ROUTLEDGE REVIVALS

Authorship and Copyright

David Saunders

Routledge Revivals

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First published in 1992, *Authorship and Copyright* traces the history of constructions of authorship as a legal reality. It offers an alternative to the two mainstream interpretations that have traditionally been assigned to authorship: the Romantic dialectical 'birth of the author' or the language-based post-structuralist 'death of the author.' Saunders examines the shortcomings of both schemes by arguing that they impose an arbitrary philosophical direction on the history of authorship and the law of copyright. Saunders addresses the issues relating to copyright and the construction of authorship as a legal status. Combining information and polemic, the author explores such matters as the historical and theoretical relations of copyright and the *droit moral*, the aestheticization of the law and the juridification of aesthetics, and the argument that authorship as a legal reality is a historically contingent and variable arrangement that cannot be separated from its cultural and juridical context. This book will be of interest to students of law, literature and philosophy.

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Preface

This is a work of history that reconnects a phenomenon of print literate cultures – authorship – to its legal conditions, and a legal phenomenon – ownership of copyright – to its historical and cultural conditions. It is a project at the threshold where two different styles of reasoning – call them aesthetic and legal, or philosophical and governmental, or theoretical and positive – have long confronted one another. In treating authorship as a legal status, I might therefore be seen as having opted for a merely technical domain of social existence rather than the high ground of moral and aesthetic culture. Perhaps so. However, this does not stop me suggesting that copyright lawyers and historians should have a better sense of aesthetics. This suggestion is not made in order to assert some fundamental value. The point is to bring to light the impact of a particular ethos – that of the *whole* or *integral* person – on law concerning authorship. This ethos is one whose spheres of operation have long since extended beyond the realm of poets on mountains or artists in garrets. Scratch a well-trained executive of today and find that concern with achieving a balanced life, an equilibrium of imagination and realism that, historically, has been the mark which distinguishes . . . the product of the aesthetic education. These are days in which we can all attend a seminar on personal growth and integrity. This whole or – in its more definitive appellation – aesthetic persona, together with the legal personality or status associated with the ownership of copyright, are the principal forms of personhood whose history is addressed in the pages that follow. This is, therefore, a work about some actual forms of personhood, not about all possible ones.

While committed to historical description, the book is intended also as a contribution to the 'history of the present'. In the context of current American, British, Canadian and Australian debates on the future directions of the humanities, it might be that the boundary between the cultural and the legal or governmental spheres will blur, a circumstance apt for hybrid and impure researches such as this. In a different direction, pressures for reform of legal studies are apparent, particularly where strictly profession-oriented curricula in the law schools leave graduates open to the charge of being highly

trained but barely cultured. Those who make this charge might welcome a comparative history that explores a form of property important in the modern economy – copyright – not only in its Anglo-American regimes but also in the continental regimes of the *droit d'auteur* or author's right in which the distinctive form of the *droit moral* or moral right has emerged, albeit more recently than is usually supposed. Putting the legal historical record straight with respect to these different legal systems permits a surer footing when, as now, there is activity at the international level. When the US Congress acknowledges a form of accommodation with the *droit moral* by passing the Berne Convention Implementation Act of 1989, and the United Kingdom and Canadian Parliaments acknowledge it through provisions of the UK Copyright, Designs and Patents Act of 1988 and the Canadian Copyright Amendment Act of the same year, there is point in having some grasp of the comparative history of copyright and the *droit moral* and their cultural circumstances.

This study is intended also to illustrate what a practical and pluralist form of literary and cultural studies might look like – not least as an alternative to the post-structuralist ascendancy in literary and cultural theory. Crudely put, this means a return to historical information. In a recent review of a work on English Renaissance literary culture, the reviewer – let him go unnamed – laments that in schools and departments of English 'instructors are oppressing their students with facts'. This statement is indicative of a cultural milieu in which authorities defend that special species of learned ignorance whereby the discipline of English has aimed to detach its students from facts and technical competence the better to concentrate on an aesthetic refashioning of their personality. In this milieu, the emergence of the literary author has been taken to exemplify how aesthetic self-production is achieved: hence the importance accorded to a Romantic theme – the 'birth' of the author. The presumed mundanity of legal matters allowed practical conditions of authorship such as ownership of copyright to be reduced to small change, regardless of the fact that in the actual world of book publishing they were big money.

More recently, in what has seemed a powerful theory-based breakthrough, a post-structuralist (or deconstructionist) account of authorship has popularised a counter-theme – the 'death' of the author. This second account offers a critique of the author as origin and end of meaning, and presents itself as an emancipation – there are tones of an epochal shift in cultural politics – from the individualised authorial subject of Romanticism. The precondition of all possible forms of personhood (and meanings) is now to be 'language', 'discourse' or 'writing'. Yet once again the status of institutional conditions – including legal arrangements – is trivialised, this time by an enthusiastic dismissal of positive fact as a discursive fiction arbitrarily imposed on linguistic possibility. From the more historical and practical perspective of this book, however, the antagonism of the author's birth and author's death brigades is not fundamental. In the name of resistance to and emancipation

from positive institutions and knowledge, each risks that loss of contact with historical specificity which comes when we neglect the actual forms of agency. Both accounts of authorship are in this regard unhelpful. By contrast, my conviction is that once we are into the technicalities of positive law, we cannot be entirely stupid.

Whatever my personal commitment to the present research, this work could not have been written without the collaborative ambience of the Division of Humanities at Griffith University. The opportunity of participating in team-based teaching and research, together with the financial and secretarial support of the Division, have made the book possible. I want to record a particular debt to Ian Hunter and Dugald Williamson, my co-authors in *On Pornography: Literature, Sexuality and Obscenity Law*, the writing of which taught me many lessons that are both explicit and implicit in the present work. My thanks go also to Jeffrey Minson, Peter Anderson and Wayne Hudson. These colleagues will, I hope, recognise here one particular outcome of a shared intellectual project. More anonymously but no less warmly, I acknowledge the work of the legal writers and historians on whom I have depended, sometimes to a great extent. To its credit, knowingly or unknowingly, their work proceeded without concern for the distinctive imperatives of contemporary literary and cultural theory. I hope to have given the work of these writers a relevance to certain current debates in literary and cultural studies which they did not seek but with which, I trust, they would not be entirely unpleased. Elements of the present argument derive from studies I have published in *Critical Inquiry*, *English Literary History* and *New Formations*; I thank these journals for giving me their permission to elaborate on those earlier formulations.

D.S.

Introduction

Authorship has proven a magnetic topic for literary and cultural studies. For their practitioners, the treatment accorded the issue of authorship has become an index of the current state of literary and cultural theory, to be regretted or applauded, resisted or embraced. Yet it is the measure of an abstraction from institutional realities that so much garrulous debate about authorship has proceeded in ignorance of and with indifference to the actual legal conditions in which some individuals who write have come to occupy definite legal statuses. This silence in the face of the law is also a sign of aesthetic culture's historical capacity to have its devotees withdraw themselves from concern with positive institutions and knowledge in order to pursue the goal of personal self-refinement. This neglect of or withdrawal from an interest in the legal dependency of the cultural sphere no doubt encourages lawyers to turn an equally blind eye on the cultural dependencies of law. It also suggests why, despite its centrality as a philosophical topic, authorship as a legal institution awaits a comprehensive history. No matter how historical their aspiration, Romantic historicist and post-structuralist accounts of authorship both persist with a quasi-philosophical project, the former to establish the author as the necessary consciousness of history, the latter as the necessary preliminary for the dissolution of that consciousness into its real – that is, non-conscious – linguistic and textual determinations.

The problem with these philosophical 'histories' is that they impose necessity and direction on the contingency of things. In a classic study of the birth of the modern author such as Ian Watt's (1957) *The Rise of the Novel*, the emergence of a law of copyright is noted, but only to be located among the several historical phenomena – Protestantism, capitalism, philosophical realism, individualism, the displacement of patronage by the professionalisation of writers, the collapse of the classic genre system, the abandoning of the conventions of the romance, the 'rise of the novel' – that are shown as finding their necessary synthesis in the emerging historical consciousness of the writers of the early modern novel. As if this convenient convergence did not go far enough, Watt's epigone, McKeon (1987), brings the scientific and typographical revolutions within the same dialectic of subjectivity and its

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material determinations, identified respectively with literary forms ('generic transformation') and social change – the breaking of the traditional nexus of social status and economic class position by the rise of a new entrepreneurial stratum (of which Daniel Defoe was an exemplary manifestation). We seem to see an epoch-making threshold. In such accounts, in fact, a familiar dialectic is at work, drawing the many threads together as the necessary movement of 'history', balancing the growth of individual or collective consciousness and the advance of material history. These twin forces, it would seem, then find their destined reconciliation in the exemplary figure of the author – typically Defoe – through whom 'history' moves into the modern age and 'man' escapes the bounds of localised conventionality to grasp his own historical reality as universal subject. This scheme has done no little damage. Above all, it leads us to impose a philosophical direction on a patchwork of diverse and contingent historical phenomena. What are the consequences of this 'historicist' approach for histories of authorship and copyright? As one element of the manifold purportedly directed by the march of 'history' towards the modern synthesis, copyright is admitted to that march. But the admission price is high – nothing less than subordination to the invisible force and irresistible principle of the dialectic, the law's role being simply to play out its allotted part in the scenography of 'man's' inevitable completion in (literary) culture. In the historicist account, it was always to be the role of copyright to support the persona that came to be enshrined in Romantic aesthetics.

It is not entirely unfortunate, then, that under the assault of a loose coalition of theoretical forces – linguistic, rhetorical, post-Marxian, psychoanalytic, feminist – the empire of Romantic historicism and the birth of the author has ceded ground to post-structuralism and the death of the author. The latter approach identifies the individual authorial consciousness of history as no more than a linguistic illusion, a discursive fiction prematurely imposed upon the flux of language. In relation to copyright law, this illusion takes the form of the emergence of the 'author as proprietor' (Rose 1988). However, thanks to the momentous advance of literary theory, we are told that this gross historical error is now seen for what it was, an illusion first staged but then upstaged by 'writing'. It was never the author who made sense but the non-conscious forces of the language system. This post-structuralist account of authorship, with its corollary that language (and images) are by their nature beyond ownership, has exercised its effect on at least one sector of artistic practice, that of 'appropriation' art – the making of an art on art that flaunts the fact of its unauthorised citation of other works. It is not clear what this supposedly more critical account of authorship has to offer historians of copyright. A quasi-philosophical necessity remains: the figure of the author has become the necessary preliminary to the eclipse of consciousness where previously it was the place in which that consciousness had risen. In this new schema, the law's role is to appear but only in order to disappear, a mere ancillary to the more fundamental process whereby the author as subject of

consciousness is dispersed by the determining transgressivity of language or writing.

Because Romanticism and post-structuralism (or deconstruction) form anything but a simple opposition, my antinomy of 'Romantic historicist' and 'post-structuralist' accounts of authorship requires comment. While I shall use this antinomy as a coordinating and classificatory device, I do not mean to imply that Romanticism and post-structuralism are two massive and coherent entities of thought standing in a singular relation of opposition one to the other. The Romantic historicism to which I refer is not the sum total of that complex and internally diverse array of cultural phenomena and personalities denoted by the term Romanticism. If for the purposes of the argument I set my account of authorship and copyright against the historicist account, I none the less reserve the right elsewhere to admire an achievement of Romanticism such as the German historical school of law associated with Savigny.

A similarly modulating comment applies to my use of 'post-structuralism' as the other term of my schematic pair. Without adding to the mountain of expositions already written on post-structuralism (and deconstruction), I shall simply offer three sets of remarks on this matter: they concern the internal diversity of post-structuralism; the problem of its 'turn to language'; and an indication of what the present study might have drawn from the broader post-structuralist project. On the first two of these I shall be brief.

On the question of authorship, it seems to me, authorities such as Roland Barthes, Jacques Derrida and Michel Foucault have not spoken with a single voice. Although an impression has formed that they have all equally embraced the image of 'transgressive' language as 'author', this impression is false. For Foucault in particular, as I will argue in chapter 9, there was no lasting commitment to a notion of language or writing as the antecedent condition of all social being. This is not to say that – among the epigones – extravagant formulations of the discursive 'death' of the author were not proposed. On the contrary, we have grown familiar with the figure of the author no longer as the origin of the work but as the imaginary discursive effect thrown up by discourse. We are familiar too – and sometimes not a little weary – with the 'critical politics' that has been assumed to flow from this turn to language. It is as if we were asked to believe that an adequate historical account of copyright law could be written entirely in terms of linguistic profusion, textual subversion and unbounded plasticity of being – all the time confronted with the assertion that we cannot get beyond the bounds of language. Post-structuralism in this style is just a clever logicist game of unsettling sets of established terms by claiming to uncover their purported aporias and logical contradictions. This game, moreover, is caught up in a pressure to be emancipatory (or emancipated), as if in a caricature of Frankfurt School political analysis every history of copyright law was required to be a critique of society or every account of the English common

law had to be written in terms of indigenous 'resistances'. Historical description is disabled when all phenomena have to be treated within some version of the exhaustive antinomy of domination and subversion, blame and praise.

However, the work of Derrida and Foucault – in part at least – calls for a quite different comment. Few have done more than them to thematise difference and discontinuity. Importantly, they have also begun the task of demonstrating that difference is more than just a literary feature. They give a firm lesson in why and how to turn from the generalities of philosophical history towards a less transcendental but more practical account of human attributes. In the present study, where the attributes in question are those attaching to certain legal and aesthetic personalities, there will be more than one occasion for applying this lesson, even though it is true to say that neither Derrida nor Foucault have done more than gesture towards a concrete history of copyright. In this respect, my debt to them is more an atmospheric relation than a specific borrowing. That said, I suspect the present argument will be seen by some to embrace a positivism and an institutionalism not entirely welcome in post-structuralist literary, cultural and – to judge by Carty (1990) and Kramer (1991) – legal theory. For these post-structuralist persons, to specify a positivity is to run the risk of imposing fixity, normativity and a dominant meaning; for the present study, however, the aim is to do justice to the historical positivity of certain legal-cultural arrangements relating to authorship. The picture is one of a patchwork, not a triumphal road. What has counted as a right in one legal environment or jurisdiction has not always so counted in another. This, of course, is the problem for any too-philosophical address to rights and attributes at some universal level.

It should now be clear what I have in view in saying that this book pursues a historical and theoretical alternative to both the Romantic historicist and the post-structuralist templates for conceiving of modern forms of authorship. The alternative consists above all in writing a history that remains within the purview of positive law and actual legal systems. There are three main coordinates for such a history. The first is provided by an important body of cultural historiography oriented not to philosophical subjectivity but to a specific communications technology: print literacy. Although authorship as a specific topic is not fully dealt with by the book historians – Davis (1975), Febvre and Martin (1976), Eisenstein (1979), Chartier (1987) – their various explorations of print and its implications for the interests and attributes of writers and readers light a path. To cite one instance, Elizabeth Eisenstein treats the attributes of the early modern author neither as the inevitable outcome of the dialectical reconciliation of consciousness and material forces nor as the dispersal of consciousness by its non-conscious determinations in language, labour or whatever. Instead what she describes is a new cultural milieu, the unforeseen outcome of a variety of alterations occasioned in pre-modern institutions and conducts by the spread of print:

> From the very first, authorship was closely linked to the new technology. . . . The romantic figure of the aristocratic or patrician patron has tended to obscure the more plebeian and prosaic early capitalist entrepreneur who hired scholars, translators, editors and compilers when not serving in these capacities himself. Partly because copyists had, after all, never paid those whose works they copied, partly because new books were a small portion of the early book trade, and partly because divisions of literary labour remained blurred, the author retained a quasi-amateur status until the eighteenth century. During this interval printers served as patrons for authors, and sought patronage, privileges, and favours from official quarters as well. This was the era when men of letters and learning were likely to be familiar with print technology and commercial trade routes in a manner that later observers overlook.
>
> (Eisenstein 1979: 153–4)

Like any actual cultural milieu, this one is irreducible to 'consciousness' or 'language'. A lower-level analysis is preferred. In the early modern printing-shop, the treatment of intellectual property as common property, the reprint industry and the amateur status of authors carry over from the culture of hand-copying. Other features – the hiring of scholars as journeymen, the fluid distribution of technical capacities, the closeness of intellectual and entrepreneurial activities – arise with print technology. The development of the technical capacity for mass mechanical copying is central to Eisenstein's account. It was through the printed book that writing and writers became connected to a system of literary production and markets of a different order and kind from that associated with the clerically controlled activity of hand-copying. In this new and uncertain milieu, new divisions of literate labour and new types of economic and moral activity also arose, organised to varying extents by new forms of legal regulation. As to the person of the author, this was not so easily differentiated from that of the artisanal book producer. Nor was there some predestined or necessary boundary – let alone a guarantee of future reconciliation at some higher level of being – between a writer's material and ideal concerns.

The second main coordinate of my alternative account of authorship is furnished by a historical anthropology of personhood that is sufficiently pluralist to be immune to the unifying pressure of philosophical histories. A perspective of this sort is outlined in the work of Marcel Mauss and Max Weber and in the late writings of Michel Foucault. In a variety of ways, they show that forms of personhood are not inevitable outcomes of some fundamental global process. Rather, they are purpose-built for their particular environments. Forms of personhood depend on the definite arrays of instituted statuses and attributes, rights and duties that organise the practical deportment of individuals and groups. An advantage of this anthropological perspective – to be explored more fully in chapter 1 – is that it distinguishes

persons and *individuals*. This might recall the legal truism that not all individuals are legal persons, while not all legal persons – corporate bodies for example – are human individuals. Applied to the legal and the aesthetic personalities of individuals who write, this distinction cuts across that Romantic habit of mind which equates the person with the expression of individuality. By adopting this anthropological concern with differentiating types of person and establishing the specific circumstances of their emergence and functioning, we can focus more attention on the statuses and attributes that constitute a given form of personhood. Considered in this light, the statuses and attributes of legal personality are seen to be inseparable from the definite yet limited parameters of particular legal systems. They do not float free in some undifferentiated space of consciousness or language.

My third coordinate for an alternative to philosophical histories of authorship and copyright involves according a determining role to positive law. In the first instance – to perpetuate the classical distinction between it and natural law – positive law is law made by particular custom or enactment. It thus refers positively to the laws as they actually have been, not normatively to what they might or should have been. For the German social theorist, Niklas Luhmann, this distinction raises the question of the preconditions under which a 'society can run the risk of making its law positive', the course of action that has been followed in our modern western states:

> For us, the foundations of law can no longer be located in a supreme natural law that exists objectively and through its objective truth is permanently binding. The stability and validity of the law no longer rests upon a higher and more stable order, but instead upon a principle of variation: it is the very alterability of law that is the foundation for its stability and validity.
>
> (Luhmann 1982: 94)

The 'very alterability' of positive law – its inseparability from the fact of historical variation – is a bulwark against higher-level explanations of particular bodies of law. To treat the law of copyright as positive law is to recognise it as an independent and variable phenomenon of culture, and to address the historical particularity of its objects and means. Not every culture has had a legal system or print literacy, let alone something so specialised as a law of copyright.

However, 'positive' also carries an anti-philosophical charge. It signals a willingness to conceive of copyright law as contingent upon certain jurisdictions and their instruments, rather than as determined or directed by some fundamental logic or necessary process in culture. To proceed from the actuality of the positive law of copyright to the cultural phenomenon of authorship should also help avoid the subordination of the law to philosophical schemata that is a characteristic feature of both Romantic historicist or post-structuralist accounts. In practice, this means allowing historical examples to do the work of arguing that the writer's legal person and its

attributes were determined by statutes executed and cases decided – and by legal doctrine – not by consciousness or its linguistic simulacrum.

These three coordinates – the good example of the book historians, the historical anthropology of personhood and the determining powers of positive law – have a common motif: the technical and technological character of authorial personality as it has been recognised in law. However, given the historically and jurisdictionally variable nature of this personality, in developing an account of copyright law and authorship that is historically rather than conceptually grounded I shall deploy my coordinates as the circumstance dictates. In some instances the three overlap, as in Eisenstein's (1979) demonstration that protection of literary works by copyright presumed a technical capacity to stabilise the relation between a particular author or printer and a particular text, a condition which could not be routinely met prior to the typographic fixity that print made possible. The lesson is this: far from being an essential attribute of all (fully developed) human beings, the capacity to conduct oneself as responsible for one's written work was contingent upon the availability of print technology. Moreover, like any other cultural attribute, the sense of personal responsibility for one's literary compositions had to be acquired – much in the same way as late twentieth-century westerners have acquired a reluctance and incapacity to spit in public. And when this ethical capacity for responsibility was acquired, it was not a sign that consciousness (or its illusion) had decisively advanced 'man' into the 'modern'; it was a contingent outcome of the new cultural environment of print communications technology, a complex environment in which early modern English law, drawing on available legal instruments, began to regulate the relations of commerce, government and cultural activity in an entirely characteristic way: by constructing a piecemeal array of different rights and remedies – attributes of legal personalities – that the law ascribed to individuals as their means of entering into specific kinds of cultural activity and commercial relationship.

As I shall approach them, the law of copyright and the very different form of law concerned with authors' rights – the European *droit moral* – will no longer find themselves subordinated to whatever currently purports to be the fundamental principle of 'man's' cultural development. These forms of law will be studied as historical positivities, to be described in their own terms. By showing the legal sphere a measure of respect as an independent phenomenon, a more pluralist and pragmatic form of literary and cultural studies might encourage legal researchers to explore the overlaps that have occurred between the legal and the cultural spheres. This would help break the complicity between legal research which studies nothing but the law and cultural critique which claims to know the truth of everything. As for literary and cultural studies, the point will be to do some actual historical work, to give some positive information and to learn some law – without assuming any universal vantage point, be it 'consciousness' or 'discourse', from which all

the different spheres of life could be inspected and judged.

As should now be clear, I shall not treat authorship as a unified phenomenon of culture that emerged in a single historical or theoretical space, that is, as if it fell within a single framework of explanation. The delineation of legal and aesthetic personalities and the manners of their occupation by individuals who write and publish obeyed no single logic or necessity. Given these precepts, my major objective is to propose a comparative framework for micro-histories of the different legal-cultural environments described below. In constructing this framework, I have relied on the existing histories. At every turn, however, I have resisted that untamed cultural historicism which has imagined an essential continuity of aesthetic and legal development from ancient Welsh bards to modern copyright holders (Wincor 1962) or from Roman bibliopoles to bearers of a *droit moral* (Dock 1962, 1963). Chronologically and thematically, I have therefore limited myself principally to the legal relations of print authorship and publication in the eighteenth and nineteenth centuries. Yet even these narrower limits do not reveal (or construct) a unified epoch. Within the span of the eighteenth and nineteenth centuries, different legal norms emerged in different geopolitical and juridical circumstances. In copyright regimes the general object has been to provide a remedy against unauthorised reproduction of a protected commodity; in *droit moral* regimes, to protect the integrity of an authorial personality. Observing these chronological limits and concentrating on the issues raised in law by print production and dissemination has none the less allowed an adequate demonstration of the complex relations that have obtained between legal and aesthetic personalities. It has also demonstrated the fact of jurisdictional difference between different national regimes.

Anonymous regulatory systems are not conventionally the heroes of cultural history, although what Marxian discourse once did for the mode of production and post-structuralism still does for the language system perhaps leaves room for hope (even though in both those cases it was a matter of constructing precisely the form of universal subject and philosophical necessity that I wish to avoid). Moreover, having recently completed a (co-authored) history of obscenity law, I hesitate to claim for copyright the ambivalent *frissons* of that topic. Nor does copyright history have a crowd-drawing equivalent – except perhaps for the heady days of 1774 when the House of Lords decided *Donaldson* v. *Beckett* – of the mid-twentieth-century literary show trials and *causes célèbres* of Anglo-American obscenity law. Yet there are indices of the importance of our present topic. If in England by the turn of the nineteenth century there had been just one Obscene Publications Act – that of 1857 – by contrast, as the 1878 Royal Commission on Copyright reported, there were 'the provisions of fourteen Acts of Parliament, which relate in whole or in part to different branches of the subject and . . . common law principles, nowhere stated in any definite or authoritative way, but implied in a considerable number of reported cases scattered over the law

reports'. And not for nothing does the copyright clause in section 8 of article 1 of the United States Constitution contain the only use of the term 'right' in the Constitution proper. Along with the freedoms of speech and press, copyright functions as a key mechanism for the dissemination of public knowledge. From the viewpoint of historical description, however, it might be advantageous that – unlike obscenity law – the law of copyright and its history do not offer so easy an opportunity to claim to speak with the voice of right, of universal history. Indeed, given the profound historical tension between legal-governmental and philosophical-aesthetic spheres and the orientation of Romantic historicist and post-structuralist approaches to authorship, simply to describe in positive terms the legal relations of authorial personality will be to engage in polemic.

Chapter 1

Preliminaries: positivities and polemics

I

The starting point is to recognise the independent and purposive character of legal persons. In 1710, what has been called the world's first copyright act was passed by the British Parliament. It has become known as the Statute of Anne. With this Act, writers acquired a statutory capacity to exclude others from the right to reproduce copies of the work and to publish and circulate these copies in a market. However, the writer was not the only individual with access to this right; printers, publishers, in fact anyone who bought, inherited or otherwise acquired a copyright now occupied the same legal status and bore the same legal personality. The right brought into statutory existence in 1710 was the perfectly alienable right – it could be sold and traded – to engage in certain economic exchanges based on the mechanical duplicates of a work. As a trade regulation statute, the Act of 1710 neither assumed nor required any equivalence between the person of the copyright holder and the moral or aesthetic personality of the writer; rather, it delineated and attributed the legal capacity to own copyright in a manner designed for the regulation of a specific economic activity – the making of and trading in a printed commodity.

Described in these terms, the first copyright act was neither a successful nor a failed attempt to recognise a writer's subjectivity in a written work or to give legal recognition to an inalienable human right inherent in the writer. Indeed, some writers of the times found the idea of an equivalence between their moral authority and a pecuniary interest repugnant. But then it was not the purpose of the Statute of Anne to establish any such equivalence. By allowing anyone, whether or not a member of the Stationers' Company to hold copyright – provided they complied with the formalities set out in the Act – the purpose of the legislation was to break the Company's 150-year-old monopoly on the publishing of books in England.[1] This step – deregulatory but also inaugurating a new threshold of regulation – was taken at a time when the technology of print and the development of new markets for books had transformed the once protective functions of the Stationers' traditional monopoly into an unacceptable constraint on an expanding book trade. There

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is an immediate lesson to be drawn. It makes no sense to view the statutory law of copyright, in this its founding instance, as if it should or could have been the pliable instrument through which history writes subjectivity into economic interests and economic interests into subjectivity. It was a positive legal device invented within a particular jurisdiction to solve a specific set of trade problems by drawing on available legal instruments. The construction of rights, liabilities and conditions provided for in the Statute of Anne was piecemeal. The durations of copyrights were differentially defined, all existing copyrights being vested in the present owners for a period of twenty-one years from 10 April 1710 (the day the law came into effect); for new publications the period of the exclusive right to produce copies was fourteen years, although in the circumstance that the author of the work was still living at the end of this period, there was a possibility of a second fourteen-year term. By the early eighteenth century, the possibility was thus emerging whereby copyright law began to personify certain print-literate capacities and products by attaching them to a purpose-built legal personality: the author as bearer of a claimable – but entirely assignable – exclusive right to the economic exploitation of his or her work.

At the same time, other aspects of book production and distribution were legally personified – not by statute but by judicial decision – in a quite different way and for a quite different purpose. This development involved the creation of another new legal personality: the obscene libeller, one who had the capacity to be held criminally liable for the corruption of public morality by virtue of issuing an obscene libel. In 1727 an individual was for the first time convicted of the crime of obscene publication. In both the Statute of Anne and the judicial creation of this new criminal offence, the outcomes proved durable. On the one hand, the 'English lawyer maintained a remarkably consistent view of copyright as a right to stop the making of copies, despite the extension of that right from 1709, when all it covered was books and sheet music, to the first great consolidation of copyright in 1911, by which time the law could be seen to protect such diverse objects as photographs, sculptures, gramophone records and telegram codes' (Phillips 1986: 104). On the other hand, the crime of obscene libel was to endure in English law for 232 years from its creation in *Rex* v. *Curll* in 1727 until the Obscene Publications Act of 1959. Thus, as legal persons, individuals who wrote acquired in 1710 the capacity to own copyright and in 1727 the capacity to be held criminally responsible for publishing an obscene libel. Yet the writer as owner of copyright and the writer as locus of criminal liability are legal persons that stand in no necessary relation one to another. If in chronological terms these legal persons so nearly coincide, this is contingent upon specific circumstances: economic power plays (the book trade and new commercial interests), technological possibilities (print production and a growing distribution capacity), cultural shifts (growth of discursive literacy

and emergence of new audiences with new interests in and uses for printed works), and the political rationality of governmental action at the time.

In 1727 Edmund Curll was finally sentenced by the Court of King's Bench for having published *Venus in the Cloister; or, the Nun in her Smock*, together with certain other works. When Curll became the first individual to be ascribed this new form of liability – this new legal personality – it was not as an author but as the printer and publisher of a work which, previously judged anodyne, now found itself in circumstances such that he gained a place in legal history. The conduct of Curll's case does not suggest crude repression of an authorial subject by the law. The judges wrestled with contradictory precedents in deciding whether an immoral work was the concern of the common law courts – rather than a sin to be dealt with in the ecclesiastical courts – and whether a 'libel' that harms no one in particular could constitute a crime. The Attorney General, prosecuting, asked the judges to distinguish between a private immoral act and one that is public, and that therefore affects all the King's subjects; he drew an evidently persuasive analogy in asserting that 'particular acts of fornication are not punishable in the Temporal Courts, and bawdy houses are'. What is crucial is the manner in which the judges drew distinctions that established the public character of a written and printed publication. According to one judge, '[t]he Spiritual Courts punish only personal spiritual defamation by words; if it is reduced to *writing*, it is a temporal offence'. And Justice Reynolds commented: 'This is surely worse than *Sir Charles Sedley's* case [Sedley had been indicted in 1663 for going naked on a balcony and causing a disturbance by pissing on the crowd below], who only exposed himself to the people then present, who might choose whether they would look upon him or not; *whereas this book goes all over the kingdom*' (*Rex* v. *Curll*: 850–1; emphasis added).*[2] What pushed Curll's action across the threshold from sin to crime was the judges' sense of the unprecedented scope of moral dissemination conferred by a new communications technology: that of the printed book circulating through the book trade network.

What, then, of the emergence of a statutory law of copyright? With the Act of 1710, as I have already suggested, the English legal apparatus was not attempting to recognise the presence of the writer's subjectivity in the work but regulating a novel and unstable sphere of cultural, commercial and technical activity by delineating and attributing a right to trade in mechanical duplicates of the work. As with the criminal liability for obscenity, it is important to register the fact that the law's interest attached not to the act of writing but to that of publication and sale. In relation to obscene publication, we are wrong to presume that the law treats these different activities as equivalent, as if the prosecution of the latter was a convenient way to repress the former. In other words, the law does not assume that the person expressed

* For the reference to this and other cases cited, see the Index of cases, p. 261.

in the work is necessarily identical with the person liable for the crime of obscene publication. In constructing this new crime, the common law altered the threshold between sin and crime, establishing a mechanism for attributing criminal responsibility quite independently of any attribution of moral or aesthetic responsibility for the work. In relation to copyright, one of our tasks will be to trace the manifestation of an analogous distinction in the sphere of literary property.

First, however, is it possible to clarify the relation of these two legal personalities – as obscene libeller and owner of copyright – to the writer's subjectivity? A certain habit of mind remains attached to the notion of an essential person, one which in terms of the history of authorship would typically be moral or aesthetic, the locus of a subjectivity deeper and more general than mere institutional constructs such as the juridical persons of copyright holder or obscene libeller. Unlike them, so it might seem, this subjectivity would not depend on attributes formed in a technical apparatus resting on executed statutes and judicial determinations. The writer's legal personalities appear extrinsic constructs, complex artefacts perhaps but finally incidental to the intrinsic personality reflected or recovered in the writing. Surely there has to be a fundamental personality, the person itself, that constitutes the necessary ground of legal personalities, the anchorage on which they ultimately depend. And so we might habitually assume that legal personality itself ought ideally to equate or approximate to subjectivity.

There is, however, an important historical sense in which the Act of 1710 could not assume a relation of equivalence between the legal person of the copyright owner and the moral or aesthetic person of the writer. The capacity to be morally responsible for one's writings is not an attribute of all human beings. The notion that a literary work is the expression of its author's moral or aesthetic personality – and not, say, a correct imitation of the best rhetorical model or a calculation as to what will sell – is inseparable from the specific cultural conditions and practices in which writers came to acquire an interest in and a capacity for having such a personality. Before a system of law could be asked to distinguish literary writing as expressive of its creator's moral or aesthetic persona, literary writers first had to acquire an expressible interiority and literary writing had to become a specialist ethical activity. These are among the special acquisitions of Romantic culture. As such, however, they long postdate the Statute of Anne. At the time of that statute, it was not an aesthetic concern with the dialectical balancing of a 'complete' self but the austere Puritan ethic of conscience that organised a moral persona for an individual such as Daniel Defoe, a very different yet no less intense form of inwardness based on rigorous devotional techniques and specific literate abilities (Saunders and Hunter 1991). We begin to see two important truths: not only are the pertinent forms of legal status or person historically variable; so too is the ethical subject that has been taken to be their ground or anchorage. The balance of this opening chapter is therefore expended on

providing support to these propositions and on specifying in more detail the line of approach I have adopted in the present study.

II

If legal personality is taken to depend on the individual writer's 'inner' personality, what do we make of the fact that what has counted as inner personality is historically variable, whether the intensely didactic interiority of the Puritan subject or the intensely aesthetic interiority of the Romantic subject? Confronted by these different forms of inwardness, whoever wishes to assert a necessary grounding of legal personality in some deeper subjectivity than a legal system must first decide which of these two inwardnesses, the Puritan or the Romantic, is to be that ground. Or, given the fact of historical variation, would it not be better not to impose a principle of necessity on the historical and cultural diversity of forms of personhood that individuals have happened to bear?

It would also help if, analytically and descriptively, we differentiated *person* from *individual*. The French anthropologist Marcel Mauss (1985) draws the following distinction: whereas individuals are biological and psychological beings, persons represent the definite complexes of instituted statuses and attributes that have provided the means of actually conducting oneself and one's relations with others. Mauss' distinction rests on evidence drawn from societies in which not all individuals are or have persons. Moreover, those individuals who are or have persons do not necessarily bear this personhood in what modern westerners would recognise as an individual manner – that is, entirely within themselves. The forms of having or being a person have sometimes been invested in trans-individual institutions such as name systems or mask-wearing rituals in which the rights, duties or other attributes that constituted personhood were attached not to an individual but to the name or mask. In some societies, names or masks were fewer in number than were individuals; nameless or maskless individuals were individuals without persons.

The first relatively even distribution of persons to individuals came, Mauss argues, with the establishment of the rights ascribed to all those individuals who were citizens under the laws of Rome. However, the form of personhood that has emerged in the west is one that Mauss identifies as a special case in a number of respects. Moral and legal in nature, it has been extended to almost every individual member of our societies. It is also a special case in so far as a very large proportion of individuals – no longer just a few specialists in Stoic castes and Christian monastic orders – have come to acquire the ethical ability of locating a moral personality within their self. The fact that certain forms of personhood have been internalised is, however, a matter of historical contingency, important in a practical sense but not a fundamental difference. Mauss is thus quite clear that the identification or equivalence of the

individual with an internalised moral persona is not the essential form of human subjectivity nor the sign of a recovery of fundamental human being. It is, as Mauss puts it, an arrangement 'only for us, among us', distinguished by its rarity and 'delicacy', not by its universal truth and necessity. Moreover, this form of personhood belongs to a particular cultural, religious and legal-administrative history in which there has occurred a wide distribution of an interest in having an inner moral persona and in which there have been the technical conditions for internalising a moral conscience and acquiring a consciousness of self. Such attributes, according to Mauss, were developed by the Stoics but among them remained limited to a cult practice. A wider dissemination of this moral persona was achieved among the Puritan sects. Mauss' lesson on the independence of the moral persona from the individual suggests one way in which to lift the heavy philosophical pressure to reconcile the writer's legal and aesthetic personalities in an organic relation. This lesson consists in learning to see the aesthetic persona as a definite but limited mode of personhood, one that has been internalised by certain members of the population along the same lines as – but until now, perhaps, with a narrower distribution than – the moral conscience.

If these historical and anthropological distinctions are valid, the legal and aesthetic personalities stand in no general relation one to the other. No claim can be made that one of them is, as it were, the person itself. These points can be underscored by reference to the concept of *Lebensführung* or 'conduct of life' that Wilhelm Hennis (1988) has reconstructed as Max Weber's central theme.[3] It is a matter of the formation of 'personalities' appropriate to particular life orders (*Lebensordnung*) or 'spheres of existence'. 'Conduct of life' names the specific ethical techniques and practical means whereby these personalities are methodically and reliably organised – like habits, they are not acquired merely by thinking. The most famous of these Weberian personalities is the Puritan, the typical denizen of that ethos which emerged in the particular life order associated with the radical Protestant sects. Others are the German peasant personality in the East German agrarian-economic system, the persona of the scientist within his or her professional vocation, and the persona of the English common lawyers that shaped and was shaped by the professional, client-oriented milieu of the Inns of Court, so unlike the academic persona of the continental lawyers formed in the European university law school (Weber 1968: 785–8).

Adapting Mauss' typology and Weber's concepts to the discussion of the history of authorship and copyright we can, first, differentiate the attributes of the authorial persona – a specific ensemble of instituted rights and liabilities, capacities and virtues – from the individual who writes. Second, we can identify the aesthetic persona with a particular historical ethos or sphere of existence, and thus distinguish it from an expression of human subjectivity in some general sense. Like other forms of person, the aesthetic personality is thus neither in accord with nor at the expense of a natural way of being

human. It is an artefact too specialised to be counted as 'the subject' (or 'the person'). And, third, we can thus begin to rethink the vexed concepts of subject and subjectivity in a similarly historical and anthropological fashion. This could mean no longer taking them as the fundamental form of being human but, much more precisely, as the *manner* in which individuals bear the persons ascribed to them.[4] This is to echo Foucault's (1985: 26) concern in his studies of the 'practices of the self' in late Antiquity with the specific 'manner in which one ought to form oneself as an ethical subject acting in reference to the prescriptive elements that make up the [moral] code'. We have noted, for instance, the manner in which Weber's Puritan internalised in the form of an ever-watchful inner conscience the public norm embodied in the predestinarian doctrine or code, rather than externalising that norm in religious ceremonies and images or, for that matter, in a legal system. The manner of bearing one's person depends on a diversity of factors, and has no general or necessary form. It is not determined by some general process or logic in 'man's' cultural development. No form of having or being a person, says Mauss, is to be considered 'in any way primitive'. And in Weber's terms, the question is not how well a particular personality equates with the truth of human experience or subjectivity in general, but how one gets individuals willing and competent to bear that personality which fits the circumstances of a given sphere of existence.

The point is therefore to construct a historical and practical account of cultural attributes such as the ability to sustain a moral responsibility for what one has written or the capacity to own a right of copyright, an account which shows the actual 'conducts of life' involved and the technical conditions for producing and deploying them. After all, ideas – even the idea of necessity – are not of themselves actionable. They guarantee nothing by way of actual competence (but they presume it). This is a point to keep in view when, for instance, we encounter attempts to bring economic theory to bear on actual conduct in the intellectual property field. To reconcile the gap between the forms of an ideal economy and the norms of conduct of actual populations, the best the theorist usually comes up with is an appeal to a psychology that oscillates between a normative science of subjectivity and a positive anthropology of actual conducts. We thus read: 'Property rights serve to internalise externalities and can influence the behaviour of participants in the economy by acting as a system of incentive, reward and efficiency control. ... As justification [of property rights] in the area of patent law, for example, reference has always more or less intuitively been made, among other things, to a "reward and incentive theory", although these considerations could not have been influenced by property rights theory' (Lehmann 1985: 530). Indeed they could not, while theory remains disinterested in the historical means of forming personal attributes, not least the human dispositions needed for a given economy to succeed.

The problem of ahistorical approaches to the historical relations of author-