomplete.

It is easy to set the optimism of the Demsetzian theory[47] and the pessimism of the public choice story in opposition,[48] but it is important to see how both theories share a commitment to a functional-materialist methodology to explain legal change. On either view, historical research should focus on data that illuminates increases in the social value of information and the battle for distribution of the economic surpluses made possible by this increase in value. From both perspectives, law generally lacks autonomy and the evolution of the contours and contents of any exclusive rights in such information will be shaped entirely by materially-motivated investments in legal reform in response to changes in the value of information.

Although economic analysis plays an important role in most contemporary discourse about intellectual property, including its history, its functional-materalist methodology is not the only relevant perspective. The intellectualist perspectives also matter.[49] Intellectual historians generally are more modest and nuanced in their explanatory objectives. As Terry Fisher explains, only some contemporary methodologies of intellectual history seek to produce a causal account, while others reject

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44. *See, e.g.*, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 110 (Cambridge Univ. Press 1991) (1990) ("Because polities make and enforce economic rules, it is not surprising that property rights are seldom efficient."); Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. 421, 429 (2002) [hereinafter Levmore, *Two Stories*].

45. *See, e.g.*, Merges, *Hundred Years*, *supra* note 28, at 2234-39 (describing increased lobbying efforts and expenditures by intellectual property owners).

46. *See, e.g.*, Levmore, *Property's Uneasy Path*, *supra* note 37, at 193-94 (predicting that intellectual property owners will seek to extend existing rights to abstract ideas); Merges, *Hundred Years*, *supra* note 28, at 2233-35.

47. *See, e.g.*, Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331, 332 (2002); Levmore, *Two Stories*, *supra* note 44, at 429.

48. *See* Levmore, *Two Stories*, *supra* note 44, at 429 (describing the pessimism of the public choice theory).

49. *See, e.g.*, William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997) (describing four distinct methodologies arising out of an intellectual history approach to legal evolution).

causal explanations altogether.[50] Consequently, intellectual historians generally reject efforts to fashion general rules of causation. Nonetheless, one can infer from at least some intellectual histories of law a view that law's domain is partially autonomous and that the evolution of legal concepts, such as property rights, may be better explained by innovative theories advanced by leading jurists, legislators, and advocates attempting to advance internal coherence or other values rather than simply responding to changing material conditions.[51]

On this view, the careers of legal concepts such as property and authorship follow paths carved by legal and political imagination in framing discourse.[52] Under this view, the relevant agents of change will not

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50. *See id.* at 1088-95.

51. *See, e.g.*, *id.* at 1076-79 (describing the contextualist legal history).

52. Reflecting this more intellectualist view of legal evolution, contemporary legal scholars vigorously debate whether information protected by copyright or patent is really "property." *See, e.g.*, James Boyle, *The Public Domain: The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003) (analogizing the modern expansion of intellectual property rights to the first enclosure movement in England); Stephen L. Carter, *Does It Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993) (commenting on the implications of the debate about whether intellectual property is "property"); Julie E. Cohen, *Panel 2; Workplace Monitoring: Cyber-Snooping, and Cookies: Creating Standards for Watching or Not Watching: Overcoming Property: Does Copyright Trump Privacy?*, 2002 U. ILL. J.L. TECH. & POL'Y 375, 379 (2002) (comparing cyberspace display rights with real space display rights); Margaret Jane Radin, *Regulation of Computing and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996) (explaining how historic property issues emerge in the computer network environment); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005) [hereinafter Lemley, *Free Riding*] (arguing that treating intellectual property as property is fundamentally misguided); Stewart E. Sterk, *What's in a Name?: The Troublesome Analogies Between Real and Intellectual Property* (Working Paper No. 88, Aug. 2004) (analyzing the disparities in justifying real property rights and intellectual property rights), *available at* http://ssrn.com/abstract=575121. Similarly, scholars debate whether the concepts of "monopoly" or "intellectual property" appropriately capture the relevant features of copyright, patent, trademark, trade secret, the right of publicity, and a hodge podge of other state law doctrines. *See, e.g.*, Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 147 (1996); Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 414-15 (2003); Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1729-38 (2000); Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 399 (1989); Lemley, *Free Riding*, *supra*, at 4-6.

A related debate about the construction of authorship in copyright law reflects the same concern. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1-56 (Martha Woodmansee & Peter Jaszi eds., 1994); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 23 (1998) (seeking "simultaneously to undertake and to undermine modern anthropologic authorship"); Keith Aoki, *Authors, Inventors and Trademark Owners:*

necessarily be those with the most to gain materially from new property rights, but jurists, legislators, and scholars who advance innovative conceptions of exclusive rights. Thus, while this approach does not predict the set of conditions under which music copyright should be expected to evolve, it does suggest that historical investigation should focus on the way in which the general concept of copyright was fashioned in legal, political, and social discourse and how that development interrelated with the conceptual status of social practices involved in musicmaking.[53]

This Article gathers data relevant to both functional-materialist and intellectualist methodologies and preliminarily assesses the value of each approach to understanding the origins of music copyright. Since economic historians make the more aggressive explanatory claims, I focus attention on data relevant to their claims, while periodically alluding to information supporting and relevant to an intellectual history of music copyright. While professional composers and music publishers appear to have been motivated by economic self-interest in many respects, functional-materialist theory standing alone has difficulty explaining why composers and publishers were not even more aggressive in pursuing their self-interest by, for example, demanding that rights under copyright extend to commercial public performance. Similarly, functional-materialist theory suggests reasons why music publishers should have embraced the extension of copyright to music rather than resist it as they did. To gain a better understanding for why the struggle for music copyright unfolded as it did, some reference to conceptions of author's rights and the books to which those rights attached is necessary as well.

For that reason, this Article also identifies data and trends relevant to a more intellectualist understanding of composer's copyright. An intellectual historian would give greater causal weight to broader trends in Romantic individualism and would expect music to be brought within the law's ambit as the concepts of authorship and protectable works of authorship expanded to embrace more than literary authors and printed books. From what available sources reveal, neither a functional-materialist nor an intellectualist account, standing alone, fully explains the development of copyright in music.

Private Intellectual Property and the Public Domain Part I, 18 COLUM.-VLA J.L. & ARTS 1 (1993) (discussing the ways in which the concept of authorship leads to withdrawal of material from the public domain); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) (arguing that authorship is a fundamental concept of copyright law); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 728 (1993) ("[C]urrent copyright dogma does not recognize that so-called 'works of authorship' are . . . unstable and dependent on context."); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 879-95 (1997) (book review).

53. *See generally, e.g.*, ROSE, *supra* note 29 (discussing the historical notion of literary property); LOEWENSTEIN, *supra* note 29 (discussing theories of authorship and institutional origins of intellectual property).

III. THE STRUGGLE FOR COMPOSER'S COPYRIGHT IN ENGLAND

England is the birthplace of modern copyright law, and it is therefore not surprising that the struggle for copyright in music also took place there. What is less obvious is why there was a struggle over music at all. To better comprehend this episode in copyright's evolution, it is important to recall how and why copyright law was invented and to understand the relatively different positions that musical composers and music publishers held in society as compared to the positions of literary authors and booksellers.

A. *Background to the Struggle*

The backdrop for both the invention of copyright and the struggle for composer's copyright is what Jürgen Habermas has dubbed the emergent "public sphere" in eighteenth-century England.[54] London was the largest and one of the wealthiest cities in Europe during the eighteenth century,[55] and this concentration of people and resources supplied the impetus for the growth of the public press and the growth of public meeting places, such as the more than 3,000 coffee houses in London and the public pleasure gardens.[56] In this sphere, where politics and culture equally were the subject of conversation and debate, the printed page also became a public space for dialogue and discourse. Consequently, the publishing business generally began to flourish.[57] Music publishing experienced similar growth, as the growth of the public sphere created new places for the public performance of secular music, which led to demand for printed music to enable performance of the day's popular songs in the home. Composers' desires to exert greater control over the publication of their music sparked

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54. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 22-23, 38 (Thomas Burger trans., 1989) (1962). The author dates the formation of this public in England from the first decades of the eighteenth century, but recent critical scholarship roots the theory much earlier in the seventeenth century. *See* David Zaret, *Religion, Science, and Printing in the Public Spheres in Seventeenth-Century England*, *in* HABERMAS AND THE PUBLIC SPHERE 212, 216-17 (Craig Calhoun ed., 1992).

55. *See, e.g.*, SCHERER, *supra* note 39, at 43; SIMON MCVEIGH, CONCERT LIFE IN LONDON FROM MOZART TO HAYDN 53 (1993) (noting that London's population increased from 575,000 in 1700 to 900,000 in 1801).

56. *See* MICHAEL CHANAN, MUSICA PRACTICA: THE SOCIAL PRACTICE OF WESTERN MUSIC FROM GREGORIAN CHANT TO POSTMODERNISM 130 (1994) ("[T]he pleasure gardens . . . with their tree-lined walks, refreshment booths and bandstands, provided relaxing open urban spaces where social distinctions tended to be disregarded at least enough for the ranks to mingle."); Zaret, *supra* note 54, at 12.

57. *See* RUSSEL SANJEK, 1 AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS 250-51 (1988) (describing the growth of the English publishing business because of increasing literacy and increasing interest in scientific inquiry and education).

litigation over music's relation to the relatively new copyright law, the Statute of Anne.[58]

1. The Law

Within legal scholarship, the general story of how the first copyright statute was enacted and interpreted is familiar,[59] and only a few features most relevant to music copyright are rehearsed here.

a. Pre-Copyright

During the sixteenth and seventeenth centuries, the predecessor to copyright emerged in the form of the royal printing privilege and the royal license or, in England, the letter patent.[60] Each printing privilege was an ad hoc form of policymaking that could range widely in subject matter, scope, and duration.[61] Granting exclusive rights in information was a form of public spending.[62] In some cases, granting a privilege was a political favor.[63] In others, the promise of protection from competition was granted to induce investment in the publishing of works for which demand was

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58. 8 Ann., ch. 19 (1710).

59. *See generally, e.g.*, LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (tracing the history of copyright law to illuminate current legal debate on the subject); ROSE, *supra* note 29 (illustrating the development of copyright law from the Middle Ages to the present).

60. Legal and other scholars generally have described and analyzed the use of the privilege in relation to the book trade. *See, e.g.*, Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 381-402 (2004). The letter "patent" was a form of privilege granted in England. *See* Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part I)*, 76 J. PAT & TRADEMARK OFF. SOC'Y 697, 700 (1994); *see also* HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON *An Act for the Encouragement of Learning*, 1710, at 25-27 (1956) ("As time went on, the distinction between the printing privilege granted by warrant and the rights conveyed by letters patent became indistinct.").

61. *See generally* Oren Bracha, *Owning Ideas: The History of Anglo-American Intellectual Property Law* (unpublished S.J.D. dissertation, Harvard Law School) (on file with author). Printing privileges tended to fall into one of three distinct classes: (1) privileges to print a book of unknown or collective authorship; (2) privileges to print groups of books on a particular subject or in a particular category, including books not yet written; and (3) privileges to print named books by named authors. *See* John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 191, 192-93 (Martha Woodmansee & Peter Jaszi eds., 1994).

62. *See* Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOKLYN L. REV. 229, 229 (2003) (arguing that "[c]opyright exhibits means and ends remarkably similar to those of social welfare programs."); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 329 (2004).

63. *See, e.g.*, ROSE, *supra* note 29, at 17 (giving examples of printing privileges as rewards for loyal service).

uncertain.[64] Authors had no legal right to complain about the unauthorized reproduction of their work, and they would be paid, if at all, by a lump sum in exchange for their manuscripts.[65] Although privileges may have appeared to be a cheap means of conferring favors or encouraging innovation, political authorities soon found that they had been too easily persuaded to grant publishing privileges and that doing so came with a social cost.[66]

Copyright law was invented in England largely because the English Crown chose to consolidate its licensing and privilege grants by granting a general charter to the London guilds involved in book publishing, the Company of Stationers.[67] To manage printing rights inter se, the Stationers invented an administrative and judicial mechanism for recognizing and enforcing a publisher's rights in a copy acquired from the author.[68] During the course of the seventeenth century, however, Parliament responded to growing hostility to royal power generally, and royal power to censor expression and regulate trade particularly, by permitting the Printing Act of 1662 to lapse in 1694, leaving the *book* publishing trade largely unregulated.[69] The lapse meant the end of the property rights in copies that the Stationers had become accustomed to and the end of censorship by the Surveyor of the Press. As Benjamin Kaplan quipped: "Three cheers for freedom of the press; but what, now, was to become of the stationers?"[70]

b. The Statute of Anne

The Stationers quickly mobilized to seek legislative protection from unauthorized publication.[71] Indeed, a small group of the most powerful booksellers, who had formed a cartel known as a "[c]onger," were the

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64. *See* ELIZABETH ARMSTRONG, BEFORE COPYRIGHT: THE FRENCH BOOK PRIVILEGE SYSTEM 1498-1526, at 66, 80-83 (1990) (describing the predominant theme in petitions for privileges as the need to secure a fair return on a risky investment in publication).

65. *See, e.g.*, RANSOM, *supra* note 60, at 34 (stating that authors had no right to publishing royalties and that any earnings beyond sale of the manuscript would depend upon "his bookseller's generosity").

66. Early privileges granted to publishers in Venice limited the abilities of new publishers to ply their trade. In 1517, the Venetian Senate revoked all existing privileges not issued on its own authority. *See* ARMSTRONG, *supra* note 64, at 6-7; BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 45 (1967) ("[A]buses arose as publishers flocked to the government to reserve well-known titles for themselves."). In other cases, the limits of a privilege's scope had to be clarified so that follow-on publishers knew what material they were free to print.

67. *See* PATTERSON, *supra* note 59, at 28-36 (describing the grant of charter and the structure of Stationers Company).

68. *Id.* at 32-35.

69. *See id.* at 139-40 (describing the Stationers' efforts to forestall lapse of the Printing Act).

70. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 6 (1967).

71. *See, e.g.*, PATTERSON, *supra* note 59, at 138-42 (describing the legislative process leading to the enactment of the Statute of Anne); ROSE, *supra* note 29, at 33-36, 42-46 (same).

principal agents of change leading to the creation of copyright law.[72] Early bills would have recreated a statutory right granted to the publisher. These were met with stiff resistance, but concerns about an unregulated press gave legislators reasons to act. By reframing the legislation as an author's rights bill to deflect some of the antimonopoly sentiment, and with some backroom negotiations,[73] the Stationers successfully persuaded Parliament to enact the first copyright law, the Statute of Anne, effective April 10, 1710.[74]

For the Stationers, the Statute of Anne was a necessary compromise, but many of its features endure as part of contemporary American copyright law.[75] The Statute of Anne applied to "books," and granted authors and their assigns the "sole liberty of Printing and Reprinting" any book written by, or purchased from, the author.[76] To obtain rights under the Act, the book's title had to be registered, a process that included depositing nine copies of the book in Stationers' Hall.[77] The author could assign his

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72. *See, e.g.*, John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUBL'G HISTORY 19, 23 (1980) ("There is no doubt that the primary motive of the 1710 Copyright Act was to reintroduce a measure of censorship."); PATTERSON, *supra* note 59, at 138-42, 151-52; SANJEK, *supra* note 57, at 204-05 (explaining that the term "'conger' . . . . came from the eel that swallowed up all small underwater life within its reach, usually far beyond its seven- or eight-foot length.").

73. *See* JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING 86 (1988) (describing the relationship between the Tory Sir Robert Harley and Daniel Defoe in setting the stage for the Statute of Anne).

74. "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." 8 Ann., ch. 19 (1710), *available at* http://www.copyrighthistory.com/anne.html. One reason composers and music sellers had doubts about music's status under the Act was that it was passed in response to petitions from the booksellers. Another reason is that the terms of the Act appeared to be directed only at literary authors and booksellers. *See infra* Part III.D.2 (describing conceptual difficulty with treating printed music as a statutory "book").

75. *See, e.g.*, WILLIAM F. PATRY, 1 COPYRIGHT LAW AND PRACTICE 11 (1994) ("The Stationers Company ended up getting far less than it had petitioned for because Parliament, instead of recognizing perpetual rights, passed a law limiting the exclusive right of publication to a set term of years and containing other provisions limiting power previously enjoyed by the Stationers.").

76. 8 Ann., ch. 19 (1710), *available at* http://www.copyrighthistory.com/anne.html; *cf.* 17 U.S.C. § 201 (2005) (vesting copyright in the author); *id.* § 106 (granting a copyright owner the exclusive rights to reproduce and distribute copies of the work).

77. 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. § 407 (stating that a deposit is mandatory when registering a work unless exempted by the Register of Copyrights and that use of deposit copies may be made by the Library of Congress). The plain language of the Act established that notice by registration was a necessary precondition to obtain a remedy under the Act. Despite the mandatory language, however, subsequent judicial interpretation did not condition protection on registration. *See* David Hunter, *Music Copyright in Britain to 1800*, 67 MUSIC AND LETTERS 269, 280 (1986) [hereinafter Hunter, *Music Copyright*]; *cf.* 17 U.S.C. §§ 408, 411 (2005) (explaining that registration no longer is a condition of protection but is required in order to maintain an infringement action for a U.S. work).

statutory rights, but valid assignments were to be evidenced by a signed and witnessed writing.[78] Once the author or publisher had secured rights, liability for unauthorized printing or reprinting was strict; in contrast, distributor liability required knowledge of a book's infringing status.[79] Those found to have infringed the statutory right would be liable in the amount of one cent for each infringing copy in the defendant's possession.[80] Some limits were placed on the exercise of copyright,[81] and the Act set an aggressive limitations period for infringement actions, running from the time of the infringement and lasting only three months.[82]

The most contested feature of the Statute of Anne was its limited term of protection, which endured "for the term of fourteen years . . . and no longer."[83] At the end of the initial fourteen-year term, the right in the copy would revert to the author for a second fourteen-year term.[84] The Stationers' ultimate goal was perpetual protection. They had been able to profit handsomely from publication of canonical works, such as those from ancient Greece and Shakespeare's plays, and they feared the loss of revenue when these works would enter the newly created statutory public domain.[85]

Following a now-familiar pattern, the Stationers continued to lobby Parliament for an expansion of the rights granted under the Statute of Anne and were met with limited success.[86] After 1738, when the statutory term

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78. 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. § 204 (requiring that assignments of exclusive rights under copyright be evidenced by a signed writing).

79. 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. §§ 106A(a), 501(a) (imposing strict liability for unauthorized exercise of a copyright owner's exclusive rights, which include rights of reproduction, distribution, and importation).

80. 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. § 504(c) (setting statutory damages in the range of $750 to $30,000, with discretion to depart downward to $200 for innocent infringement and upward to $150,000 for willful infringement). The courts apply statutory damages per work infringed rather than per copy.

81. To check overreaching by booksellers, the Act provided that any person could bring a complaint to a fairly long list of high government officials charging that the owner of the copy had set the price unreasonably high. *See* PATRY, *supra* note 75, at 12. The listed officials were granted the power to conduct an inquiry on the basis for the price, and, if the price was deemed unreasonable, the power to set the price and order the owner of the copy to publish notice of the newly settled price. 8 Ann., ch. 19 (1710).

82. 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. § 507(b) (establishing three-year limitations period).

83. *See* 8 Ann., ch. 19 (1710); Feather, *supra* note 72, at 36 (describing the Stationers' disappointment with a limited term). Copyright protection in the United States constitutionally must be for a "limited [t]ime[]," U.S. CONST. art. I, § 8, cl. 8, but Congress has greatly expanded the term of protection. *See* 17 U.S.C. §§ 302-304.

84. *See* 8 Ann., ch. 19 (1710); *cf.* 17 U.S.C. §§ 203 (permitting authors or heirs to terminate copyright assignments in works other than works made for hire between thirty-five and forty years after the grant).

85. *See, e.g.*, ROSE, *supra* note 29, at 52.

86. *See* PATTERSON, *supra* note 59, at 154-56 (describing 1734 petition). Parliament agreed to drop the price control provisions of the Act in 1739, *see id.* at 158, and it added a provision prohibiting importation of copies in English (primarily from Irish publishers). *See* PATRY, *supra*

expired for works initially protected under the Act, the Stationers invested in litigation.[87] The London publishers, who had come into increasing competition with provincial and Scottish publishers, sought a means of squelching this threat to their margins.[88] In what became known as the Battle of the Booksellers (the materialist label) or the Question of Literary Property (the intellectualist label), the London publishers sued their rivals for publishing works after the statutory term had expired.[89] The London publishers claimed that the Statute of Anne was merely an overlay on common law copyright, which, they argued, was perpetual and survived expiration of the statutory period of protection.[90]

This claim of perpetual copyright first reached the Court of King's Bench in the 1769 case of *Millar v. Taylor*,[91] in which Lord Mansfield fashioned the common-law, authorial right and held that the Statute of Anne did not abolish this right.[92] The opinion sparked one of the few dissents issued during Mansfield's thirty-year tenure as president of the court,[93] and the decision was short-lived. In 1774, the House of Lords in *Donaldson v. Becket*[94] ruled that no common-law right is infringed by republication of a work whose term of protection under the Statute of Anne has expired.[95] As is discussed *infra*, *Donaldson* had a significant impact on the struggle for composer's copyright.[96]

2. Composers and Musicians

a. Artistic and Business Relations

While certain literary authors, such as Alexander Pope, asserted their rights under the Statute of Anne relatively shortly after its enactment,[97]

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note 75, at 12. But Parliament was unwilling to extend the term of protection. *See id.*; ROSE, *supra* note 29, at 52-58 (describing the booksellers' lobbying campaign).

87. *See* PATRY, *supra* note 75, at 12.

88. *See*, *e.g.*, PATTERSON, *supra* note 59, at 167; PATRY, *supra* note 75, at 13 n.30.

89. *See* PATRY, *supra* note 75, at 12.

90. Only the essential details of the fate of common-law copyright need be elucidated here, as the tale has been oft told. *E.g.*, AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899); FEATHER, *supra* note 73, at 78-83; ROSE, *supra* note 29, at 4-5. *See generally* Trevor Ross, *Copyright and the Invention of Tradition*, 26 EIGHTEENTH-CENTURY STUD. 1 (1992) (detailing the evolution of copyright law in eighteenth-century England).

91. 98 Eng. Rep. 201 (K.B. 1769).

92. *See id.* at 218.

93. *See id.* (Aston, J.).

94. 98 Eng. Rep. 257 (K.B. 1774).

95. *See id.* at 258-62.

96. *See infra* notes 218-19, 235 and accompanying text (discussing cases affected by *Donaldson* ruling).

97. *See* FEATHER, *supra* note 73, at 103.

musical composers were far more reticent to rely on the Act.[98] To understand why this may have been, it is important to note the differences between the two groups. Literary authors relied primarily on publication as the means of communicating with their audience.[99] By contrast, most musical composers outside the theater still were professional performers.[100]

Most professional musicians and composers relied on the goodwill of wealthy patrons for their economic survival,[101] but market exchange had begun to emerge as an alternative means to make a living. For example, the general public also had started to become an important patron of music through the institution of the public concert with paid admission.[102] By the early eighteenth century, the concert series had become a central part of the aristocratic social season in London.[103] Performance spaces included two theaters operating under patent, Covent Garden and Drury Lane, as well as pleasure gardens (i.e., public parks), such as Vauxhall and Ranelagh.[104]

Along with public concerts, opera was the leading entertainment for the upper classes during the eighteenth century.[105] Invented in Italy at the dawn of the seventeenth century, this form of musical theater did not attract serious interest or support in England until the early eighteenth century.[106] Italian opera then became the rage, and opera singers, particularly

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98. *See* CHANAN, *supra* note 56, at 150-51.

99. *See* LOEWENSTEIN, *supra* note 29, at 6.

100. Opera remained a vibrant art form and continued to develop on the Continent and in England. Other forms of musical theater emerged as well. For more on these developments, see generally DONALD JAY GROUT, A SHORT HISTORY OF OPERA (3d ed. 1988) (detailing the evolution of European opera).

101. *See*, *e.g.*, MCVEIGH, *supra* note 55, at 203 (1993) (explaining that British musicians "remained dependent at every turn on patrons' support and approval, for all the outward appearance of a new commercial environment"); DEBORAH ROHR, THE CAREERS OF BRITISH MUSICIANS, 1750-1850: A PROFESSION OF ARTISANS 40-61 (2001) (discussing different sources of patronage in eighteenth-century England).

102. *See* REINHARD G. PAULY, MUSIC IN THE CLASSIC PERIOD 66 (4th ed. 2000).

103. *See* CHANAN, *supra* note 56, at 134.

104. *See* ROHR, *supra* note 101, at 105. The primary site for middle-class patronage of public performance was in the pleasure garden performances. According to a contemporary account of a 1786 performance at Vauxhall Garden:

> There were last night above 6000 persons present, and among them some of the first people in the kingdom, but as is always the case at Vauxhall, it was a *melange*; the cit and the courtier jostled each other with the usual familiarity; the half guinea was no repellant to the middling order . . . .

MCVEIGH, *supra* note 55, at 41 (quoting from *The Morning Chronicle*, May 30, 1786) (emphasis in original).

105. *See* ROGER FISKE, ENGLISH THEATRE MUSIC IN THE EIGHTEENTH CENTURY, at v (2d. 1986).

106. *See id.*

castrati,[107] were the highest paid musical performers in the land.[108] Competing with Italian opera in London was the ballad opera.[109] In 1728, John Gay, a member of London's leading literary circles, presented *A Beggar's Opera*, a musical extravaganza featuring popular songs sung in English, parodies of Italian opera, and political satire. It was, perhaps, the greatest theatrical success of the century in England.[110]

Annual music meetings also extended the range of professional musical performance. Most of these festivals evolved within a political and religious context;[111] but improved transportation infrastructure that enabled formation of a festival circuit and increasing financial investment broadened these music meetings into a broad political and entertainment mechanism.[112] The growth and spread of the music festival intensified the demand for nationally recognized singers and players.

The growth in markets for live performance fueled a growth in the market for printed music, largely by amateurs seeking to play current favorites at home.[113] Increasing demand for printed music created new opportunities for freelance composition,[114] but for many composers, publication of their compositions functioned as a means for increasing demand for their public performances.[115] Many composers did not even receive a one-time payment from publishers for their compositions, as ownership of musical manuscripts written with patronage funding appears to have varied.[116] Where composition was part of a musician's duties under his employment agreement, ownership in the manuscript generally vested in the employer; however, if performance was a musician's only musical duty, he would be free to seek publication and retain any payment made for the manuscript.[117]

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107. *See* GROUT, *supra* note 100, at 71.

108. *See* SCHERER, *supra* note 39, at 97; ROHR, *supra* note 101, at 155-56.

109. *See* SCHERER, *supra* note 39, at 46.

110. *See id.* at 48.

111. *See* WILLIAM WEBER, THE RISE OF MUSICAL CLASSICS IN EIGHTEENTH-CENTURY ENGLAND 103 (1992) (discussing the context of the evolution of the English music festival).

112. *See id.* (noting the political reach of the music festival). By the early eighteenth century, such towns as Oxford, Salisbury, Winchester, Bath, Wells, and Norwich had developed similar festivals, and by the second half of the century, festivals had spread to a wide variety of towns and cities in most parts of England. *See id.* at 124-25.

113. *See, e.g.*, SANJEK, *supra* note 57, at 221-35 (describing examples of successful publishers and successful titles).

114. *See* SCHERER, *supra* note 39, at 70-74 (surveying freelance composition across Europe, including in England).

115. *See* CHANAN, *supra* note 56, at 112.

116. *See, e.g.*, SCHERER, *supra* note 39, at 167-70 (surveying composers' rights in their manuscripts across Europe).

117. *See* ROHR, *supra* note 101, at 149-50 (explaining that popular music composers received a lump-sum payment in exchange for possession of the manuscript, the right to publish being assumed); PHLILIP G. DOWNS, CLASSICAL MUSIC: THE ERA OF HAYDN, MOZART, AND BEETHOVEN

Musicians who sought to express themselves primarily through composition rather than performance found their circumstances frustrating. Unlike gentleman authors such as Pope, most musicians residing in England were from the lower-middle ranks of society. They pursued musical careers because they were either following in a family tradition, taking advantage of natural talent, chasing after potential riches, or responding to unanticipated economic hardship.[118] Throughout the eighteenth century, English-born musicians and composers competed with foreign and immigrant musicians, who generally enjoyed greater prestige and financial remuneration than did their English counterparts. British composers resented the limited economic rewards for composition, generally, and the skewed distribution of such rewards in favor of those who wrote songs, "domestic" music, and educational pieces for sheet music publishers.[119] The only musicians able to focus solely or primarily on composition were certain foreign composers, such as George Frideric Handel, Johann Christian Bach, and Joseph Haydn.

Handel was the most important transitional figure, setting important precedents for the struggle for composer's copyright. He participated in the markets for public performance and publication of his work and, by doing so, helped enlarge those markets. His music supplied healthy publishing profits, and its durable popularity was the basis for the creation of the "classical" music canon and tradition.[120]Handel may have started his career in law.[121] Once his interest turned to music, he began composing operas and was then appointed *kapellmeister* to George, elector of Hanover, who later became George I of Great Britain.[122] Handel had difficulty escaping his patron, but in 1712 he settled in London, where he was given an annual income by Queen Anne.[123]

In London, Handel was the first major composer to pursue freelance composition in a serious way. Departing from the vogue for Italian opera, Handel invented the English oratorio, the best known of which is *The Messiah*.[124] As both composer and impresario, Handel raised funds for his

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20 (1992); SCHERER, *supra* note 39, at 169. Today, composers generally retain copyright in commissioned works. *See* Anne Midgette, *Music Fit for a King, Written for a Dentist*, N.Y. TIMES, Jan. 23, 2005, Arts & Leisure, at AR 1 (describing modern patronage arrangements).

118. *See* ROHR, *supra* note 101, at 27 (cataloging musicians' motivations).

119. *See id.* at 141 (describing disparities in revenues among composers).

120. *See generally* WEBER, *supra* note 111 (describing creation of retrospective repertory and "classical" music tradition).

121. *See* DONALD BURROWS, HANDEL 9-10 (1994).

122. *See* JONATHAN KEATES, HANDEL: THE MAN AND HIS MUSIC 50 (1985).

123. *See* CHRISTOPHER HOGWOOD, HANDEL 66-69 (1984).

124. *See* SCHERER, *supra* note 39, at 110 (listing oratorios and noting that *The Messiah* initially was more successful in Dublin than in London); Anthony Hicks & Gerald Abraham, *Oratorio and Related Forms*, *in* 6 NEW OXFORD HISTORY OF MUSIC 23, 25 (Gerald Abraham ed., 1986) ("English oratorio came into being quite suddenly with the composition and performance of

performances from a range of sources, including individual attendance tickets. These permitted middle class citizens who could not afford seasonal subscriptions to become part of his audience.[125] In addition, from 1720 to 1728, Handel served as musical director of London's principal opera company, the Royal Academy of Music.[126] Handel then became partner in managing King's Theatre, where he continued to stage operas and other musical performances.[127]

Handel's entrepreneurialism also led him to take an interest in publication. Initially, Handel feuded with John Walsh, London's leading music publisher. Walsh had been republishing Handel's continental publications without permission.[128] Subsequently, Handel and Walsh came to terms and they had a long-lived business relationship.[129] Handel's music remained popular in print and in performance well after his death in 1751. Surely, one reason for this was the music's aesthetic appeal, but William Weber also identifies political motivations for continued support for the staging of Handel's works.[130] Handel's preeminent position was signaled by the fact that, in 1760, he became the first composer to be the subject of a full-length biography.[131]

b. Publication and Copyright

From a functional-materialist perspective, the growing value of printed music and the establishment of copyright should have led composers to seek legal recognition as authors under the Statute of Anne. The evidence shows that, instead, professional composers embraced copyright reluctantly. In the years after the Statute of Anne's enactment, successful composers generally did not seek to assert rights by registering their new

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Handel's *Esther*, probably in 1718."). For an interesting exposition of the political themes and dimensions in Handel's oratorios, see generally RUTH SMITH, HANDEL'S ORATORIOS AND EIGHTEENTH-CENTURY THOUGHT (1995).

125. *See* SCHERER, *supra* note 39, at 62.

126. *See id.*

127. Handel faced stiff competition from 1733 to 1737 from the Opera of the Nobility until it folded following massive losses. *See id.* at 99.

128. In addition to republishing Handel's previously printed works, Walsh employed agents to copy unpublished works. *See* SANJEK, *supra* note 57, at 211 (describing a pit musician hired by Walsh to copy score during performances); *see also id.* (describing Walsh's employment of William Babbell, a member of the royal band with a phenomenal memory who attended Handel's opera *Rinaldo* on Walsh's behalf and recreated from memory Handel's musical improvisations during the prior evening's performance). Walsh boasted that he had earned £15,000 from *Rinaldo*'s music, prompting Handel to rejoin, "Next time I will publish the opera and Walsh can write the music." *Id.* at 211-12.

129. *See* Hunter, *Music Copyright*, *supra* note 77, at 277 n.31 (listing joint publications of Handel and Walsh).

130. *See* WEBER, *supra* note 111, at 14.

131. *See* Peter Holman, *Eighteenth-Century English Music: Past, Present, Future*, *in* MUSIC IN EIGHTEENTH-CENTURY BRITAIN 5, 7 (David Wyn Jones ed., 2000).

compositions in Stationers' Hall. Rather, they sought legal vindication for proprietary claims in their music through petitions for printing privileges. Between 1710 and 1770, the English crown granted at least sixteen privileges to composers, and the scope of most of these extended to any work the composer chose to publish.[132] These privileges either identified music as property or alluded to it.[133] The term of protection under most privileges was fourteen years.

One would think that copyright, which guaranteed protection without need for a petition and which provided the author with a total of twenty-eight years of protection, would have served composers' material interests better than printing privileges. Conceivably, privileges may have been preferable to composers because privileges often provided ex ante protection to all of the composer's works whereas copyright was effective on a per-work basis and normally did not vest until registration and deposit took place. Alternatively, royal privileges may have been a valuable status signal that would not have been easily sacrificed in favor of copyright.[134] Finally, if composers would have had difficulty obtaining deposit copies, privileges may have been more attractive. I was unable to locate evidence of explicit deliberation along these lines. Instead, certain composers eventually did embrace copyright as a form of legal hedge, and it was through this indirect route that they eventually won the struggle over music copyright.

3. Music Sellers and Publishing Music

In contrast to professional musicians and their equivocal response to the Statute of Anne, music publishers appear to have been hostile toward music copyright. At first glance, this response is surprising given that the music sellers' colleagues in the Company of Stationers had been largely

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132. *See* Hunter, *Music Copyright*, *supra* note 77, at 277. Privileges were granted to Handel (1720); William Croft (1724); William Thomson (1733); Handel and Walsh (1739); T.A. Arne (1741); Maurice Greene (1742); John Stanley (1742); Samuel Howard (1744); William Boyce (1745); Thomas Vincent (1748); Count de Saint Germain (1749); Niccolo Pasquali (1750); John Worgan (1755); C.F. Abel (1760); Handel and Walsh (1760); J.C. Bach (1763); Joseph Kelway (1764); John Burton (1766); and J.C. Fischer (1770). *Id.* at 277 n.51; David Hunter, *More Musical Privileges*, *in* 68 MUSIC & LETTERS 210 (1987) (acknowledging H. Watton's contribution in identifying three of these privileges).

133. *See* Hunter, *Music Copyright*, *supra* note 77, at 277. Often composers would give notice of their privileges in music books or through public advertisements. For example, John Worgan, a composer of many songs performed at Vauxhall Garden, included the following notice in an advertisement of his Vauxhall ballads of 1755: "No single balled can be wrote out or printed from this book, the author having been to the expense of obtaining the King's royal licence to prevent the Music shop keepers and others doing him so great an Injury, it being no less than robbing him of his property." John A. Parkinson, *Pirates and Publishers . . .*, 58 PERFORMING RIGHT 20, 21 (1972) (quoting from *The Public Advertiser*, June 26, 1755).

134. I thank Jessica Litman for this observation.

responsible for the invention of copyright. On second look, however, the music publishers' reaction is understandable because they were situated differently from the Stationers, both legally and economically.

Legally, music sellers continued to be eligible for royal printing patents.[135] By the end of the seventeenth century, music publishing had become a distinct subspecialty in the publishing business, and music publications largely were not subject to registration and control by the Stationers.[136] Thus, the lapse of the Printing Act in 1694, which had spurred the Stationers to action, had been something of a boon for music publishers because it reduced the burden of state censorship while leaving the prospect of exclusive economic rights intact.

Economically, music sellers cared less about legal protection than did booksellers because they made most of their income from selling contemporary works for which lead time was more important than exclusive rights for appropriating the value of new music.[137] By contrast, literary publishers relied on their backlists to supply a steady stream of revenues.[138] (Coincidentally, during the period of competition, changes in

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135. Queen Elizabeth had granted the first Letters Patent for music printing in 1575 to the leading composers of their day, William Byrd and Thomas Tallis. *See* GUSTAVE REESE, MUSIC IN THE RENAISSANCE 784-85 (1954). They received a twenty-one-year monopoly on music printing. *See* JOSEPH KERMAN, THE ELIZABETHAN MADRIGAL 258 (1962) ("Tallis and Byrd were given the first privilege for the printing of 'pricksong' in 1575 . . . ."). After ten years, Tallis died, and the privilege was assigned to another publisher, who further sublicensed his publishing rights. *See* REESE, *supra*, at 787; KERMAN, *supra*, at 258. The only line of their business that was profitable, however, was blank music paper for use by the hand copyists. *See* Iain Fenlon & John Milsom, *"Ruled Paper Imprinted": Music Paper and Patents in Sixteenth-Century England*, 37 J. AM. MUSICOLOGICAL SOC'Y 139, 140-41 (1984) ("[T]he Byrd-Tallis patent seems not to have been a commercial success . . . ."). Music publishers faced competition from "scribal" publishers—human copyists—well into the nineteenth century. *See* SCHERER, *supra* note 39, at 161-66 (describing competition between copyists and publishers in Germany); *see also generally* HAROLD LOVE, THE SCRIBAL PUBLICATION IN SEVENTEENTH-CENTURY ENGLAND (1993) (describing the process of scribal literary publication).

For the first half of the seventeenth century, psalm books, covered by a separate patent, were the only profitable line in music publishing, and that patent came within control of the Stationers. *See* Hunter, *supra* note 77, at 270-71. The Byrd-Tallis music patent had been allowed to lapse in 1613. *See* D.W. KRUMMEL, ENGLISH MUSIC PRINTING 1553-1700, 32 (1975) (noting that between 1613 and 1650 scarcely two dozen books were issued that might have come within the scope of the music patent). During the balance of the seventeenth century, individuals sought a royal privilege for only two books containing music, and the music was not an important contributor to either book's economic value. *See* Hunter, *supra* note 77, at 271. George Wither's patent on his HYMNS AND SONGS OF THE CHURCH was controversial because the patent broadly required that Wither's book be bound with every metrical psalm book published. *Id.* Not surprisingly, the Stationers protested and commenced legal action to reconcile Wither's rights with theirs under the psalm-book patent. *Id.*

136. *See* Hunter, *Music Copyright*, *supra* note 77, at 271.

137. *See id.* at 276 (describing the economics of music publishing).

138. *See id.* at 272, 276 (describing the market for book publishing).

printing technology made publishing and distribution of popular music even cheaper.[139]) Music sellers also had reason to be skeptical about the economic value of legal rights. Even when music was subject to a royal printing privilege, music publishers' claims of right did little to thwart unauthorized publication.[140] Even well-established publishers engaged in unauthorized reproduction of previously-published works.[141]

Consequently, success in the music publishing business required speed, an acute sense for changing tastes, and little regard for proprietary claims of rivals or composers.[142] This pattern for success was first established by John Playford, who became the dominant music publisher between 1650 and 1684 because he knew how to cater to the growing middle class audience.[143] New engraving techniques made it economical to publish individual song sheets and to sell them for a few pennies,[144] and by the end of the century, engraving had become the dominant technique for music publishing.[145] Not only did this development make printed music more widely accessible, but it also better served consumers, who previously had been forced to purchase an entire book in order to obtain the one song they truly desired.[146]

During the eighteenth century, the value of printed music continued to increase as Londoners became more wealthy, the size of the national

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139. Printers used a European innovation dating back to 1660 using short, steel rods shaped at one end into musical characters and letters of the alphabet and for the heads of notes, clefs, time signatures, or other symbols, and for the words of songs. *See* SANJEK, *supra* note 57, at 167. Other details were added with etcher's tools. *See id.*

140. *See* Parkinson, *supra* note 133, at 20 ("It is clear that the music shops maintained a well-organised trade in pirated copies, printed or manuscript."); David Hunter, *The Publishing of Opera and Song Books in England, 1703-1726*, *in* 47 NOTES 647, 657 (1991) [hereinafter Hunter, *The Publishing of Opera*] (finding that 10% (18 out of 180) of songbooks published between 1703 and 1726 were republished in "competitive editions," i.e., without authorization of author or first publisher).

141. *See, e.g.*, DOWNS, *supra* note 117, at 22 ("Piracy in publishing yielded profits as great as those from legitimate business, and many respectable publishing houses turned to it from time to time. . . ."); Hunter, *Music Copyright*, *supra* note 77, at 276-77 ("Though some publishers might advertise their disapproval of unauthorized editions . . . the activity was profitable enough for most to practise it.").

142. *See, e.g.*, Adam Carse, THE ORCHESTRA IN THE XVIIITH CENTURY 8-9 (1940) (describing the importance of lead time and arguing that "[i]f any law held good, it was the law of the jungle").

143. *See* MUSIC PRINTING AND PUBLISHING 92 (D.W. Krummel & Stanley Sadie eds., 1990) (describing Playford as "the first great promoter among music publishers" because he "sensed the distinctive spirit of England's middle-class audience").

144. *See* SANJEK, *supra* note 57, at 163; *see also* SCHERER, *supra* note 39, at 159 (describing the evolution of engraving techniques).

145. *See* LORENZO BIANCONI, MUSIC IN THE SEVENTEENTH CENTURY 79 (David Bianconi trans., Cambridge University Press 1987) (1982); SCHERER, *supra* note 39, at 159.

146. *See* SANJEK, *supra* note 57, at 163. The keen reader will notice the parallel between this technological development and the arrival of digital distribution, which also puts pressure on the bundled album format.

population grew, music literacy increased, and the shelf life of printed music increased with the invention of classical music.[147] The story of Handel's publisher, John Walsh, illustrates the bare-knuckles tactics music publishers used to succeed in the early eighteenth century. Walsh entered the market in 1695, when he introduced inexpensive instruction books for instruments found in the home.[148] Using techniques such as employing a set of agents who sent him the latest publications from the Netherlands as soon as they came off the press,[149] Walsh quickly reproduced these and other unauthorized editions for sale in London at considerably lower prices before authorized publishers could offer their editions.[150] Walsh was able to issue new songs on a weekly basis and advertised them as a regular feature in his shop.[151] Most of Walsh's publications were printed without the permission of the composers.[152] Walsh's financial success was due to a combination of good business judgment[153] and the use of less savory tactics, such as misleading advertising, predatory pricing, and "legal manoeuvres" to thwart competition.[154] The strategy bore financial success, as evidenced by the £30,000 value of his estate and the ongoing business taken up by his son who also profited, leaving an estate worth £40,000.[155]

From the functional-materialist perspective, then, it is not surprising that even after the booksellers' investment in copyright legislation paid off, the music sellers chose not to make the investments necessary to transition

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147. *See* SCHERER, *supra* note 39, at 33.

148. *See* SANJEK, *supra* note 57, at 167. Walsh was able to finance his publishing venture in part from income earned as the exclusive supplier of musical instruments to the military. *See id.*

149. *See id.* at 169. Walsh's practice resembled that of other leading publishers, who entered into agreements with composers or patrons through agents who acted both as distributors of already published music and as talent scouts for new music. *See* Sarah Adams, *International Dissemination of Printed Music During the Second Half of the Eighteenth Century*, *in* DISSEMINATION OF MUSIC: STUDIES IN THE HISTORY OF MUSIC PUBLISHING 30 (Hans Lenneburg ed., 1994) ("Many of the larger publishing houses had agents in other cities, both to sell music and to facilitate acquisition of new music to send back for publication."). Publishers also agreed to print each other's catalog locally. *See id.* at 31 ("The evidence that has surfaced thus far suggests that this was a well-developed means of transmission. . . . Publishers in business with one another arranged for the reciprocal sale of publications, exchanged plates, and exchanged each others' engravings, to which they added their own title pages.").

150. *See* Adams, *supra* note 149; MUSIC PRINTING AND PUBLISHING, *supra* note 143, at 101 (describing Walsh's catalog as "songsheets (sometimes collected into periodical series) and works of other publishers which he sold at his shop").

151. SANJEK, *supra* note 57, at 168-69. In 1703, the Walsh catalog boasted ninety-two items and increased dramatically through the years. *Id.* at 169.

152. *See id.* at 170.

153. *See, e.g.*, *id.* at 207 ("Walsh kept in touch with new trends that might affect the business, particularly the rebirth of interest in social dancing."). Using production economies, Walsh was able to diversify his inventory to serve a variety of tastes. *See id.* at 206 (stating that, by 1720, Walsh's catalog included more than 600 editions).

154. *See* Hunter, *Music Copyright*, *supra* note 77, at 273.

155. *See id.* at 275.

from printing privilege to copyright. Moreover, even if the prospect of copyright had been economically attractive, music publishers would have had reason to doubt that they could rely on registration in Stationers' Hall as a means to secure rights. The Statute of Anne applied to "books," and it was uncertain whether Parliament intended the Act to do anything more than regulate literary works.[156] Reinforcing a limited view of copyright's scope is the fact that William Hogarth, a famous artist-engraver, along with others, separately petitioned Parliament for protection for engraved works.[157] Implicit in the petition was a view that engraved works of visual art were not "books" within the meaning of the Statute of Anne, and Parliament apparently agreed because it passed the Engravers' Copyright of 1735 better known as Hogarth's Act.[158] One music publisher apparently believed that the Engraving Act was a closer fit than copyright for music, and he issued warnings citing the Engraving Act in his publications.[159]

Whether the music sellers were irrational in overlooking the Statute of Anne is too hard to judge from this distance in time. The trade-offs for them would have been the benefit of automatic availability of protection under the Statute of Anne weighed against the theoretically increased bargaining power that the Statute would have conferred upon composers. I was unable to find any evidence that music sellers explicitly debated this choice, but from their actions we can infer that they preferred to rely on printing privileges and competitive edge. Music historian David Hunter draws a stronger inference and charges that music publishers "actively denied composers their copyright."[160] What we know is that most music publishers carried on as if the Act did not apply to music and as if composers had no initial entitlement to control reproduction of their work.[161] After passage of the Statute of Anne, very few music publishers registered their works in Stationers' Hall (about two percent of registrations), and those works that were registered tended to be published by letter press or were self-published engraved works.[162]

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156. *See* 8 Ann., ch. 19 (1710).

157. *See* PATRY, *supra* note 75, at 36 n.108.

158. 8 Geo. II, ch. 13 (1735); *see* Hunter, *Music Copyright, supra* note 77, at 278 (describing the Act as protecting only engravers who also were the designers of their prints); David Hunter, *Copyright Protection for Engravings and Maps in Eighteenth-Century Britain*, 9 LIBRARY 128 (1987); PATRY, *supra* note 75, at 36 n.108 (same).

159. *See* Hunter, *Music Copyright*, *supra* note 77, at 278. Although the Act may not have been "tested" insofar as a court may not have ruled on the applicability of the Engraving Act to printed music, in one case the composer Thomas Augustine Arne asserted rights under the Act against music sellers, who joined the issue in their answer. *See infra* Part III.B.3.

160. Hunter, *Music Copyright*, *supra* note 77, at 278.

161. *See id.* at 274 ("As far as the trade was aware, until 1777 music was not protected by the Act of Anne. . . .").

162. *See id.* at 278 (reporting on registrations from 1710 to 1780).

B. *The Struggle for Composer's Copyright*

With the background set, we can see how the struggle for composer's copyright had both material and ideological dimensions. Materially, composers sought greater economic independence and sought a share of the growing publishing revenue stream as a means to achieve that goal. The more successful and better connected composers sought and obtained royal printing privileges for their music rather than asserting rights under copyright. Ideologically, these composers increasingly saw themselves as entitled to reap the financial rewards from their intellectual labor and sought a share of the increasing respect and social standing that other intellectual laborers, such as literary authors, were beginning to enjoy.

These composers soon found themselves in conflict with the London music sellers, who, under the competitive pressures of a relatively unregulated market, were not inclined to respect any claims of royal privilege, whether they be made by rival publishers or composers. Relatively recent research by musicologists and literary historians has revealed that the struggle for composer's copyright played out in a sporadic series of cases during the course of the century and in public advertisements by composers warning against unauthorized publication of their works. The dearth of case law is not surprising. Composers generally lacked the resources and will to pursue litigation, and even publishers who had received a printing privilege relied primarily on their lead-time advantage to profit from publication.[163] The few cases that were litigated offer unique insight into music's conflicted relationship with copyright.

1. *Gay v. Read*

One of the earliest cases brought by an author under the Statute of Anne involved music but did not directly implicate the question of composer's copyright. In 1728, John Gay had composed a sequel to *The Beggar's Opera* entitled *Polly*. Sensitive to Gay's satirical wit, the government censored the work's performance but did not suppress its printing.[164] Gay, recognizing the publicity value of censorship, quickly enlisted a printer, and he self-published a total of 10,500 copies of the music and words bound together.[165] Having no doubt that he was an author, and that his *Polly* was a book within the meaning of Statute of Anne, Gay had the title

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163. *See, e.g.*, Ronald J. Rabin & Steven Zohn, *Arne, Handel, Walsh, and Music as Intellectual Property: Two Eighteenth-Century Lawsuits*, *in* 120 J. OF THE ROYAL MUSICAL ASS'N 112, 116 (1995) ("[T]he popularity of most musical compositions was ephemeral, and the cost of legal proceedings prohibitive, composers and music booksellers rarely engaged in extended court battles.").

164. *See* James R. Sutherland, *Polly Among the Pirates*, 37 MODERN LANG. REV. 291, 291 (1942).

165. *Id.*

entered in the Stationers' Register about the time of first printing.[166] Consistent with the functional-materialist account, the ready profits to be made from satisfying public curiosity about the banned work tempted many booksellers to put Gay's copyright to the test.[167] At least four unauthorized editions of *Polly* were for sale in London within less than a month.[168] Gay quickly filed suit in Chancery and received a preliminary injunction against more than twenty printers and booksellers three months later.[169] Apparently none of the defendants denied that *Polly* was within the subject matter of the Statute of Anne, as defendant booksellers would later do when accused of infringing only musical compositions.[170] With his short lead time, higher quality edition, and the protection afforded by the injunction, Gay managed to clear a £1,000 profit on his publication.[171]

2. *Geminiani v. Walsh*

The earliest case in which a composer may have claimed copyright in solely a musical composition sheds more light on business relations in music publishing than on whether the Statute of Anne supplied a basis for a conceptual shift concerning rights in music. According to an account published in 1776, the composer Francesco Geminiani sued publisher John Walsh, Sr. in 1731 or 1732.[172] Walsh precipitated the action by having surreptitiously obtained a manuscript of an opera by Geminiani.[173] Walsh was set to publish the opera when he decided it could be made more valuable if it incorporated Geminiani's edits.[174] Walsh contacted Geminiani and threatened to publish the manuscript "as is" unless Geminiani corrected it. Geminiani filed suit in Chancery seeking an injunction instead.[175] We do not know Geminiani's legal theory because the case did not proceed very far. Hawkins reports that Walsh "compounded the matter" (i.e., settled the case), and "the work was published under the inspection of the author."[176] Reportedly, Geminiani's distaste from the episode helped propel him to begin engraving and publishing his own

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166. *Id.* at 293 n.4.

167. *Id.* at 291-92.

168. *Id.* at 292.

169. *Id.*

170. Professor Sutherland based his article on his reading of the defendants' answers to Gay's complaint, and he almost certainly would have mentioned any defense that contested Gay's copyright on subject matter grounds.

171. Sutherland, *supra* note 164, at 291.

172. *See* SIR JOHN HAWKINS, 2 A GENERAL HISTORY OF THE SCIENCE AND PRACTICE OF MUSIC 850 (Charles Cudworth ed., Dover Publications 1963) (1853).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* Walsh subsequently published Geminiani's Opera terza and advertised "that he came honestly by the copy." *Id.*

works.[177]

3. *Arne v. Roberts and Johnson*

Thomas Augustine Arne is the first composer known to have asserted rights under the Statute of Anne, however obliquely, in *Arne v. Roberts and Johnson*.[178] Arne is an important transitional figure in the struggle for composer's copyright. He wrote primarily for the theater, becoming the leading English theatrical composer after Handel's death in 1751. Arne wrote pleasing melodies incorporated into many comic and ballad operas and some popular nationalist works. However, his larger ambition to fashion a hybrid of English opera in the "Italian style" generally failed.[179]

By all accounts, Arne was an unpleasant person in both his familial and commercial relations.[180] Some of his prickly qualities, however, also gave him reason to be a risk-taking individual, and consequently, he was both a legal and a commercial entrepreneur. Choosing to be an English theater composer at a time when Italian opera still dominated the London stages was inherently risky.[181] Theater managers paid freelance immigrant composers a sum for their manuscript and a share of the nightly receipts.[182] Freelance English theater composers were lucky to be paid anything for their manuscripts.[183] Arne, for example, received only £60 for his most successful theatrical work, *Artaxerxes*.[184] English theater composers hoped to reap financial rewards through publishing revenues from music made popular on the stage.[185]

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177. *See* ENRICO CARERI, FRANCESCO GEMINIANI (1687-1762), at 24 (1993).

178. Arne's Bill of Complaint, Arne v. Roberts and Johnson, C11/2260/7 London Public Record Office (1741), *reprinted in* Rabin & Zohn, *supra* note 163, at 135-37 [hereinafter Arne's Bill of Complaint].

179. Only one of these works, *Artaxerxes*, succeeded. Interestingly, although Arne positioned himself as a Romantic genius in litigation, his lasting influence was as a compiler. For example, his *Love in a Village* (1762) combined old ballad opera idiom with Italian pasticcio, which brought together arias by a number of composers into one opera and "started a vogue for English pastiche operas that lasted well into the nineteenth century." *See* Holman, *supra* note 131, at 11.

180. *See, e.g.*, MICHAEL BURDEN, GARRICK, ARNE AND THE MASQUE OF ALFRED: A CASE STUDY IN NATIONAL, THEATRICAL AND MUSICAL POLITICS (1994) (suggesting Arne's personality caused conflicts); *see also* Roger Slade, *18th Century English Music, Thomas Arne (1710-1778)*, *at* http://www.rslade.btinternet.co.uk/arne/index.html (last visited July 10, 2005).

181. *See* ROHR, *supra* note 101, at 146.

182. *See id.*

183. *See id.* During most of the eighteenth century, composers had to look to the librettist for payment. *See* FISKE, *supra* note 105, at 262 ("By custom the author was given the takings of the third, sixth, and ninth nights, and out of these he usually had to pay the performers and orchestra as well as his composer."); *id.* at 295.

184. *See id.* at 148; *see also infra* note 257 and accompanying text (describing litigation involving unauthorized publication of *Artaxerxes*).

185. *See* ROHR, *supra* note 101, at 146; Hunter, *The Publishing of Opera*, *supra* note 140, at 647, 655 (stating that composers began to sell opera scores to publishers in the early eighteenth

Arne self-published and, therefore, had particular reason to guard his publishing revenues from unauthorized reproduction. Moreover, he was unusually well equipped to do so. Growing up as a member of the "middling sort,"[186] Arne had been positioned to pursue one of the practical professions. His father had directed him toward a career in law, and he spent three years as an apprentice.[187] During his apprenticeship, however, Arne pursued musical training on the sly.[188] After discovering his son conducting an amateur group, Arne's father relented and allowed him to pursue his vocation.[189]

Arne readily put his legal training to use, for he was notoriously litigious.[190] As a composer and a businessman with legal training, Arne was in a unique position to pursue the cause of composer's copyright. He did, although his chosen means indicates the uncertain relation between printed music and the Statute of Anne. As his own publisher, Arne could have asserted rights simply by having the titles of his new works entered into the Stationers' Register. He did not do so and instead petitioned the Crown for a royal privilege, which he received in January 1741.[191] The privilege for fourteen years extended to "'several Works, Consisting of Vocal and Instrumental Musick'" composed with "'great Study, Labour and Expence.'"[192] Arne then placed an advertisement warning that "the author has procur'd his Majesty's royal license for the sole printing and publishing of his works, whoever shall print or sell any Work of the author's without his approbation or consent, will be prosecuted according

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century); (describing process and prospects of obtaining publishing income for theater composers). The unreliable nature of publishing income forced many composers to find other sources. Like many composers and musicians, Arne taught music. *See* ROHR, *supra* note 101, at 147.

186. *See* ROHR, *supra* note 101, at 7 (explaining the social hierarchy of professions and professionals in eighteenth-century England).

187. *See* Slade, *supra* note 180 (describing Arne's early career).

188. Arne took private violin lessons, practiced on a spinet with muffled strings, and attended the opera dressed as a servant. *See* ROHR, *supra* note 101, at 26 (quoting C.F. ABDY WILLIAMS, A SHORT HISTORICAL ACCOUNT OF THE DEGREES IN MUSIC AT OXFORD AND CAMBRIDGE, WITH A CHRONOLOGICAL LIST OF GRADUATES . . . FROM THE YEAR 1463, at 87-88 (1894)).

189. *Id.* Musical inclination must have been strong in the family, for Arne's sister, Susannah Cibber, also became a well-known singer. *See, e.g.*, Slade, *supra* note 180.

190. *See* Rabin & Zohn, *supra* note 163, at 117 ("'[A]ll the [theatre] managers knowing [Arne] to be a more regular bred attorney than Musician, took care to tie him neck & heels in all contracts otherwise he [would] not have been kept honest by his own principles & probity.'") (quoting ROGER LONSDALE, DR. CHARLES BURNEY 18 (1965)). Arne also was a defendant in a copyright case. *See generally* Judith Milhous & Robert D. Hume, *Librettist v. Composer: The Property Rights to Arne's* Henry *and* Emma *and* Don Saverio, 122 J. OF ROYAL MUSICAL ASS'N 52 (1997) (describing the case in which Arne borrowed six-line lyric).

191. *Id.*

192. *Id.* (quoting VOCAL MELODY: AN ENTIRE NEW COLLECTION OF ENGLISH SONGS AND A CANTATA, at i (1749)); Arne's Bill of Complaint, *supra* note 178, at 135.

to law."[193]

London music publishers Henry Roberts and John Johnson each had published some of Arne's works immediately prior to the issue of the privilege (and Johnson published a few immediately thereafter), and both continued to sell their publications after having notice of Arne's privilege.[194] The works in suit were eight songs, six from Arne's popular masque (the English version of ballet) *Comus*, and two from his incidental music to Shakespeare's *As You Like It*.[195]

We do not know the outcome of the case because Arne apparently did not pursue it to judgment. The pleadings demonstrate that Arne, relying principally on his royal privilege, hedged his position by also asserting claims under the Statute of Anne and the Engraving Act.[196] With regard to Arne's claim under his privilege, Roberts and Johnson questioned the continued legitimacy of the royal printing privilege by refusing to admit that Arne had any legal rights thereunder.[197] Even if Arne had such rights, they argued that those rights were prospective, applying only to publications printed after the privilege had been issued and not to subsequent sales of previously printed editions.[198] Because they had printed their versions of Arne's songs prior to the grant of privilege, Roberts and Johnson "insist[ed] that nothing which was done by these Defendants or by either of them before that day can be deemed an Infringement of any right thereby granted to the Complainant."[199]

In response to Arne's assertion of statutory rights, Roberts and Johnson argued that (1) neither the Statute of Anne nor the Engraving Act applied to printed music;[200] (2) if either Act did apply, Arne's suit was barred because he had failed to follow the required procedures under each Act;[201]

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193. Parkinson, *supra* note 133, at 20 (quoting *London Daily Post, and General Advertiser*, Mar. 9, 1741).

194. *See* Rabin & Zohn, *supra* note 163, at 117-18.

195. *See id.* at 119. Roberts had published some of these without Arne's consent between August 1739 and January 1741 in a serial song collection entitled *Calliope or English Harmony*. Johnson published some of Arne's songs from *Comus* and *As You Like It* as single sheets before and after Arne had received his privilege. *Id.*

196. *See* Arne's Bill of Complaint, *supra* note 178, at 135-37.

197. *See* Answer of Roberts and Johnson, Arne v. Roberts and Johnson, C/11/2260/7 London Public Record Office (1741), *reprinted in* Rabin & Zohn, *supra* note 163, at 140 [hereinafter Answer of Roberts and Johnson].

198. *See id.*

199. *Id.*

200. With regard to the copyright claim, they answered: "[T]he Musick [sic] and Songs published by the Complainant are not such Books as are by the said Act intended to be preserved to the Author for the Encouragement of Learning. . . ." *See* Answer of Roberts and Johnson, *supra* note 197, at 139. With regard to the Engraving Act claim, they responded that the Act applied only to "Historical and other prints in Mezzotinto or Chiaro Oscuro and not to Musick [sic], Songs or Ballads. . . ." *See id.*

201. With regard to the copyright claim, they alleged that Arne had not entered his copyright

and (3) even if Arne had complied with procedural prerequisites, the three-month limitations period had run under both statutes.[202]

4. Other Equity Actions

By the early 1770s, the pressure to resolve the question of music copyright had begun to grow. Nancy Mace, having searched London's Public Record Office, has identified four equity actions after Arne's that implicated the question of music copyright.[203] In three of these, the librettist Isaac Bickerstaff sued to enjoin publication of music from two of his operas.[204] In the first, Bickerstaff sued over an unauthorized print run of 1,500 copies of songs, adapted for German flute, from his comic opera, *Maid of the Mill.*[205] Bickerstaff alleged that the defendant had received profits of more than £150.[206] In his complaint, Bickerstaff lied and claimed to have composed and adapted the music himself, apparently believing these allegations necessary to maintain an action.[207] Changing tacks, in his latter two suits Bickerstaff claimed to have acquired rights through an employment relationship because he had had his libretto for *The Padlock* "set to Musick under his own directions and instructions" and had arranged to have the music "engraved printed and published as a separate work and distinct from the said Comic Opera under the Title of The Padlock a Comic Opera."[208]

Consistent with the functional-materialist account, we see the rising value of private performance, as reflected in the sale of popular songs adapted for use in the home, which inspired composers and publishers to invest greater resources in litigation over the rising surplus. The plaintiffs in these actions increasingly came to rely on the Statute of Anne as the source of exclusive rights. In the last of the suits identified by Mace, the music seller John Johnson, who had denied the existence of music copyright when defending the action brought by Arne, asserted rights possibly under the Statute of

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in the Stationers' Register and had not deposited the required nine copies. *See id.* With regard to the Engraving Act claim, they alleged that Arne had not engraved his name on each plate or had not printed it on each print. *See id.*

202. *See id.* at 139-40.

203. *See generally* Nancy A. Mace, *Music and English Copyright before 1773: Applications of the Act of Anne to Music Before* Bach v. Longman, Lecture for the Society of the History of Authorship, Readers, and Publishers (July 17, 2001) (unpublished lecture, on file with author).

204. *See id.* at 2-6.

205. *See id.* at 2-3.

206. *Id.*

207. *See id.* at 3, 5 (asserting that it was well known that Samuel Arnold was the composer).

208. *Id.* at 6-7. In his complaints, Bickerstaff was vague about the source of law on which he relied. *Id.* He did not name the composer, the popular Charles Didbin, nor did he assert that he had received a written assignment of copyright from Didben as the Statute of Anne required. *Id.* He did, however, appear to rely on the act by expressly waiving any claims for statutory damages, as was common to do in equity suits under the Act. *See id.* at 7.

Anne.[209] He sued the harpsichordist Robert Falkener for printing music by Arne and Didbin to which Johnson claimed to have purchased the rights from the composers, evidenced by written receipts. Without hearing from Falkener, the court issued a preliminary injunction until Falkener answered the complaint. Falkener let the matter drop.[210]

5. *Pyle v. Falkener*

One reason Falkener may have done so is that he was embroiled in a different suit, one which may well be the first in which a court awarded permanent relief for infringement of music copyright. In *Pyle v. Falkener*,[211] John Pyle, a surgeon, filed suit in his capacity as sole executor of music publisher John Walsh, Jr.'s estate against Falkener for unauthorized publication of a variety of profitable works, seeking an injunction and an accounting of Falkener's profits from infringing sales.[212] As executor, Pyle's role was simply to liquidate the assets of the estate, ultimately valued at £40,000.[213]

Walsh, Jr. had acquired by contract manuscripts from many of the most popular composers of the day, including Thomas Arne, Maurice Green, Isaac Bickerstaff, and George Frideric Handel.[214] Some of the works by Handel had been published more than twenty-eight years prior to Falkener's publication, which meant that they could not be protected by the Statute of Anne. But, Walsh, Jr. had obtained a royal privilege in 1760 that extended to a broad range of Handel's vocal and instrumental works.[215] The scope of the privilege was broader than the rights granted by the Statute of Anne because it included a prohibition on abridgment as well as on republication and distribution of copies of the protected works.[216]

Filing the suit in 1771, Pyle relied on royal privilege, common law copyright, and, perhaps, the Statute of Anne as the legal bases for his complaint.[217] With respect to the claim for common-law copyright, Pyle

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209. *See id.* at 8-9.

210. *See id.*

211. Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Rabin & Zohn, *supra* note 163, at 140.

212. *Id.* at 142.

213. *See* Hunter, *Music Copyright*, *supra* note 77, at 273.

214. The works in suit were excerpts from Arne's opera, *Thomas and Sally*, Arne and Bickerstaff's opera, *Love in a Village*, Greene's *Six English Songs six Overtures for ye Violins in eight parts*, and eleven of Handel's works, including five of his by-then-canonical oratorios. For the full listing of the works in suit and the dates of Walsh's contracts with the composers, see Rabin & Zohn, *supra* note 163, at 127-29.

215. *See id.* at 130. Walsh had received an earlier privilege covering Handel's work that had expired seven years earlier. *Id.*

216. *Cf.* 8 Ann., ch. 19 (1710).

217. *See* Rabin & Zohn, *supra* note 163, at 130-31.

sought a stay in 1773 to await the outcome in *Donaldson v. Beckett*.[218] After *Donaldson* laid perpetual copyright to rest, there was little doubt that the common-law claims had been nullified.[219] The Statute of Anne was the only remaining basis for the claims concerning the works by Arne, Green, and Bickerstaff.

With respect to Walsh's printing privilege, Falkener argued that it had been fraudulently obtained because all of the works covered by it had been published previously.[220] Falkener denied liability for the other works on the grounds that Bickerstaff had not composed the music attributed to him and that musical compositions were not copyrightable.[221] The opinion is an enigma because after a long recitation of the facts and arguments before him, Lord Apsley expressed no opinion on the merits other than by entering a partial judgment in Pyle's favor, granting him an injunction with respect to the works of Handel, Arne, and Bickerstaff.[222] The most reasonable inference from the court's ruling is that the privilege was enforceable with respect to the works by Handel, and the Statute of Anne applied to the remaining works.[223] By refusing to grant relief for the works composed by Green, written sometime prior to their assignment in 1744,[224] the court essentially declared these to be in the public domain.

C. *Composer's Copyright*—Bach v. Longman

The increasing economic value of printed music suggests one reason why composers invested in litigation against publishers; but, for present purposes, the question is whether an increase in the value of printed music inspired investment in litigation or lobbying to bring music within the Statute of Anne. The evidence is mixed. The lawsuit brought by Johann Christian Bach and Karl Friedrich Abel that ultimately led to resolution of the struggle for composer's copyright in England was not filed originally for that purpose.

Bach and Abel were immigrant entrepreneurs drawn to London's growing markets for music. Bach was the youngest son and eighteenth child of Johann Sebastian Bach. After having been taught and launched into a musical career by his father and older brother, Carl Phillip Emmanuel Bach, Johann Christian went to Italy, where he ultimately

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218. *See supra* notes 88-96 and accompanying text (describing the Battle of the Booksellers and *Donaldson*).

219. The judge in *Pyle* was Lord Chancellor Apsley, who had been one of the vocal Lords opposed to perpetual common-law copyright. *See* Rabin & Zohn, *supra* note 163, at 131-32.

220. *See id.* at 130.

221. *See* Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Robin & Zohn, *supra* note 163, at 144 (reciting defenses in Falkener's answer).

222. *See id.* at 145.

223. *See* Rabin & Zohn, *supra* note 163, at 132.

224. *See id.*

served as organist to the Milan Cathedral in 1760.[225] Two years later he traveled to London, where he became known as the "English" Bach to distinguish him from his distinguished father and siblings.[226] He served as music master to the Queen of England, in which capacity Bach befriended the child prodigy, Wolfgang Amadeus Mozart, who had come to perform for the Queen and who admired and was influenced by Bach's compositional style.[227] Bach composed "serious operas" and "delightful arias," making him a popular composer in London.[228] Abel was a composer and renowned performer on the viola da gamba. Having studied with Bach's father earlier in life, Abel moved to London in 1759, where he became chamber musician to the Queen.[229]

Among their entrepreneurial activities, Bach and Abel launched in 1765 what became the most popular concert series of the day at Vauxhall Gardens.[230] Initially, they enjoyed economic and social success. With respect to music publishing, each composer had obtained a printing privilege from the English Crown for his respective music.[231] Both men had come into conflict with the publishing firm Longman & Lukey.[232] This conflict occurred during a period when both men were enjoying financial success.[233] By agreement, Bach filed the suit against Longman in Chancery, seeking injunctive relief based on his royal printing priviliege, which had

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225. *See id.* Within the Bach family, the women generally gave up their careers when they wed. The exception was J. C. Bach's wife, the soprano Cecilia Grassi, who had a long professional career. *See* Barbara Garvey Jackson, *Musical Women of the Seventeenth and Eighteenth Centuries*, *in* WOMEN & MUSIC: A HISTORY 99 (Karen Pendle ed., 2001).

226. *See* KARL GEIRINGER, THE BACH FAMILY: SEVEN GENERATIONS OF CREATIVE GENIUS 409, 411 (1954) (stating that Bach traveled to England in 1762 and served as music master to Queen Charlotte). Apparently due to his time spent in London, Johann Christian Bach became known as the London, or English, Bach. *See id.* at 418, 442.

227. *See id*. at 411-12. In his first year under the employment of Queen Charlotte, J. C. Bach arranged for the appearance of both Wolfgang Amadeus Mozart and his sister, Nannerl, at Buckingham House. *Id.* at 411. Bach was to become friends with the prodigal Mozart, and together, they would perform musical stunts that endeared them to their audiences. *Id.* For instance, Bach would have Mozart on his lap while they played the harpsichord together, and they would either alternate every other bar, or would compose fugues, with Bach starting and Mozart completing. *Id.* at 411-12.

228. *See* GEIRINGER, *supra* note 226, at 412-13.

229. *Id.*

230. *See* MCVEIGH, *supra* note 55, at 14-15; SCHERER, *supra* note 39, at 59.

231. *See* Hunter, *Music Copyright*, *supra* note 77, at 278-79.

232. Longman had been apprenticed to John Johnson and had purchased the right to use his trademark, the Harp and Crown. *See* John Small, *J.C. Bach Goes to Law*, 126 MUSICAL TIMES 526, 526 (1985).

233. In 1773, when Bach filed his suit, he had £4,000 in the bank. SCHERER, *supra* note 39, at 175 (citing HEINZ GÈARTNER, JOHN CHRISTIAN BACH: MOZART'S FRIEND AND MENTOR 299 (Reinhard G. Pauly trans., 1994)).

longer to run than Abel's.[234]

1. *Bach v. Longman*

Bach's royal privilege was the legal basis for his suit, but he understood that this foundation was eroding.[235] One would have expected Bach to hedge his legal risk, as Arne had done previously, by adding claims under the Statute of Anne and common-law copyright. However, Bach's lawyer filed two bills of complaint, both of which relied principally on Bach's printing privilege and possibly on a claim of common-law copyright but made no mention of the Statute of Anne.[236]

During the pendency of the lawsuit, Bach and Abel changed strategy and made specific investments designed to bring music within the Statute of Anne. The case was moving slowly. When the House of Lords decided *Donaldson* in 1774, Bach saw his common-law claims effectively denied. Bach and Abel responded with a two-pronged strategy: they pursued the lawsuit while also joining the London booksellers in petitioning Parliament to overturn *Donaldson*. Specifically, Bach and Abel's petition sought clarification that musical compositions were within the scope of the Statute of Anne.[237] This was the first investment by professional composers aimed specifically at rendering music copyrightable. The legislative effort failed.

In the lawsuit, Bach also changed his strategy. At the hearing on his first bill of complaint, held more than three years after it had been filed and well after *Donaldson* had been decided, Bach's counsel apparently introduced the Statute of Anne as a new basis for granting the relief requested.[238] Rather than ruling on the merits, the Chancellor certified to

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234. *See* Hunter, *Music Copyright*, *supra* note 77, at 279.

235. *See* Small, *supra* note 232, at 527 (asserting that "[t]he grounds available to Bach for an action for breach of musical copyright therefore comprised an act which might not apply to music, a common law right which some lawyers claimed did not exist, and a royal privilege which the Crown may have had no power to grant").

236. *See id.*

237. Bach and Abel's petition read:

> [A] Doubt has arisen, whether the sole Right granted by the said Act, to the Author of any Book or Books, extends to the Author of any Book, Writing or Composition in Music: And therefore praying, that Provision may be made, for obviating such Doubt; and that they may have such Relief in the Premises as to the House shall seem meet.

Id. at 528 (quoting petition); *see also* Hunter, *Music Copyright*, *supra* note 77, at 279 (discussing the petition). Parliament appears to have been unmoved by the petition. Hunter reports that the official record from the committee hearing was not in petitioners' favor, and "[a]s no recommendations by the Committee concerning music were reported and no motions were put before the House, we must assume that the legislators were satisfied with the status quo." *Id.*

238. *See* Small, *supra* note 232, at 528 ("Bach's counsel argued that music was a form of

the Court of King's Bench the question of whether a musical composition was "within" the Statute of Anne.[239] That court responded with a short opinion authored by Lord Mansfield certifying that "a musical composition is a writing within the Statue of the 8th of Queen Anne,"[240] resolving sixty-seven years of doubt on this issue.[241]

Bach and Abel probably did not realize a positive return on their investments in litigation and lobbying. Apparently, Longman and Lukey settled the case after the Chancellor had issued a permanent injunction and had ordered an accounting[242] because in 1779 Longman published two songs written by Bach for performance at Vauxhall Gardens.[243] Bach's fortunes had turned during the pendency of the suit. The Bach and Abel concert series had become a financial albatross because the rent had been trebled, a move to another location had failed to attract sufficient audience interest, and the cost of Bach's subsequent purchase of a performance space at Hanover Square could not be recouped.[244] Abel withdrew from the partnership, leaving Bach to answer for their debts.[245] In 1782, Bach died a debtor, and creditors attempted unsuccessfully to seize his body for sale to medical schools.[246] Doubts also surround whether other composers benefitted immediately from the decision. According to F.M. Scherer, the availability of composer's copyright in England did not serve as a sufficient incentive to attract composers living in countries, such as Germany, that still did not recognize such a right.[247]

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writing within the meaning of the copyright act. . . .").

239. *See* Bach v. Longman, 98 Eng. Rep. 1274, 1275 (K.B. 1777).

240. *Id.* at 1275 (emphasis added). The importance of the development of musical notation as a precursor to copyright in music should be clear; it is only because music fits within the meaning of a protected "writing" that Mansfield declared it within the scope of the Act. *Cf.* U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant to authors the exclusive right to their "Writings").

241. The case also established an important territorial principle in relation to copyright—the rights under the Statute of Anne were not conditioned on the nationality of the author or composer so long as he or she was resident in England. *See* Hunter, *Music Copyright*, *supra* note 77, at 280. As had been the case under the privilege system, however, non-resident foreign composers had no standing to complain about British republication of works first appearing on the Continent. *See* DOWNS, *supra* note 117, at 22 (1992) (referring anachronistically to the unauthorized British republication of works by Continental composers as "[p]iracy").

242. For the final order in the case, see Small, *supra* note 232, at 529.

243. *See* Small, *supra* note 232, at 529.

244. *See* SCHERER, *supra* note 39, at 59-60.

245. *Id.* at 60.

246. *See id.* at 175.

247. *See id.* at 195; *see also id.* at 194-96 (hypothesizing that "[t]he evolution of copyright from an occasional grant of royal privilege to a formal and eventually widespread system of law should in principle have enhanced composers' income from publication," and finding that incentive effects for invention of music copyright are unproven).

2. Publishers Embrace Copyright

Within music publishing, however, the consequences of *Bach* were far-reaching. By bringing published music within the sphere of copyright, the decision regularized the means for obtaining and enforcing rights, and it established that these rights uniformly would be limited to the statutory period rather than subject to the ad hoc duration of printing privileges. Accepting their defeat, music publishers came to see registration at Stationers' Hall as beneficial because it served as proof of publication.[248] Records from the registers of the Stationers' Company show that, between 1700 and 1779, there were 175 music titles registered.[249] From 1780-1789, that number grew to 738, and it more that doubled in the decade following.[250]

Publishers also quickly warmed to copyright as a tool to guard their profits. Shortly after *Bach*, Longman & Lukey reversed its litigation stance and began suing upstart publishers under the Statute of Anne.[251] As Nancy Mace relates, two London booksellers sought to serialize music publishing in a novel publication—the *New Musical Magazine*.[252] In a telling advertisement, they announced their goals to print "every Piece of Music worth preserving" from English and foreign "celebrated composers" along with a music dictionary explaining not only "every word used in this Divine science, but even the true principles of the science itself; including the rules for composition."[253]

Longman & Lukey sued the upstarts in what fairly clearly was a nuisance action.[254] The defendants claimed that the suit had been brought

> not so much for any real Value in the Opera in Question but to destroy a publication of which it composed but a small part because it is considered as inimical to the Interest of Music Sellers in general who these Defendants say have long enjoyed a most shameful Monopoly with little or no advantage to Men of Genius or their families.[255]

Longman chose not to pursue the action further, and the bill was

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248. *See* Hunter, *Music Copyright*, *supra* note 77, at 280 (discussing the impact of *Bach*).

249. *See id.* at 281 tbl.1.

250. *See id.*

251. *See* Nancy A. Mace, *Litigating the* Musical Magazine*: The Definition of British Music Copyright in the 1780s*, *in* 4 BOOK HISTORY 122-23 (Ezra Greenspan & Jonathan Rose eds., 2001).

252. *See id.*

253. *See id.* at 125-26 (quoting an advertisement from *The Morning Chronicle*, Oct. 25, 1783).

254. *See id.* at 126-27 (quoting PRO E112/1690/3452 London Public Record Office (1772)).

255. *See id.* at 135 (quoting PRO C33/462/9 London Public Record Office (1772)). There is some irony in Harrison and Drury now championing the rights of "Men of Genius" when in all likelihood they had been opponents of composers' rights in the run-up to *Bach*. *See id.*

dismissed.[256] Other publishers successfully brought an action in Chancery under the Statute of Anne to enjoin distribution of the first issue of the *New Musical Magazine* because it included portions of Arne's *Artaxerxes*, for which the plaintiffs had purchased the rights.[257]

The functional-materialist account of intellectual property's evolution finds some support for its prediction of how copyright would be extended to music, but the evidence does not fully conform to the theory's predictions. Certainly, composers who brought suit to assert and enforce publication rights did so out of a desire to obtain a greater share of the wealth generated by publication of their music.[258] Certainly, defendant publishers resisted composer's copyright because it would have raised costs and reduced profits.[259] But, while the desire to acquire greater wealth was certainly one motivation for composers, another was the desire to gain control over how and when their works would be communicated to the public.[260] Even the desire for wealth was not solely to serve material self-interest, for the acquisition of wealth had symbolic significance and professional musicians dearly wished to be regarded as members of the professional classes.[261]

Functional-materialist theories also have difficulty explaining the absence of any attempt to create a public performance right by either composers or publishers. Increases in publication revenues are not the only evidence for the rising value of music as a resource in eighteenth-century England because the invention and growth of commercialized public performances also created a visible revenue stream.[262] Why did composers or publishers not seek exclusive rights in public performance of

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256. *See id.* at 128 (citing PRO E127/48/Michaelmas 1786/257 London Public Record Office (1772)).

257. *See id.* at 121-22. The Thompsons did not enter their copy in the Stationers' Register until four days prior to the November 1783 publication of Issue Number 1 of the *New Musical Magazine.* Nonetheless, the Thompsons had put Harrison and Drury on clear notice of their claim of right prior to publication, and Harrison and Drury proceeded. *See id.* at 141-43 (tracing chain of title in *Artaxerxes* copyright).

258. *See*, *e.g.*, Hunter, *Music Copyright*, *supra* note 77, at 275 (describing composers' attempts to gain a greater share of publication revenues); FISKE, *supra* note 105, at 263 (describing Arne's desire to increase his share of profits).

259. *See* Hunter, *Music Copyright*, *supra* note 77, at 276-77 ("Though some publishers might advertise their disapproval of unauthorized editions . . . the activity was profitable enough for most to practise it.").

260. For example, Bach's second bill of complaint emphasized not only his economic injury, but also reputational and artistic injury because Longman & Lukey had adapted his work for instruments not intended by him. *See* Ann Van Allen-Russell, '*For Instruments Not Intended': The Second J.C. Bach Lawsuit*, 83 MUSIC & LETTERS 3, 5, 8-9, 21-22 (2002) (quoting Bach as complaining that his compositions were "very Ignorantly and, Much to the Discredit of this Deponent as a composer, adapted to and for Instruments not intended by this Deponent").

261. *See* ROHR, *supra* note 101, at 164-65.

262. *See supra* note 185.

their music as the basis for claiming a share of performers' revenues?

The efficiency strand of the functional-materialist account would require evidence that composers or publishers could not feasibly or efficiently have directly appropriated value from others' performance of their music by enforcing rights and granting performance licenses.[263] The political economy strand would require evidence that no interest group had sufficient organizational clout to advocate for property rights in public performance. Alternatively, it may have been possible to extend property rights to other inputs, such as sheet music, and then adopt a pricing strategy for those inputs that would allow composers and publishers to appropriate some of the value generated by professional performance of their music. While we do not have enough evidence to fully assess the success of either approach, a more convincing approach appears to be an intellectualist account according to which composers and publishers had not come to see the intangible musical work as the resource that could be the subject of property rights because they still had a more limited conception of printed music as the resource that appropriately could be the subject of exclusive rights.

D. *Intellectual Themes from the Struggle*

Consequently, it is important to also recognize changes in the conceptual environment that took place during the struggle for composer's copyright. With respect to composer's copyright in printed music, an intellectualist account would focus on the power of the author's right as an organizing principle in relation to communicating in print, and more specifically on extension of that concept to communicating musical expression in print. The concept of author's rights was not invented by the English Parliament. Rather, the Statute of Anne gave government sanction to a concept for which various authors had contended for some time.[264] Recent scholarship has drawn increased attention to the development of this concept.[265] Less well recognized is that some composers also had asserted claims of author's rights well before the invention of copyright.[266]

A full analysis of the conceptual developments leading to composer's copyright is beyond the scope of this Article, but from the few reported

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263. This explanation would have to contend with the fact that the practice of paying composers to supply new works for concert performance was established with Joseph Haydn. *See* MCVEIGH, *supra* note 55, at 169-70 ("The concept of star orchestral composer was unwittingly invented by Haydn, who was offered generous inducements to travel to London.").

264. *See*, *e.g.*, ROSE, *supra* note 29, at 25 (explaining that in seventeenth-century England "there may have been some feeling that authors should have the right to control the first publication of their writings" but that the law offered no form of redress in cases of publication without the author's permission).

265. *See* LOEWENSTEIN, *supra* note 29, ch. 1.

266. *See* Carroll, *supra* note 23, at 1482-83 (telling the story of Orlando di Lasso).

decisions, we can identify certain conceptual uncertainties about author's rights that informed the struggle. These are as follows: (1) whether composers were authors endowed with a property right under either common-law copyright or the Statute of Anne; (2) whether published musical compositions were books protected by the Statute of Anne; and (3) whether or under what conditions musical compositions entered the public domain.

1. Composers as Authors

Mark Rose has elegantly described and analyzed how the discourse of Romantic authorship influenced and intersected with the legal discourse of copyright under the Statute of Anne.[267] Within that setting, the question of whether musical composers were statutory authors highlights similarities and important distinctions between those who composed literature and learned works and those who composed music. The most salient similarity of course was that musical composers, like literary composers, engaged in an intellectual process of communication by rendering ideas in symbols capable of being read on paper. But in three important respects, these groups were distinct: literary authors enjoyed higher social status and wealth than musical composers,[268] the process of composing music was more perceptively derivative than was literary composition,[269] and the social role of music as entertainment was less valued than the contribution to learning that literature made.[270]

In the struggle for composer's copyright, the question of authorship arose repeatedly. As a conceptual matter, the defendant publishers appear to have conceded that musical composers could be authors within the Statute of Anne.[271] For example, in *Arne*, Arne asserted that he was an author by natural right.[272] In their answer, Roberts and Johnson referred to the creator of music alternatively as "[a]uthor, [i]nventor, or

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267. *See generally* ROSE, *supra* note 29, ch. 7.

268. *See*, *e.g.*, ROSE, *supra* note 29, at 58-59 (discussing the disposition of "[p]olite authors" and Alexander Pope's unique status).

269. *See*, *e.g.*, FISKE, *supra* note 105, at 274 (stating that borrowed music can be found in about three out of four operas after 1762); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. (forthcoming 2006) (discussing evolution of musical borrowing practices from eighteenth-century England to present).

270. *See*, *e.g.*, CHARLES BURNEY, 1 A GENERAL HISTORY OF MUSIC 21 (Dover 2d ed. 1957) (1789) ("Music is an innocent luxury, unnecessary, indeed, to our existence, but a great improvement and gratification of the sense of hearing.").

271. *See, e.g.*, *infra* notes 274-75 and accompanying text.

272. According to Arne, "having with great Study, Labour and Expense Composed several Works Consisting of Vocall and Instrumentall Musick, [he] *became Intitled thereby to the sole property therein*, and the same ought not to have been Printed, Published, uttered or sold" without his permission. *See* Arne's Bill of Complaint, *supra* note 178, at 135 (emphasis added). In his telling, he sought the royal privilege "the better to Estabilsh his property to the same." *Id.* at 135.

[c]omposer,"[273] and they did not seriously dispute that a composer of music was an "author" as that term is used in the Statute of Anne.[274] Similarly, in *Pyle*, the defendant appears to have conceded that if Isaac Bickerstaff had written the music in question, he had a right to enter both works in the Stationers' Register "so as to Ascertain his property as the Author of [the] said Opera, pursuant to [the] said Statute made in the eighth Year of Queen Anne."[275]

Frequently, however, the publishers suggested that authorship of music required a high standard of originality to qualify for protection under any legal theory. Roberts and Johnson suggested that Arne may have only re-arranged "some old Songs made by Shakespear [sic] and other Authors."[276] Falkener similarly defended with respect to the Bickerstaff opera, claiming that he did not know of any "New Tunes or New Music" that Bickerstaff had composed and instead he had relied on "Old Tunes which had been Used in Common by all persons for many years before the said Isaac Bickerstaff wrote the said Opera."[277]

The record reveals one other glimpse of Arne's understanding of author's rights. In public advertisements, Arne complained about publication of compositions falsely attributed to him.[278] Free-riding off the reputation of a famous composer had been a part of music publishing since the Renaissance,[279] and it was a practice about which successful composers had been particularly bitter. In an advertisement published by Arne after his printing privilege had expired, he announced that two or three songs had been "imposed on the Public" that "were not the Doctor's Music, but Things vilely trumped up for the Unskilful."[280] He pledged to register his works in Stationers Hall so that he might sue future perpetrators.[281]

This threat is revealing. Recall that Arne had received some legal training, and he undoubtedly was both a business and legal entrepreneur.[282] The conception of author's rights evinced by his threat went well beyond the statutory text if Arne genuinely understood the Statute of Anne to

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273. *See* Answer of Roberts and Johnson, *supra* note 197, at 137.

274. *Id*. at 139.

275. Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Rabin & Zohn, *supra* note 163, at 144.

276. Answer of Roberts and Johnson, *supra* note 197, at 137.

277. Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Rabin & Zohn, *supra* note 163, at 144. Falkener alleged that Bickerstaff was the putative author of both *Thomas and Sally* (rather than Arne) and *Love in a Village* (co-authored with Arne). *Id.*

278. *See infra* note 280 and accompanying text.

279. *See* Carroll, *supra* note 23, at 1480.

280. *See* Rabin & Zohn, *supra* note 163, at 125 (quoting from *The Public Advertiser*, Jan. 27, 1761).

281. *See id.*

282. *See supra* notes 180-81 and accompanying text.

supply a cause of action against palming off.[283] Indeed, under contemporary American copyright law, attribution disputes are deemed to be trademark rather than copyright issues.[284]

2. Whether Musical Compositions Were Protected "Books"

The question of whether printed musical compositions were "books" appears to have posed the greatest conceptual hurdle for composer's copyright. Understood literally, a book described sheets produced by letter press printing that have been bound together. In the eighteenth-century, the exclusive rights afforded by printing patents and the Statute of Anne generally applied to rights to print and sell such objects. The notion that copyright might apply to some intangible work reflected in material copies had only begun to germinate. A celebrated case brought by Alexander Pope established that copyright extended to an author's private letters and that the author retained ownership of publication rights even if the letters belonged to the recipient.[285] This distinction between intangible and tangible properties remains a critical one for copyright law and may well be the most important part or aspect of the case's legacy.[286]

We can see doubts about whether sheet music could qualify as a book in the manner in which Arne pursued his case. As a self-styled author, he should have been able to rely on the Statute of Anne by registering his

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283. As Mark Rose discusses, Alexander Pope similarly mixed the discourses of property and propriety in the preface to Pope's 1737 publication of his correspondence, in which he railed against booksellers for filling out a volume with material penned by another so that the author has "not only Theft to fear, but Forgery." Mark Rose, *The Author in Court*: Pope v. Curll (1741), *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 211, 219 (Martha Woodmansee & Peter Jaszi eds., 1994) (quoting 1 ALEXANDER POPE, THE CORRESPONDENCE OF ALEXANDER POPE, at xl (1956)). The circumstances of Pope's complaint were laden with disingenuity, as he had contrived to have his letters published by another so as to supply a gentleman with the predicate for issuing an authorized version of his private correspondence. *See id.* at 216-17.

284. *See*, *e.g.*, Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademark Law*, 41 HOUS. L. REV. 263, 265 (2004).

285. *See* Rose, *supra* note 283, at 211; *cf.* Denis v. Leclerc, 1 Martin (O.S.) 297 (La. 1811) (deciding the issue on privacy grounds). I thank Anuj Desai for this comparison.

286. Two other features of the case bear mentioning for purposes of the story of music copyright. First is that Pope's advocate, who advanced this broad reading of the Statute of Anne, was William Murray—who later became Lord Mansfield, one of the original copyright maximalists and the author of *Bach v. Longman*, 98 Eng. Rep. 1274 (K.B. 1777). Second is that although the court in *Pope* extended the Statute of Anne to private correspondence, it implicitly accepted the defendant's argument that the Statute of Anne's protection extended only to books that were in some way learned or that encouraged learning. The court ruled in Pope's favor because "no works have done more service to mankind" than private correspondence. *See* Pope v. Curll, 26 Eng. Rep. 608, 608 (Ch. 1741). As Mark Rose observes, this understanding of the Statute's reach put judges in the position of making "literary critical proclamation[s] from the bench." Rose, *supra* note 283, at 222.

works in Stationers' Hall. He chose not to, even though some composers had.[287] Moreover, in his suit he relied principally on his royal privilege as the basis for equitable relief.[288] He alleged that Roberts and Johnson "had Notice from Publick adverstisements and otherwise of his Majesty's Royall Lycence and priviledge aforesaid" and, after waiving any claims to monetary relief, sought an injunction "till after the said fourteen years are Expired, or for such other time as your Lordship shall think reasonable."[289] The "said fourteen years" were the term of his privilege, not those granted under the Statute of Anne.[290]

A further reason for skepticism about the strength of Arne's copyright claim is that the parties treated his Engraving Act claim as equally viable, and they treated the claim under royal privilege to be the more serious. Others in the trade also viewed the privilege as worthy of respect, as a few years after Arne had publicized his privilege, two publishers printed only lyrics and not Arne's accompanying music to two songs because of Arne's threat to sue.[291]

Even at its strongest, Arne's understanding of the Statute of Anne's application to music demonstrates the limits of that application. In the advertisement he placed after his royal privilege had expired, Arne declared that "All his future Works (single Songs excepted) will be published in Books or Pamphlets, and entered with the Company of Stationers, as the Act of Parliamont directs; such Method being under the immediate Protection of the Common Law" insofar as unauthorized publications could be enjoined.[292] Arne's distinction between music published in books or pamphlets as being covered by the Act and single songs as being excepted is telling.[293]

From the defendant publishers' perspective, even if musical composers were authors, the Statute of Anne had not been enacted to protect all authors, but only those who had advanced the cause of learning by producing books. In their view, printed music did not fit within this concept. For example, responding to Arne, Roberts and Johnson flatly rejected the notion: "[T]he Musick and Songs published by the Complainant are not such Books as are by the said Act intended to be

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287. *See* Hunter, *Music Copyright*, *supra* note 77, at 278 (noting that a few of the music copyright registrants between 1710 and 1780 were individual composers).

288. Rabin and Zohn suggest that Arne "threw into the legal pot whatever he could expecting at least one of the arguments" to supply grounds for equitable relief. Rabin & Zohn, *supra* note 163, at 120. While Arne undoubtedly did seek to cover his bases by including his copyright and Engraving Act claims, on my reading, his complaint primarily seeks enforcement of his privilege.

289. *See* Arne's Bill of Complaint, *supra* note 178, at 136.

290. *Id.*

291. *See* Rabin & Zohn, *supra* note 163, at 124.

292. *Id.* at 125 (quoting from *The Public Advertiser*, Jan. 27, 1761).

293. *Cf. infra* notes 302-06 and accompanying text (describing judicial reluctance to hold a single sheet of music to be a "book" within the Statute of Anne).

preserved to the Author for the Encouragement of Learning."[294] Decades later, Robert Falkener would take the same position with respect to the Statute of Anne: "Nor doth he [Falkener] know or believe that any person whomsoever can Acquire to himself any sole or distinct Right and property in or to Musical Compositions, and that the same are not as he Insists an Object of distinct property."[295] With respect to the common-law claim, Falkener similarly asserted that "Musical Compositions are not a Subject of Literary property."[296] Apparently, when the issue arose in *Bach*, Longman and Lukey also denied music's copyrightability.[297]

While *Bach* resolved the issue, it is telling that Mansfield did not directly hold that music was a "book" within the Statute. Instead he wrote:

> The words of the Act of Parliament are very large: "books and other writings." It is not confined to language or letters. Music is a science: it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. . . . [W]e are of opinion, that a musical composition is a *writing* within the Statute of the 8th of Queen Anne.[298]

Note that the phrase "Books[] and other Writings" appears only in the Statute's preamble.[299] The operative provisions apply only to "books."[300] If taken literally, the court's holding that a musical composition is "a writing" within the Statute would leave composers without protection. That clearly was not Mansfield's intent. Instead of holding that the term "book" encompassed musical compositions, Mansfield chose to construe the term "book" in the operative provisions as shorthand for "books and other writings" and hold that musical compositions were such other writings.[301] What explains that choice? Perhaps Mansfield thought that

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294. *See* Answer of Roberts and Johnson, *supra* note 197, at 139.

295. Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Rabin & Zohn, *supra* note 163, at 144.

296. *See id.* at 143.

297. *See* Small, *supra* note 232, at 528.

298. Bach v. Longman, 98 Eng. Rep. 1274 (K.B. 1777) (emphasis added). The importance of the development of musical notation as a precursor to copyright in music should be clear; it is only because music fits within the meaning of a protected "writing" that Mansfield declared it within the scope of the Act. *Cf.* U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to grant to authors the exclusive right to their "Writings").

299. 8 Ann., ch. 19 (1710).

300. *See id.*

301. *See Bach*, 98 Eng. Rep. at 1275.

importing "other writings" into the Act's subject matter would better broaden its scope, but the choice also reflects a certain reticence to ask readers to accept a more pliable understanding of "books." This hesitancy reinforces how different engraved music appeared to be from printed books even in the latter eighteenth century.

Indeed, in subsequent cases, the question arose whether a single sheet of music was a copyrightable book. The Court of King's Bench struggled with this issue, torn between a plain meaning approach to statutory construction that would have rejected such a claim and a more functional approach that would prohibit free-riding on the composer's creativity whether expressed on one sheet or many.[302] Ultimately, in *Clementi v. Goulding*,[303] the court initially held that a single sheet of music was a "book" within the Statute of Anne and directed that a verdict be entered for the plaintiff.[304] The court had sufficient doubt about its ruling, however, that the defendant persuaded it to issue a rule to show cause why the verdict should not be set aside.[305] Apparently, the defendant subsequently acquiesced in the verdict, and the matter was settled.[306]

3. Public Domain

Some commentators have argued that because the Statute of Anne limited the term of copyright protection, it implicitly created the concept of a "public domain"—i.e., a legal status for books whose copyright has expired.[307] Arguably, the time-limited royal privileges that had been

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302. *See* Hime v. Dale, 2 Camp. 27 (K.B. 1803) (initially dismissing complaint for infringement on grounds that sheet music could not be a protected "book" and then reversing that decision and ordering a new trial).

303. 103 Eng. Rep. (K.B. 1809).

304. *See id.* at 98-99.

305. *See id.*

306. *See*, *e.g.*, Clayton v. Stone, 5 F. Cas. 999, 1000-01 (Cir. Ct. S.D.N.Y. 1829) ("It seems to be well settled in England, that a literary production, to be entitled to the protection of the statute on copyrights . . . . may be printed on one sheet, as the words of a song or the music accompanying it.").

307. *See*, *e.g.*, PATTERSON, *supra* note 59, at 144. To be clear, it is the Statute of Anne, as interpreted by the House of Lords in *Donaldson*, that gives rise to this notion. *See*, *e.g.*, Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75, 86-87 (2003) ("Perhaps the single most important moment in the establishment of the public domain was, as this article suggests, the foundational case of Donaldson in 1774, which confirmed that the term of protection was limited."); *see also* KARTHYRN TEMPLE, SCANDAL NATION: LAW AND AUTHORSHIP IN BRITAIN 1750-1832 114-19 (2003) (discussing relationship between transition from oral tradition to literary expression in culture and law and effect of that transition on construction of public domain). Subsequently, in the United States, the idea of implicit public dedication became more explicit. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 978 (1990) ("The idea that a statutory copyright carries with it a dedication to the public of aspects of or rights in the copyrighted work emerged in the case law of the

granted for hundreds of years prior to the Statute already had created such a legal concept. But those royal privileges were subject to extension and renewal, and privileges covered works that were hundreds and even thousands of years old.[308]

In the equity actions discussed above, a third source of authority for the public domain emerges—custom. Just as the Stationers had constructed an account of custom in the publishing trade as a foundation for their claims of common-law copyright during the Battle of the Booksellers,[309] music publishers constructed an account of a customary public domain as part of their defense. Implicit in the publishers' challenges to musical authorship discussed above is the view that old songs were free to be re-used in the creation of new ones and could be freely republished. In *Pyle*, the defendant Falkener claimed that a work previously published and not covered by a privilege could freely be republished "as it has been ye Custom, Usage and practice for all persons who thought proper so to do."[310] Similarly, when attacking the claims regarding Bickerstaff's works, Falkener argued that Bickerstaff had no proprietary rights because he had merely borrowed from "Old Tunes which had been Used in Common by all persons for many years before the said Isaac Bickerstaff wrote the said Opera."[311]

The evolution of music copyright in England involved more than a materialist struggle over the growing revenues from music publishing. In litigation and in threatening advertisements, professional composers, music publishers, lawyers, and the courts tested the pliability of the concepts of authorship and of copyright. *Donaldson* determined that statutory law was the sole source of authority for copyright, but *Bach* demonstrated that the concept of copyright could be readily expanded through statutory interpretation. *Donaldson* also confirmed that the expiration of copyright placed a work in the public domain. The scope of the statutory public domain was confined to rights of republication because of the Statute of Anne's limited scope. But, relatedly, composers had different views about the scope of legitimate borrowing of melodies, harmonies, and other compositional components from each other, and this question of the scope

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mid-nineteenth century as a matter of statutory construction.").

308. Indeed, it was the Stationers' exclusive control over publishing ancient Greek and Roman texts that led John Locke to lobby to end their monopoly. *See* Letter from John Locke, to Edward Clarke (Jan. 2, 1693), *in* THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366 (Benjamin Rand ed., 1927).

309. The argument for common-law copyright first emerged during the run-up to the Statute of Anne. *See* Millar v. Taylor, 98 Eng. Rep. 201, 209 (1769) (describing Stationers' description of author's common-law copyright as reflecting an "ancient and reasonable" custom); Feather, *supra* note 72, at 34-35.

310. *See* Pyle v. Falkener, C33/442 London Public Record Office (1772), *reprinted in* Rabin & Zohn, *supra* note 163, at 143 (reciting Falkener's argument).

311. *Id.* at 144.

of legitimate borrowing would become a more central conceptual concern during the nineteenth century and continues to be debated to the present day.[312]

IV. CONCLUSION

What should we make of the gradual extension of copyright law to music and of the very circumscribed portion of musicmaking that fell within the domain of early copyright law? My hope is that a better understanding of this history triggers a variety of responses. In this section, I offer three.

A. *The Progress Narrative in Copyright Law*

On first glance, it would have been easy to read *Bach* as a natural extension of copyright—the correction of an oversight. However, closer attention to this episode in copyright history makes clear that copyright does not naturally extend itself to new subject matter. Rather, certain participants within a community of social practice—such as those who create music, photography, or software—find the rights supplied by copyright to be an attractive alternative to existing arrangements and struggle to extend copyright to the subject matter. The extension of copyright to new subject matter does not merely fill a void. Instead, it displaces a preexisting set of formal or informal means of relating to that subject matter.

The establishment and extension of copyright law comes with a social cost.[313] This is an old lesson that bears reemphasis. Shortly after Italian authorities had begun granting printing privileges, they quickly learned that printing privileges solved one problem by stimulating investments in new publications, but they created another by starving new publishers of a source of material with which to ply their trade.[314] To this day, balancing incentives to create and publish against the need for access to published or invented knowledge remains the central problem that copyright and patent law must resolve.

Thus, the displacement of prior arrangements by copyright should not necessarily be viewed as a form of legal progress—from a primitive privilege system to a more evolved copyright regime. Instead, as is true of all disputes concerning the applicability and scope of copyright, *Bach* should be understood as the outcome of a specific political struggle.

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312. *See generally* Arewa, *supra* note 269 (discussing evolution of musical borrowing practices from eighteenth-century England to present).

313. *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1516 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) ("Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large.").

314. *See* BUGBEE, *supra* note 66, at 45.

Whether this outcome should be viewed as forward movement should be judged on the basis of one's normative criteria concerning how liberties[315] should be allocated among creators, disseminators, and users *of music* rather than as autonomous progress. On this view, the relevant historical continuities and discontinuities pertain as much, if not more so, to the social practices surrounding specific forms of expression than simply to the legal system's internal developments.[316] This is a view of federated rather than unitary copyright, and on this view, copyright's displacement of prior legal arrangements concerning forms of expression—be that music, software, or architecture, for example—cannot simply be pronounced progress per se. In some cases, extension of copyright may be viewed as liberation and in others as colonization, depending on whether the broader justifications for using copyright apply with equal force to a particular form of expression.

B. *History and Contemporary Copyright*

From my perspective, the result in *Bach* should be viewed positively because composers had begun to rely on market exchange and self-publication to support their art, and the extension of copyright marginally improved their ability to compose independently of their patron's desires.[317] From the perspective of musicmaking, *Bach* modestly reallocated liberties by granting to composers a legal basis for participating in publishing profits while leaving other composers free to continue their traditional borrowing and leaving performers, professional and amateur, with plenty of room to experience music on their own terms.

In contrast, modern copyright law's governance of relations in music should be seen as containing many discontinuities. Traditional borrowing practices, long regarded as a composer's liberty, increasingly have become circumscribed by threatened litigation. In the age of digitally recorded music, a composer's use of even a short sequence from a prior recording is likely to draw a lawsuit.[318] Moreover, public performance of music lay

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315. My use of "liberties" in place of "rights" is advised. The first copyright act did not grant authors any "rights," although it may well have assumed the existence of some, and instead was phrased as conferring on the author or proprietor of a copy the "sole liberty" of having a work printed, reprinted, sold, or imported. Because "liberties" are less easily reified than are rights, and because liberties generally are associated with what natural persons may do, discussing copyright in terms of an allocation of liberties clarifies the law's real-world effects.

316. *Cf.* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (analyzing and explaining fair use doctrine in relation to social roles and patterns of information exchange).

317. *See generally* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that democratic theory favors creation of copyright law to promote diversity of expression by liberating authors from economic dependence on patrons).

318. *See* Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003) (holding that Beastie Boys's use

outside copyright's boundaries until the end of the nineteenth century.[319] Prior to that reallocation of liberties, the view in England and America had been that "[a] person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use."[320]

Consequently, the modern battle to reallocate rights in music should be understood as lacking any clear precedent. The question is how rights or liberties should be allocated under current conditions. The *Bach* case suggests a useful focus—identifying the activities from which the author should be entitled to profit.[321] In 1777, the law gave the right to profit from printing to the author and from performance to the professional performer. Under contemporary conditions, with a far greater range of uses of music possible, which of these should be understood to belong exclusively to the composer? My view is that composers should control only the minimum number of uses necessary to stimulate a vibrant musical economy.[322] Making that determination should be done with reference to the current economics of making, marketing, and distributing music.

Allocating liberties in relation to music likely will entail both legislative and judicial judgments. Concerns about historical continuity are less influential in the legislative arena, but these still resonate. It is important that the many new uses enabled by digital technology and the radically changed economics of music production and distribution mark the current moment as unprecedented in many ways. Consequently, we should give little weight to historically grounded arguments claiming that continuous expansion of the subject matter, scope, and duration of rights under copyright has always been, and will continue to be, socially beneficial. In the judicial arena, recognizing the discontinuities of the present should serve as a check on expansionist tendencies in this branch of the law and should influence the ways in which courts interpret the fair use doctrine, and the broader relationship between copyright law and the First Amendment.

C. *Professional Musicians and Copyright's Evolution*

Copyright lawyers generally share an understanding that well-financed, well-organized distributors beginning with the Company of Stationers and

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of a short sample was a permissible *de minimis* use).

319. *See* Act of Mar. 3, 1897, ch. 392, 29 Stat. 694 (reallocating right of public performance from public to composer).

320. Bach v. Longman, 98 Eng. Rep. 1274, 1274 (K.B. 1777).

321. *Cf.* Tonson v. Collins, 96 Eng. Rep. 169, 169 (1761) ("I contend it belongs to the author; and when I speak of the right of property, I mean in the profits of his book, not in the sentiments, style, & c.").

322. *Cf.* FISHER, *supra* note 9, at 215 (suggesting the goal of sustaining a "flourishing entertainment culture" as a normative criterion for alternative compensation schemes).

continuing to groups such as the RIAA and the MPAA have been the primary agents of change in copyright law's evolution.[323] Most copyright historians recognize that authors periodically have played important roles as well, however.[324] Authors who invested time and energy in enlarging their respective rights under copyright include figures such as Daniel DeFoe,[325] Jonathan Swift,[326] Alexander Pope,[327] William Wordsworth,[328] Charles Dickens,[329] Mark Twain,[330] and Gilbert and Sullivan.[331] Johann Christian Bach and Karl Friedrich Abel should be added to this list.

In the world of contemporary popular music, certain authors also have stepped forward to engage in legal reform. Recall that Bach and Abel fought to extend copyright to music as part of a struggle with publishers. Contemporary legal disputes between musical authors and publishers center on who rightfully is the author of a sound recording[332] and whether the law should or may regulate the terms of author-publisher recording

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323. *See*, *e.g.*, PATTERSON, *supra* note 59, at 147 ("Emphasis on the author in the Statute of Anne implying that statutory copyright was an author's copyright was more a matter of form than of substance."). *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (2001) (describing copyright's legislative evolution during the twentieth century).

324. *See*, *e.g.*, ROSE, *supra* note 29, at 48 ("[A] number of influential writers had raised the issue of authorial rights.").

325. *See id.* at 34-37 (noting that DeFoe published his *Essay on the Regulation of the Press* in which he called for a parliamentary law to protect authorial property rights).

326. *See* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 922-23 (2003) (suggesting that Swift was the drafter of the Statute of Anne).

327. *See* ROSE, *supra* note 29, at 60-65 (describing Pope's copyright litigation).

328. *See id.* at 110-11 (describing Wordsworth's lobbying for extending the term of copyright to life of the author plus sixty years).

329. *See* AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA 58-63 (1960) (describing Dickens's campaigning for copyright reform in America in 1906).

330. *See* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 35-37 (2001) (describing Twain's testimony before the Joint Committee on Patents).

331. *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 232-34 (2000) (describing how Gilbert and Sullivan went to extraordinary steps to withhold publication of their scores).

332. *See*, *e.g.*, David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y 387, 390-91 (2001) (describing insertion and subsequent deletion of language inserted into a "clarification" bill that would have rendered sound recordings by independent contractors eligible to be works made for hire under 17 U.S.C. § 101). The songwriter and performer Don Henley, who has been a leader in advocating for composer's and performing artists' interests and who cofounded the Recording Artists' Coalition, sings about the imbroglio in his song "Inside Job."

contracts.[333]

The manner in which contemporary composers approach questions such as whether rights under copyright should be expanded and how existing rights should be enforced and/or licensed is heterogenous and quite interesting. The Internet's power as a mechanism for producing, distributing, and marketing music is encouraging professional musicians to engage more directly with copyright law. Early responses indicated that established musicians shared publishers' reaction to the Internet as nothing more than a threat. Recall that recording artists Metallica and Dr. Dre were first out of the box to sue Napster for copyright infringement.[334] Some found irony in Metallica's stance, since this band, which had an unusual degree of control over its copyrights, generally permitted fans to record live shows and trade tapes noncommercially.[335] The band reportedly filed its suit because an insider had made soon-to-be-released material available on the Napster network.[336]

Some professional songwriters continue to demonize those who create the software for peer-to-peer networks and those who transmit music files across these networks.[337] Others, however, have begun to embrace the new technologies and their users.[338] Recently, bands such as Wilco have successfully released their material on peer-to-peer networks as a form of

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333. *See*, *e.g.*, Martin Edlund, *Lyin' Eyes: The Recording Artists Coalition's Bogus Crusade to Save the Little Guy*, SLATE, Feb. 11, 2002, *available at* http://slate.msn.com/id/2061830/.

334. *See* John Snell, *Artists Denounce Music Free-For-All*, OREGONIAN, May 1, 2000, at B1 (stating that both Metallica and Dr. Dre filed suit against Napster claiming $100,000 for each song downloaded via Napster); *see also Industry Upbeat Over Ruling Blames Napster for $84M Drop in Canadian Music Sales*, OTTAWA SUN, Feb. 13, 2001, at 12 (giving timeline of lawsuits against Napster).

335. *See My, How Time Flies. It's Four Years Since the Napster Suit*, ONLINE REP., Apr. 17-23, 2004, *at* http://www.onlinereporter.com/TORbackissues/TOR392.htm (stating that Metallica encouraged fans to tape their concerts and make bootleg copies); *In the Know/ A Look at the Week Ahead; Metallica Finds Itself at Odds with Fans*, L.A. TIMES, May 15, 2000, at F2 (stating that Metallica invited fans to tape-record their concerts); *Napster Settles Suits by Metallica, Dr. Dre*, SEATTLE POST-INTELLIGENCER, July 13, 2001, at C2.

336. *See* Charles C. Mann, *The Heavenly Jukebox*; Efforts to Obtain Control Access to Sound Recordings from the Internet, ATLANTIC MONTHLY, Sept. 1, 2000, at 39. Metallica filed suit after learning that Napster users had been trading an unreleased and unfinished version of the band's forthcoming single, "I Disappear," from the soundtrack to the film *Mission Impossible 2*. *Id.*

337. *See*, *e.g.*, Hugh Prestwood, *An Open Letter to File-Sharers*, BILLBOARD, Apr. 10, 2003 (asserting that "If you won't pay for music, you will soon be receiving a product commensurate with your thriftiness. A society that doesn't value a commodity enough to pay for it will soon see the creation and production of that commodity cease.").

338. *See*, *e.g.*, Janis Ian, *The Internet Debacle-An Alternative View*, PERFORMING SONGWRITER MAG., May 2002, *available at* http://www.janisian.com/article-internet_debacle.html (describing the benefits of online distribution of music, including through peer-to-peer file sharing); *see also* Janis Ian, *Fallout–A Follow Up to the Internet Debacle*, Aug. 1, 2002, *at* http://www.janisian.com/article-fallout.html (last visited July 10, 2005).

marketing.[339] We see similarly conflicting reactions to uses of new technologies for creating digital samples and derivative works. Flautist James Newton thought that his copyright should have given him the right to control the Beastie Boys's use of a small portion of one of his solos. The Ninth Circuit held that musical copyright does not extend that far.[340] By contrast, *Wired* magazine persuaded a number of prominent artists, such as David Byrne, the Beastie Boys, and Chuck D, to release songs on a compilation CD distributed with the November 2004 issue of the magazine under a Creative Commons sampling license, which gives listeners explicit permission to create and use samples such as the one at issue in *Newton*.[341]

Copyright lawyers should pay close attention to professional musicians' evolving attitudes about new technologies and copyright law. These technologies give artists the material incentives and abilities to keep control over the copyrights in their music and to experiment with different licensing models for these copyrights. Conditions in eighteenth-century England led professional composers such as Johann Christian Bach to engage directly with copyright law, and, interestingly, current conditions also appear to be ripe for enticing musical artists to become more directly involved in the evolution of copyright law through legislation and litigation. If these artists do become more involved, we should expect the path of copyright law to take some interesting turns, as the legal relationships among producers, distributors, and consumers continue to be redefined.

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339. *See*, *e.g.*, Brian Mansfield, *When Free Is Profitable*, USA TODAY, May 20, 2004, *available as updated at* http://www.usatoday.com/tech/webguide/music/2004-05-20-file-sharing-main_x.htm.

340. *See* Newton v. Diamond, 349 F.3d 591, 593-94, 598 (9th Cir. 2003).

341. *See* WIRED (Nov. 2004); *see also* Creative Commons Sampling Licenses, *available at* http://creativecommons.org/projects/sampling (last visited July 10, 2005). [Disclosure: I serve on the Board of Directors of Creative Commons, Inc.].