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COPYRIGHT LAW

VOLUME I: THE SCOPE AND HISTORICAL CONTEXT

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AND BRIAN FITZGERALD

Copyright Law

Volume I: The Scope and Historical Context

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The Evolution of Copyright

Introduction

What is Copyright?

Copyright is a form of property created by statute.[1] The first national copyright codes were passed in the United Kingdom in 1710 and in the United States in 1790 but the origins of copyright law can be traced from the social, political and legal thought of Greece and Rome, and the history of property relations in western Europe.[2] In other parts of the world, different societies developed conceptions of ownership similar to those of European societies. Some defined title in very different ways, and others bypassed any notion of possessive individual ownership.[3]

Copyright confers on the authors of works and the companies that make products embodying works – or control the means of disseminating works – exclusive rights. These are economic rights. They enable authors and producers to control the process of producing and disseminating copyright material for sale (although the copyright owner also controls most non-economic uses of material).

Although the exclusive rights are primarily economic in function, the author to whom the rights accrue also enjoys moral rights, which are personal rights. Personal rights, unlike the exclusive rights, are normally not assignable. They benefit the author alone and are usually extinguished when the author dies or when copyright lapses.[4]

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1 Sir William Blackstone, in his *Commentaries on the Laws of England* (1766) called property the 'sole despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' (Bk 2, Ch 1 at p. 2). The idea of copyright as property, however, is considered controversial by many thinkers. Copyright began as a limited right and progressively grew in scope. Unlike most real property, it lasts for a specified period. The justifications for copyright, or aspects of copyright, are considered by many critics to be deficient. In particular, critics have cast doubt on the social utility of modern copyright law, which is usually justified on mixed grounds, most of which assert social utility as an outcome of protection. Some believe copyright should more properly be regarded as a statutory monopoly, justified to the extent that it results in economic efficiency. They consider the range of exclusive rights grants copyright holders economic power far beyond the expectation or desire of early legislators.

2 In France, monarchs granted limited printing patents from the sixteenth century. In the throes of revolution, a decree of 1793 created authors' rights in France. Codification in civil law countries followed in the nineteenth century creating copyrights that recognized *droit d'auteur* including moral rights.

3 See discussion of obligation-based society.

4 The Berne Convention for the Protection of Literary and Artistic Works (1886) provides that moral rights survive the death of the author and are exercisable, at least until copyright is extinguished, by persons or institutions nominated in legislation (Article 6 *bis*). The legislation of some countries, such as France, provides for moral rights to exist in perpetuity.

In the English-speaking world, moral rights usually consist of the rights of attribution (to be named the author of the work) and integrity (to prevent adaptations or uses of the work that depart from the integrity of the work as conceived by the author). In civil law countries, in which economic rights are understood to derive from moral rights, moral rights are more extensive in scope.[5] Moral rights of any complexion can be traced to the French-inspired civil law conception of copyright as regulation that recognizes the innate value of the author's vocation. French custom characterizes copyright as an author's right or *droit d'auteur*, a term that recognizes that in addition to moral rights (*le droit moral*), the author possesses entitlement to economic reward (*le droit patrimonial*).[6]

An account of copyright that refers to exclusive rights and moral rights is, however, incomplete. More than most other categories of law, copyright law was, and is, shaped by social and economic forces with deep historical roots. Copyright works consist of *information*, the lifeblood of cultural development, exchange and evolution. All societies, dependent on communication for survival, intrinsically are interested in the supply of information. Information is a source of enlightenment and freedom. The way society regulates information supply expresses how society thinks about people and how they are entitled to live.

Possession and Exclusion

The Stoic philosophers of Greece and later Rome postulated the idea that various formulas for devising proprietary rights are attempts to express the natural law. The correct formula merely expressed principles immanent in the natural world. Thus the Roman categories of property based on the concept of absolute possession found justification in nature. From the time when Roman law first articulated the owner's *dominium* and, later, when the jurist emperor Justinian distinguished between tangible and abstract property[7], the ideology of natural law supplied justifying theory for jurists explaining the owner's control.

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[5] In France, moral rights consist of, in addition to the rights of attribution and integrity, the rights of publication and withdrawal (see *Code de la propriété intellectuelle* or Intellectual Property Code).

[6] The French law, however, is called the *Code de la propriété intellectuelle*. French legal usage has increasingly accepted the Anglo-Saxon term 'intellectual property' to signify that copyright protection applies to 'intellectual' output. Increasingly, lawyers use the term *droit intellectuelle* to describe copyright.

[7] Issued under the Emperor Justinian's direction, from AD 529-533, the Corpus Juris Civilis, consisting of the Code, Novels, Institutes and Digest, restated and expanded Roman law. The law explained abstract or incorporeal property by reference to incorporeal things and usufruct (see Book II Chapters II and IV of the Institutes). Justice Arthur Emmett of the Australian Federal Court has pointed out (2011) that while Roman law did not recognise the right to control copying of works, it established principles that could later be adapted to define the categories of literary property and other species of copyright. In particular, the idea of usufruct, which referred to the right of a person to enjoy the fruits – the product, like farm produce, of something regenerative – of another's property, accommodates the idea of the author enjoying the fruit (royalties) of something regenerative (a literary work). The usufruct itself was an incorporeal thing, a legal interest. 'An analogy can be drawn between the [statutory] concept of copyright . . . and the notion of a usufruct under Roman law. The author of a copyright work has the right to use and enjoy the work for the term of the statutory copyright. The work, however, is in the public domain and the public is the owner of the copyright subject to the usufruct. Under Roman law, a usufruct could be for a fixed term or for life. Even if it was for a fixed term, the usufruct terminated

Roman law bequeathed to the modern systems of common and civil law principles of property, the chief of which is the idea that possession confers ownership. The concept of ownership, expressed in the Latin word *dominium*, has recurred as the motif of social and political action in the Western world since the end of the Roman Empire in the fifth century. Ownership is the determinant of power. Insistence upon the right of authors, and later industries, to own whatever they produced created and expanded the modern law of copyright.

Because proprietary rights confer power, they are contested, and the events leading to the vesting of rights invariably occurred in the context of charged politics. Debates, however, were rarely resolved by simple political calculation. They usually involved intense dispute over assumptions and philosophies that were aired in ancient Greece, and then, over nearly two thousand years, in the Roman world, and, later, in the societies of western Europe.

Disputes concerned the moral or economic necessity for granting ownership over land, things and definable abstractions. The main propositions debated have not varied greatly over the centuries. For example, faced with the prevailing belief that proprietary rights are justified in themselves, the early Fathers of the Catholic Church argued, especially in the third to fifth centuries, that the fruits of the earth are to be shared, not appropriated for private use. Though inspired by a unique teleology, their attitude resembled in part that of folklore-based indigenous society, and prefigured the communist conception of society without property.[8]

Centuries before the Fathers, the Greek philosopher Plato (427–347 BC) in the *Republic* and *Laws* proposed a society in which community of interest made private property a redundant concept. His pupil Aristotle (384–322 BC), though he shared Plato's view that concentration of ownership is socially harmful,[9] considered private property a consequence of human existence, reflecting an innate desire for private possession. Aristotelian ethics concentrated little on the existence of property and much more on the way in which citizens exercised proprietary rights. Aristotle's idea of property as a social good if available to all, and exercised in ways consistent with public benefit, strongly influenced the social teaching of the Catholic Church.[10]

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on the death of the holder of the usufruct'. However, as Emmett J noted, Roman law did not recognise the idea of literary property. The property in a book was in the chattel itself. The owner of the book enjoyed a proprietary right to sue for recovery of the book or damages. The author of the book enjoyed no usufruct in the replication of its contents. For Roman jurists, copying of manuscripts confirmed their public character. Once books containing identical contents were sold to the public, the contents existed in the public domain. Roman law did, however, attribute value to uniqueness of paintings or sculptures. A painting did not enter the public domain like a book because it could not, in Romans times, be identically copied. Even so, for the Romans, the value lay in the thing itself – the painted canvas – not in a definable abtraction, the work.

[8] The Church Fathers, theologians and teachers from the eastern and western empire spoke vehemently, in sermons and writings over a number of centuries, against the accumulation of possessions and the exclusion of the poor from the benefits of those possessions. A number, especially St Iranaeus (130–202), St Basil the Great (329–79), St Ambrose (340–97), St Augustine (354–430) and St John Chrysostom (347–407) attacked covetousness and selfishness – the 'pride of life' – that led some to concentrate wealth while neglecting to share for the common good.

[9] In the *Republic*, Plato posited, in the dialogues of Socrates, that private property – and money – encouraged in humans hatred, plotting and fear. He advocated, initially, a *polis* governed by 'guardians' who live without property or family.

[10] Aristotle, *Politics,* Book II, Pt V.

In the nineteenth century, the anarchist Pierre Proudhon, enraged that the great mill of capital maintained the owners in luxury and kept the workers in bondage, their lives eked out in tenements, reached conclusions similar to those of the Church Fathers over 1,500 years earlier. He looked at the city proletariat and asked the question 'What is property?' His famous reply has ever since resonated in debate over property rights: '*It is robbery!*'(Proudhon, [1840] 2007).

The theme of exclusion runs through the history of property relations. Its antithesis is the modern idea of a copyright 'commons', a source of communal exchange from which no one is excluded. Ideas of copyright and commons have co-existed uneasily for over a century, and today in political debate over copyright the commons is seen to infringe on private rights. For their part, supporters of the commons regard statutory copyright as a moveable feast, encroaching, to the point of complete possession, on the notional terrain of free inquiry and exchange.

While arguments over the scope of copyright may appear bloodless, their implications are not negligible. It is by consulting the history leading up to the creation of statutory copyright that we understand the extent to which the law of copyright represents political and philosophical assumptions that remain contested.

Social Change Determines Rules about Information

To understand the law of copyright, it is important to look at how philosophies and social movements influenced its development. This is both an historical and a comparative exercise. A history of copyright law development necessarily focuses on the story of legislative changes in the United Kingdom and United States, and various civil law countries, chiefly France.

The history of information regulation is also a history of social development. For most of human history in most of the world, a hierarchy of authority – tribal elders, emperors, kings, magistrates, judges, bishops and so on – controlled the dissemination of information to the general population. The emergence of copyright law represents a shift in societal norms, from acceptance of authority and hierarchy, towards assertion of individual or private interests, and the demand for ownership of things produced.

Approaches to the regulation of information historically fell into two classes: obligation-based and entitlement-based. In obligation-based society, each class in the social hierarchy carried out its duties and respected the trust – or obligations – bestowed on it. Social stasis characterized such societies since individuals accepted their unchanging status, and fixed function, within the society.

Entitlement-based society repudiates the idea of a fixed social order and substitutes, in place of social obligation, the individual freedom, in a contested environment, to accrue material benefit. By labour the individual becomes entitled to those benefits, in other words to own

property, and ownership confers sovereignty. Acting within the law, the owner is free to use property as he or she chooses, and to exclude any other person from its benefits.

Obligation-Based Society and Attitudes to Information

In most societies, for most of history, the obligation to obey has channelled the creative impulse into communal rather than individual expression. For this reason, perhaps, such societies have not been preoccupied with attributing individual works to individual authors.[11] Literacy did not necessarily, or even usually, result in ideas of authorial entitlement.

Indigenous peoples, often nomadic, have, sometimes over thousands of years, observed ancient cultural norms that reflect knowledge of the complex elements of their physical environment. They have expressed symbolically and metaphorically, in stories and legend, the meaning of existence and the purpose of society. But their expressive tradition is not intended to communicate to a foreign audience, the knowledge contained in it is sometimes secret, and each adult member of the group is charged with the obligation to honour the social or communal purpose of tribal or group culture.

Obligation of this sort is unlikely to precipitate individual appropriation of knowledge for private gain. In short, the social norms of indigenous people are often incompatible with the possessive, self-maximizing coda of proprietary rights that has pertained in the Western world for many centuries. Indigenous peoples living in traditional society are thus vulnerable to proprietary appropriation, by predatory commercial interests, of ancient knowledge, and the expressions of their tradition, such as artwork.[12]

In China, over millennia, neither literacy among the educated nor the invention of printing[13] led to a strong tradition of authors' rights or property in literary works. Confucianism instilled primary allegiance to the emperor, who represented the state, and secondary allegiance to the patriarchal family. The state discouraged self-expression (except through controlled channels) and declared itself owner of the works of artists.

In India, an extensive vedic literature in Sanskrit began to appear in the sixteenth century BC and for nearly a thousand years from around the sixth century BC, Indian writers recorded the

[11] An animist tribe obeying the edicts of elders fulfilled obligations to honour ancestors by living in certain ways in the physical environment. Before European penetration, many non-European societies, including the indigenous cultures of North America and Australia, shared knowledge about their natural surroundings, including the medicinal properties of plants, and collected and retold folklore and other stories. But they had no conception of individual entitlement: tales about nature, stories about people, were a collective inheritance.

[12] See, for instance, discussion of the relevance of traditional cultural obligations in the production of indigenous artworks in the Australian case of *John Bulun Bulun & Anor* v. *R & T Textiles Pty Ltd* [1998] Federal Court of Australia, 1082 (3 September 1998) at www.austlii.edu.au (Chapter 6 in this volume). See also discussion in the Australian publication, *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Janke, 1998).

[13] Woodblock printing for textiles appeared in China around AD 220 and ceramic movable type came into use in the eleventh century. A court official and a scholar invented wooden and metallic movable types in the fourteenth and fifteenth centuries respectively.

precepts and stories of Hinduism in the *Mahabharata*.[14] The text, including the book's most famous part, the *Bhagavad Gītā*, continued over centuries to contribute to popular acceptance, in most of the subcontinent, of Hindu ontology.

Vyasa is declared by tradition author of the *Mahabharata*, but no one remembers his successors, the anonymous elaborators of the work. They were, so far as the teachers of Hinduism were concerned, scribes of the numinous, giving material form to the truth about existence. Authorship and dissemination helped to create Indian society, but works created were the possession of society not authors.[15]

Mughal rule in India, beginning in the early sixteenth century, and the liberal use of the printing press, introduced from Europe, produced a diffuse literature written in Urdu and other languages of the subcontinent. The Mughals encouraged poetry, translation of Sanskrit literature, works of history, even works of fiction. But in a linguistically diverse and sometimes politically fragmented country, ideas of property in literature were alien. The Mughal court remained the locus of literary patronage. Literature united society according to the pattern decided by the imperial centre, and the idea of possessive authorship, of literature belonging to its authors, remained largely unknown.

In societies that do not recognize possessive values, expressed in the language of 'I' and 'mine' and the restless desire for accumulation, dissemination is usually a favoured instrument for creating social cohesion. In a non-individualist, obligation-based society, culture is created to shape society not profit the creator. In such a society, however, the Western mode of cultural production may not automatically be regarded as alien, and authorial rights maybe recognised.

Modern Islamic society draws on a rich and diverse literary and artistic heritage that began nearly fifteen centuries ago. While contemporary Muslim society in the Middle East increasingly affirms the value of legal protection of abstract property, the Muslim tradition, which clearly delineated proprietary rights in tangible things, did not categorically recognize property in intangibles. Literary and artistic production, over the centuries, tended to be commissioned by, or produced under the auspices of, royal or well-connected patrons.

The dynamic capitalism that stimulated the growth of book trades in the English-speaking world never pertained in the Middle East, so the motive of commercial gain, which played so large a role in Western agitations for proprietary rights, did not inspire in Muslim countries a commensurate demand for abstract property rights. But a totality of scholars has never declared that Islamic or Shariah law could only apply to tangible property (see Raslan, 2007).

Recognition of Authors

The recognition of authors is identifiable (though not exclusively) with a cultural outlook that emerged first in ancient Greece, and spread through the Roman world. From the second century BC, until the breakdown of the empire, Romans accepted that authors were entitled

[14] The author of the *Mahabharata*, including the *Bhagavad Gītā*, is said to be Vyasa, a mythic figure who appears in the text. Anonymous writers contributed, over many centuries, to the threefold enlargement of the original document. In the fourth century BC, the *Ramayana*, an epic poem written in Sanskrit, and attributed by Hindu tradition to the sage Valmiki, appeared in India and came to influence Indian culture co-extensively with the *Mahabharata*.

[15] The Mughal invasion of India resulted in the creation of a different tradition in which poets, historians and writers patronized by the court flourished.

to profit in some way from their work.[16] The work of Roman jurists in defining categories of property, and the legal status of quasi-possessions, such as the right to sue for a debt, created the basis for establishing literary property in later European law.[17]

The common law system first formally recognized literary property, the common name for copyright in books, in 1710, when the British parliament passed the Statute of Anne. However, the idea of a person's right to exclusively possess printed works long preceded this date. Although print monopolies existed in the fifteenth century, a convenient marker of the shift in European societies towards recognition of modern categories of private property, including literary property, is the Protestant Reformation.

Out of that religious rupture came societies that accepted, in some degree, an idea announced earlier by the Italian Renaissance: man, reaching for the heavens, is free to shape his destiny. How European nations interpreted this idea differed, but after the Reformation, all moved away from the medieval conception of the artist as an anonymous contributor to public expressions of God's glory. In England especially, the author began gradually to step into public sight, and, more prominently, the bookseller, proto-publisher and proto-capitalist, who actually benefitted from print monopolies.

Underpinning the idea of literary property is the idea of entitlement. Output is not an obligation but the result of positive choice, and one deserving reward. In the case of printed output, said the booksellers of the sixteenth century, the reward of output, and the guarantee of its continuation, must be monopoly control of the process of production and distribution.

The Origins of Entitlement

Recognition of authors followed centuries of feudalism in Europe, during which a few writers might be acknowledged for a religious work or even works of general literature. But the notion of authorship, accepted in the Roman world, stagnated in feudal society, and devotional or academic treatises, and even a few diversionary works, were written for instruction or entertainment, not fame or fortune.

The feudal world of Europe came slowly into existence after the breakdown of Roman institutions in western Europe after the fifth century, and lasted for nearly a millennium. Only as feudalism broke down in the fifteenth century, did attitudes to information change. In preceding centuries, the accepted modes of social exchange precluded the dynamic exchange of information that later resulted in creation of the copyright system. Atrophy rather than dynamism characterized the process of spreading information.

In the feudal world, no one could have conceived of proprietary rights in information. Medieval notions of property relied on the concept of *trusteeship*. Man received all things from

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[16] The nineteenth-century author Walter Copinger, author of the famous English legal textbook *The Law of Copyright* (1870 – now in its 15th edition as *Copinger and Skone James on Copyright*) argued that the Roman world embraced a notion of literary property. According to Copinger, the Roman playwright Terence (d. 159 BC) sold copies of *Eunuchus* and *Hecyra*, and the poet Statius (AD 45–96) sold copies of *Agave*.

[17] The Institutes of Justinian (AD 533) distinguished between corporeal and incorporeal property and they also interpreted the doctrine of *accessio* or merger to favour, in some circumstances, ownership by the artist of objects embodying art. Whether the artist owned the object seemed to depend on the quality of the art (*Institutes* 2.1 33–34).

God, and *enjoyed* the use of these things in trust from God.[18] Trust imposed obligations but the complex web of relationships that bound superiors and inferiors restricted the transmission of information. When people knew their permanent function in society, what need had they of new information?

On the other hand, obligation limited the extent to which Crown, church and nobility insisted on their absolute possession of landholdings. They made available to common people, for grazing and cultivation, their 'waste' lands which they could not, or chose not to, use for private purposes. These wastelands became known as the 'commons'.[19]

Then, from the fourteenth to sixteenth centuries, overlapping phenomena – humanism, the Italian Renaissance, the Black Death, the invention of the moveable-type printing press and the Protestant Reformation – began to upend the obligation-based system of property relations. When the plague swept through Europe in the middle of the fourteenth century, killing one-third of the population, it rattled every institution of the medieval world, setting many peasants free from feudal obligations. Traumatized survivors saw that high birth, social status or spiritual rank did not protect a person from the undiscriminating hand of death.

Nearly a century after the outbreak of the Black Death, came an event that more than any other pointed to the end of medievalism and the start of the new age that would eventually usher in the law and economy of copyright. In 1439, Johannes Gutenberg, a German goldsmith, perfected a mechanical printing press that reproduced copy using moveable type.

In the 1450s, he printed copies of the Bible, the so-called Gutenberg Bible. Imitations of Gutenberg's printing press spread swiftly through Europe and by the end of the century, publishers throughout Europe had printed millions of books.[20] The literate of any class could read or publish, in their own language, pamphlets, and even books.

Ideas and controversies inflamed minds across Europe, and a publishing frenzy ensued. Pamphlets followed books and more books. Foment eventually produced an earthquake, the Protestant Reformation. As humanism had spread across Europe, restless spirits in the north showed themselves less friendly to church precepts than the Italian progenitors of the new learning. Eventually, they created a popular intellectual revolt against Catholicism by remarkable use of the printing press.

Protestant Reformation

For over a century until 1517, when Martin Luther nailed his 95 theses on the door of All Saints' Church at Wittenberg, dissenters such as the English Lollards and the Hussites in Bohemia, criticized, without much popular support, some ecclesiastical practices such as the issuing of indulgences. But Luther expressed his protest in print and his polemics were distributed in Europe, and especially Germany, in thousands, then hundreds of thousands, of pamphlets. When he drew to his cause disaffected German princes, he threw Europe into uproar.

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[18] See, for example, treatment of the question of property by St Thomas Aquinas, *Summa Theologica*, II-II q66 a.2 (see Chapter 8 in this volume).

[19] On the history of common land, see Clark and Clark (2001). The authors estimate that by 1500 common land constituted only one-third of total land in England and by 1600, waste (land unencumbered by any proprietary restrictions) only 4 per cent of total land.

[20] Estimates of the number of published books vary from 8 million to 24 million.

In the disputatious atmosphere of the north, the intellectual openness of the southern Renaissance transformed into the fierce didacticism that became the hallmark of Luther and his followers. Luther's raging nature, and his willingness to fight spiritual warfare against an institution in existence for nearly one and a half millennia, suited very well the programme of the German princes and the money-making classes of the north. It freed them from the constraint of spiritual authority and allowed them to assert their wills in politics and commerce.

A hundred years of tumult followed Luther's death, and came to an end in the 1648 Peace of Westphalia. In the continuing struggles within societies, and between nations, the legacy of Gutenberg and Luther is unmistakable. The proselytizing use of the printing press may have transformed Europe but it is the genie of information that everywhere incited change and invited government suppression. The genie never returned to its bottle. It continues to shape society, to alarm authorities, to delight the curious. In the explosion of information from the sixteenth century until the present, the story of copyright finally takes shape.

The Printing Industry in England

When Luther's revolution came to England in the years after 1517, its ideas received a cool official welcome for a number of years, until King Henry VIII's desire for a new wife resulted in estrangement between monarch and Pope, then excommunication, and the English Crown's rejection of papal authority. From these events sprang consequences that resulted in the licensing of books and ultimately the creation of statutory copyright.

The consequences included political changes that upturned English society, paving the way for the emergence, over 150 years, of an economically dynamic society receptive to the idea of literary property. In the same period, religious hostility encouraged political authorities to censor literature and proscribe books. In England the printers, who on the European continent spread religious and social protest, collaborated in, then oversaw, the process of censorship.

Why they did so is easy to explain. Though they may have varied in their views about the content of censored material, the principal London printers, members of the Stationers' Company, a London guild of bookbinders, printers and booksellers,[21] agreed that to prosper they must secure monopoly over printing in the kingdom. By seeking exclusive control of printing, they were at once true to the exclusionary ethos of their 200-year-old guild, and strikingly modern in their desire to control the market, crush competition and dominate supply. They were no less than the prefigurement of the modern copyright industries, which rely on statutory monopolies to optimize revenue.

Printing came to England in 1477, when William Caxton published the first book printed in the country. Suddenly, capital became a crucial element in book production, and as the market increased, so did the fortunes of booksellers with the foresight and pockets to spot and supply demand. Inspired by European precedents, they tried to overcome competition by securing

[21] The Stationers were members of a guild consisting of allied trades recognized by the City of London in 1403. Their name recognized the dominant role of the booksellers, who contracted the services of other trades in the production of a book. Booksellers, the forerunners of modern publishers, played an integral part in the political and legal dramas that established the boundaries of statutory copyright in the eighteenth century.

state-sanctioned monopoly.[22] By the time of Henry VIII's excommunication in 1533, Crown grants, or letters patent, which gave booksellers the exclusive right to print a book, were not uncommon.

Political Revolution and Privatization

The invention of the printing press, and the grant of printing monopolies in Italy and France in the fifteenth century are the precursors of statutory copyright, but the politics of Tudor England provided the catalyst for the creation of an incipient form of copyright, and its successor, statutory copyright.

In Henry VIII's reign, the English political and merchant classes, including the printers and booksellers, cast off the last fetters of the old medieval economy, and embraced selfhood and material gain as primary motives for action. But they could only do so because to attain personal ends, Henry embarked upon political revolution, and in the course of that revolution, initiated an extraordinary programme of what is now called privatization – the creation of private property from public resources, or institutional property. In the case of Henry's privatization, the institution affected was the Catholic Church, and the property appropriated was that belonging to the monasteries.

Dissolution of the monasteries delivered a large portion of England into private hands but the process of privatization did not end with Henry's death. The act of privatization, involving appropriation and possession, the elements of ownership, became the accepted mode of creating industry and wealth. Property ownership became the emblem of social success. Once unleashed, the spirit of privatization continued to influence political action, complementing the growth of capitalism until the present day. The law of copyright is merely one part of the story of privatization begun by Henry VIII.

That law, as we know it, can trace direct descent to the printing monopoly established after Henry's death by the Stationers' Company, a collective galvanized by the opportunities for economic preferment that seemed to proliferate in Henry's tumultuous reign. His programme created the conditions for the Stationers to seek control over the printing trade, and their eventual success in this enterprise resulted in a licensing system only definitively extinguished by the creation of the first copyright statute in 1710.

Attack on the Monasteries

Henry set sail on the course of revolution in 1532 when, with the assistance of Cranmer, the Archbishop of Canterbury, a covert Protestant, he divorced his wife, Catherine of Aragon, and married Anne Boleyn. He thus found himself in a double-bind. In danger of excommunication by the Pope, who upheld the sacramental validity of his marriage to Catherine, and beholden to Cranmer's theology, which justified his actions, Henry faced a Rubicon: accept the Pope's authority and his own error, or press forward in rebellion.

For Henry, there was no turning back and the Pope excommunicated him in 1533. Though Henry considered himself faithful to his baptism, and disliked the anti-sacramental reform

[22] In 1469, the government of Venice granted a printer the exclusive privilege to print copies of a particular work, and Parisian printers received equal entitlements in 1507.