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‘The Play’s The Thing …’ But What’s the Play? And Who Owns It?

Introduction

One of the many things we learn from *Hamlet* is ‘the play’s the thing’ – an object.[1] As with many other ‘things’, the law protects plays as objects of *property*.[2] But what exactly is the play as protected by copyright law? And who owns it? In this chapter I explore the history of authorship and ownership of plays from the Elizabethan period up to the early twentieth century (1558–1911) by analysing both theatrical and legal developments.

A note of caution is necessary. The narrative sweep of this chapter covers a large amount of material, spanning more than four centuries. Legal scholars have devoted entire books to micro-historical studies within this period.[3] Within the limitations of the length of this chapter my aim is to build upon these valuable historical studies to contribute a novel account of the emergence of the author-figure as owner of the dramatic work under UK copyright law. In addition to being

[1] W Shakespeare, *The Oxford Shakespeare: Hamlet* (S Wells ed, Oxford: Oxford University Press, 2008) Act II, Scene ii.

[2] B Sherman, ‘What is a work?’ (2011) 12 *Theoretical Inquiries in Law* 99, 120. See also A Pottage, *Figures of Invention* (Oxford: Oxford University Press, 2011); ZK Said, ‘Copyright’s Illogical Exclusion of Conceptual Art That Changes over Time’ (2016) 39 *Colum. J. L. & Arts* 335; HY Kang, ‘Is There (Should There Be) a Law & Humanities Canon?’ (2019) 16 *Law, Culture and the Humanities* 1; A Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Cheltenham: Edward Elgar, 2011); J Sanders, *Adaptation and Appropriation* (New York: Routledge, 2006); PK Saint-Amour (ed), *Modernism and Copyright* (Oxford: Oxford University Press, 2011); T Flessas and L Mulcahy, ‘Limiting Law: Art in the Street and Street in the Art’ (2018) 14 *Law, Culture and the Humanities* 219; A Drassinower, *What’s Wrong With Copying?* (Cambridge, MA: Harvard University Press, 2015); G Frosio, *Reconciling Copyright with Cumulative Creativity – The Third Paradigm* (Cheltenham: Edward Elgar, 2018); K Bowrey, *Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author* (Abingdon: Routledge, 2020).

[3] D Miller, *Copyright and the Value of Performance, 1770–1911* (Cambridge: Cambridge University Press, 2018); E Cooper, *Art and Modern Copyright: The Contested Image* (Cambridge: Cambridge University Press, 2018); and W Slauter, *Who Owns the News? A History of Copyright* (Stanford: Stanford University Press, 2019). See also M Rose, *Authors and Owner – The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993); L Goehr, *The Imaginary Museum of Musical Works: An Essay in the Philosophy of Music* (Oxford: Clarendon Press, 1992) and A Barron, ‘Copyright Law’s Musical Work’ (2006) 15 *Social & Legal Studies* 101.

a useful contribution to the literature, this chapter lays the groundwork for my exploration of the modern law of copyright in the chapters that follow.

The significance of theatre to daily life during the often-tumultuous period from 1558–1911 is unquestionable: it is not an exaggeration to say that theatre was the primary public forum of art.[4] During the passing of these centuries England was transformed by momentous events including civil war (1642–51), restoration of the monarchy (1660) and the 'glorious revolution' (1688–89). The modern state of the United Kingdom of Great Britain and Ireland emerged via unions with Scotland (1707) and Ireland (1801), with the Imperial Parliament at Westminster forming the centre of the British Empire by the time of the Copyright Act 1911. Theatre reflected these events and was shaped by them, via constant state censorship and even by the shutting down of all theatres (as happened most dramatically in 1642–60).

At various points during this long period theatrical innovations influenced the law's perception of dramatic texts. The property boundaries of the play shifted, with the text being first protected via law solely as a print-commodity, and later additionally as a performance-commodity.[5] The law's impact on theatre was no less profound, with the literary activities of lawyers at the Inns of Court influencing the development of English tragedies.[6]

In the Elizabethan period the majority of plays were not published at all, and if so only in 'Quarto' form.[7] Playwrights were sometimes named as authors in printed play-texts registered at the Stationers' Company but not always, and they did not receive royalties. After the Statute of Anne 1710 legal claims made by playwrights, publishers and theatre owners (some of whom had received legal training at the Inns of Court) helped establish key case law principles concerning the 'right to copy' – the dramatic print-commodity under copyright. Later on, seminal cases such as *Macklin v Richardson* (1770) and *Murray v Ellison* (1822) stirred public debate over the commodification of performances and the ultimate question of 'how and what we value in art' – issues we still grapple with today.[8]

[4] S Shepherd and M Wallis, *Drama/Theatre/Performance* (London: Routledge, 2004) 1; J Dryden, *Of Dramatic Poesy and Other Critical Essays* (G Watson ed, London: Dent, 1968) 87 (originally written 1665–66); ST Coleridge, *Coleridge's Shakespearean Criticism* (TM Raysor ed, London: Constable & Co., 1930) 200; S Johnson, *Dr Johnson on Shakespeare* (WK Wimsatt ed, Harmondsworth: Penguin, 1969) 70–71 (originally published 1765), W Hazlitt, *Selected Writings* (J Cooke ed, Oxford: Oxford University Press, 1991) 330.

[5] Miller (n 3) 27–31 and 128–30.

[6] P Raffield, *Shakespeare's Imaginary Constitution* (Oxford: Hart Publishing, 2010); A Moore, *Shakespeare Between Machiavelli and Hobbes: Dead Body Politics* (Lanham: Lexington Books, 2016); E Heinze, '"Were it not against our laws": Oppression and Resistance in Shakespeare's Comedy of Errors' (2009) 29 *Legal Studies*; BJ Sokol and M Sokol, *Shakespeare's Legal Language* (London: Continuum, 2004) 316.

[7] Several Shakespeare plays were published during his lifetime in Quarto form, but Shakespeare's posthumous *First Folio* (1623) featured a large number of previously unpublished plays – see E Smith, *Shakespeare's First Folio: Four Centuries of an Iconic Book* (Oxford: Oxford University Press, 2016).

[8] Miller (n 3) 31.

My concern in this book is UK law, so it is appropriate to begin in the first part of this chapter by analysing drama as it emerged in England.[9] I explore the nature of dramatic authorship from an interdisciplinary perspective, considering law, theatre studies, literary studies, anthropology and sociology. As acknowledged earlier, several important studies on copyright history in non-literary forms (visual art, news, theatre & music performance) have been published in recent years.[10] This chapter contributes to this flourishing field of research by mapping out how plays came to be protected as works – property objects encompassing a bundle of rights to eg copy, publish, perform, adapt, etc.

My focus in this chapter is on two related issues: authorship and the work. How did *authorship* of theatre occur in the sixteenth century and seventeenth century? On this I explore whether individual playwrights were viewed as authors of plays; and I trace how conceptions of authorship (and ownership) changed over time, especially in the eighteenth century and nineteenth century.

Furthermore, what exactly was *the work* of theatre in the time of Elizabeth I? I consider how theatre houses in the sixteenth century took ownership of scripts and examine how the burgeoning printing technology and market for books began to alter conceptions of dramatic texts as property during the seventeenth century and early eighteenth century. I outline how from the mid-eighteenth century until the early 1900s claims for performance rights and adaptation rights challenged the way copyright law gave protection to plays.

Overall, this chapter seeks to map out the relationship between the artistic practices of theatre and the legal institutional philosophy of copyright, explaining how the modern law of copyright came to protect plays as works. I begin this process with a commentary on my theoretical approach before I assess theatrical authorship in the Elizabethan period. The key mechanism of copyright law is considered in order to trace the dramatic text's emergence as property object, from its early legal form in the era of the Stationers' Company to the Statute of Anne 1710 and up to the 1911 Copyright Act, when the print and performance commodities were subsumed within a bundle of rights encompassed by the copyright 'work'.

[9] Theatre is such an extraordinarily multi-faceted subject, rooted in many different linguistic and performative cultures, that to explore theatrical cultures beyond the English-language world is beyond the capacity of this chapter. Where useful I refer to theatrical works as they developed in other major European countries including Italy and Russia; at times I refer back to examples from Greek and Roman theatre, especially where they influenced English-language theatrical works during the past 500 years. For a reasonably comprehensive overview of theatre in the global context see JR Brown, *The Oxford Illustrated History of the Theatre* (Oxford: Oxford University Press, 1995). For an account of the fascinating process by which copyright emerged in France see K Scott, *Becoming Property: Art, Theory and Law in Early Modern France* (New Haven: Yale University Press, 2018).

[10] See, eg Miller (n 3); J Feather, 'The Book Trade in Politics: The Making of the Copyright Act of 1710' (1980) 8 *Publishing History* 19; T Ross, 'Copyright and the Invention of Tradition' (1992) 26 *Eighteenth-Century Studies* 1; J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287 and J Waldron, 'From Authors to Copiers' (1993) 68 *Chicago-Kent Law Review* 841.

Assessing the Relevance of Literary Theory and Theatre Studies on Legal Issues of Authorship

In line with copyright scholarship's 'cultural turn', I argue in this chapter that insights from theatrical and literary studies facilitate a more holistic apperception of theatrical creativity relevant to questions of law. In particular, Jeffrey Masten's path-breaking approach to theatrical authorship is invaluable.[11] Masten builds upon the work of Barthes and Foucault to argue that the figure of the individual author in theatre is a constructed (or 'produced') one that often does not reflect the social reality. As I outline in detail below, our individualist assumptions about authorship in theatre, and ownership of plays, are very different from what occurred in practice in the Elizabethan period (and indeed, in later eras to varying degrees).[12] The presumption of the individual author in theatre must, therefore, be questioned. The author-figure is not 'produced once and for all'.[13] The concept can be unpacked, enabling a richer study of the authorship process:

> We might note that the presumed universality of individuated style depends on a network of legal and social technologies specific to a post-Renaissance capitalist culture (for example, intellectual property, copyright, individuated handwriting).[14]

In critiquing our universal authorship presumptions, it is important to acknowledge that promoting individual – and typically, male – authorship is in many cases a deliberate strategy.[15] Krause claims that the institutions of, for example, literary scholarship, publishing and historical biography all have an interest in producing (and reproducing) the idea of a sole 'genius' author to an audience.[16] Although some level of simplification may be inevitable, it is hard not to conclude that it is easier to sell an individual mythology than to explain the complexities involved in collaboration, especially when apportioning the roles of others may reduce the

[11] J Masten, *Textual Intercourse: Collaboration, Authorship, and Sexualities in Renaissance Drama* (Cambridge: Cambridge University Press, 1997). See also R Barthes, 'The Death of the Author' 5/6 *Aspen: The Magazine in a Box* (R Howard tr, 1967), available at www.ubu.com/aspen/aspen5and6/index.html and M Foucault, 'What Is an Author?' in JM Marsh, JD Caputo and M Westphal (eds), *Modernity and its Discontents* (New York: Fordham University Press, 1992) 299, 305 (original essay dating from 1969 and seen by many as a response to Barthes).

[12] J Masten, 'Beaumont and/or Fletcher: Collaboration and the Interpretation of Renaissance Drama' (1992) 52 *English Literary History* 337, 352. See also WC Booth, 'The Rhetoric of Fiction and Nehamas, "The Postulated Author and Critical Monism as a Regulative Ideal"' (1981) 8 *Critical Inquiry* 133–49.

[13] M Krause, 'Practicing Authorship: The Case of Brecht's Plays' in C Calhoun and R Sennett (eds), *Practicing Culture* (Oxford: Routledge, 2007) 217.

[14] Masten (n 12) 342. See also K Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019); JE Cohen, *Between Truth and Power: Legal Constructions of Informational Capitalism* (Oxford: Oxford University Press, 2019) and S Thambisetty, 'Liza's Bucket: Intellectual Property and the Metamodern Impulse' (2020) 19 *LSE Law, Society and Economy Working Papers* 1.

[15] Krause (n 13) 217. See also T Moi, *Sexual/Textual Politics* (London, UK: Methuen, 1985).

[16] ibid, 216. See also P Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (Cambridge: Polity Press, 1996) and L Ede and A Lunsford, *Singular Texts/Plural Authors: Perspectives on Collaborative Writing* (Carbondale: Southern Illinois U, 1990).

image of the 'great man' in history.[17] The 'great man theory' originally ascribed to Thomas Carlyle, and occasionally applied by scholars such as Harold Bloom to a select group of women authors such as Mary Ann Evans (George Eliot) and Jane Austen may be alluring, even comforting; but it is sometimes – perhaps often – not reflective of collaborative realities.[18] At the same time, my intention here is not to remove the author-figure completely, merely to widen and deepen the understanding of authorship in the collective medium of theatre.[19]

Collaboration is a constant. It is evident in theatre in the sixteenth century, through the early modern and Romantic periods and up to our present day.[20] Acknowledging the collaborative realities of theatre is perhaps the key factor in understanding how to make authorship of theatrical works truly visible.[21] Nonetheless, as we shall see, collaboration has worked differently from era to era, with legal concepts and case law influencing theatre practices. As I explore below, the Elizabethan period provides rich accounts of collaborative theatricality.[22] Tracing the arc of recognition of authors' rights in the sixteenth and seventeenth centuries reveals enthralling insights not only about authorship but also, as the title of this chapter suggests, what the play is today as an object of property: the dramatic work. But before discussing the theatres themselves, it is necessary to ground my analysis by outlining the place of law viz the theatre world of the mid-1500s.

Tracing the Influence of Law on Theatre and Theatre on Law: The Role of the Inns of Court and the Impact of the Stationers' Company in the Elizabethan and Jacobean Eras (1558–1625)

At the dawn of the Elizabethan age in the 1550s there was a boom in litigation, causing an increased demand for lawyers, judges and administrators.[23] The legal

[17] BA Spector, 'Carlyle, Freud, and the Great Man Theory More Fully Considered' (2016) 12 *Leadership* 250.

[18] L Bently and L Biron, 'Discontinuities between legal conceptions of authorship and social practices: What, if anything, is to be done?' in M van Eechoud (ed), *The Work of Authorship* (Amsterdam: Amsterdam University Press, 2018) 237.

[19] B Boyd, 'Review of Brian Vickers, *Shakespeare Co-Author: A Historical Study of Five Collaborative Plays*' (2003) 54 *Shakespeare Quarterly* 458, 460–61 noting that a kind of individuated authorial ambition can be traced in Western theatre to classical antiquity, as evidenced by the plays of the Greek and Roman playwrights that survived, though it is likely collective creative practices occurred during this period that cannot be evidenced in the records that remain.

[20] S Keller, 'Collaboration in Theater: Problems and Copyright Solutions' (1986) 33 *UCLA Law Review* 891, 908–09.

[21] B London, *Writing Double: Women's Literary Partnerships* (Ithaca, NY: Cornell University Press, 1999). See also M Woodmansee, 'The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"' (1984) 17 *Eighteenth Century Studies* 425, 440.

[22] H Hirschfeld, 'Early Modern Collaboration and Theories of Authorship' (2001) 116 *Theories and Methodologies* 609, 619–20. See also E Ostrom, *Governing the Commons* (New York: New York University Press, 1990).

[23] J Winston, *Lawyers at Play: Literature, Law and Politics at the Early Modern Inns of Court, 1558–1581* (Oxford: Oxford University Press, 2016) 50–73.

field flourished and became more professionalised. A significant Elizabethan innovation was the use of printed law reports alongside manuscript reports.[24] Meanwhile, the Inns of Court thrived, becoming relatively secular and liberal spaces, not just for legal training but for philosophical thought, debate and the performance of plays.[25] The works of Ovid and Cicero were translated and became an influence on the development of English legal rhetoric.[26] Perhaps the great legal thinker of the period – Sir Edward Coke – while 'neither a dramatist nor a friend to actors' nonetheless 'recognised and embraced the dramatic medium through which English law manifested itself to its audience'.[27]

Buoyed by the liberal atmosphere, lawyers at the Inns of Court such as Barnaby Googe, George Turberville and Sir Thomas North translated plays by Roman philosophers such as Seneca and Plutarch that shaped English renaissance theatre in innumerable ways.[28] Key elements of Senecan drama that were co-opted into English theatre include the use of violence (and even gore) onstage as well as the presence of supernatural figures on stage (ghosts, demons, etc).[29] Senecan tragedy's sense of inferiority, often expressed in monologue, influenced Shakespeare's classic plays *Titus Andronicus* and *Hamlet*.[30] In addition, Shakespeare relied heavily on the works of Plutarch – as translated by Sir Thomas North – for the plot of *Antony and Cleopatra*.[31]

Printing technology enabled the diffusion of these translations – though it is worth noting that printing was severely regulated by law. From its formal incorporation via Royal Charter in May 1557 the Stationers' Company possessed a near-exclusive jurisdiction to register and copy books for printing.[32] Only members of the company could print books (unless the Crown had granted a direct privilege).[33] Within the system controlled by the Stationers Company, the market for printed books and play-texts expanded steadily. The plays of Seneca were among the most commonly printed and widely read, becoming so popular that in England among the literary class it was possible to speak of a 'Senecan vogue'.[34]

[24] P Raffield, *The Art of Law in Shakespeare* (Oxford: Hart, 2017) 8.

[25] Winston (n 23) 123.

[26] Raffield (n 24) 12.

[27] ibid, 3. See also WR Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590–1640* (Harlow: Longman, 1972) and I Williams, 'He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c.1550–1640' 28 (2010) *Law and History Review* 39.

[28] Winston (n 23). See also C Perry, *Shakespeare and Senecan Tragedy* (Cambridge: Cambridge University Press, 2020) and S Elsky, *Custom, Common Law, and the Constitution of English Renaissance Literature* (Oxford: Oxford University Press, 2020).

[29] ibid.

[30] Perry (n 28).

[31] R Miola, *Shakespeare's Reading* (Oxford: Oxford University Press, 2012) 106–09.

[32] I Gadd, 'The Stationers' Company in England before 1710' in I Alexander and HT Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Cheltenham: Edward Elgar, 2016) 81–95. For the early history of the Stationers' Company see PWM Blayney, *The Stationers' Company and the Printers of London, 1501–1557* (Cambridge: Cambridge University Press, 2013).

[33] For example, the universities at Oxford and Cambridge had their own right to print.

[34] DA Brooks, 'Dramatic Authorship and Publication in Early Modern England' (2003) 15 *Medieval & Renaissance Drama in England* 77. See also P Blayney, 'The Publication of Playbooks' in J Cox and DS Kastan, *A New History of Early English Drama* (New York: Columbia University Press, 1997) 383 and L Febvre and H-J Martin, *The Coming of the Book – The Impact of Printing*, 1450–1800 (London: Verso, 1997).

While the translations are acknowledged as influential, that Elizabethan lawyers were enthusiastic writers and performers of plays is perhaps less widely known.[35] It is notable that the first 'English tragedy' – *Gorbudoc* – was authored jointly by two lawyers, Thomas Norton and Thomas Sackville, and was performed first at Inner Temple by actors from the Inns.[36] Later, the Inns would be referenced (and satirised) by Ben Jonson in 1599 in *Every Man out of His Humour*; and celebrated plays such as Shakespeare's *Comedy of Errors* and *Twelfth Night* were performed at the Inns in 1594 and 1602 respectively.[37] Indeed, a deep fascination for law and legality is visible in Elizabethan play-texts, particularly those of Shakespeare. Raffield notes that 'the *agon* of the trial is represented to great dramatic effect in, for example, *The Merchant of Venice, Measure for Measure, King Lear* and *The Winter's Tale*';[38] while Heinze argues that Shakespeare's history plays explore the conditions for how a functional and just legal order can be established.[39]

Thus, the Elizabethan age saw the flourishing of the legal profession (via the Inns) and the expansion of printing (via the Stationers' Company). Rather than the common law courts or the Court of Chancery, if disputes arose involving infringement of the right to copy under the Stationers' privileges resolution was sought at The Court of Assistants, the Court of Star Chamber and the Court of High Commission.[40]

The activities of lawyers and printers cannot be separated from the great blossoming of English theatre in the latter half of the sixteenth century. Over the remainder of this chapter, as my focus turns to questions of theatrical authorship and legal ownership, it is worth bearing in mind the connection between the institution of law and the business of printing – this helped shape the ways in which the play has come to be seen not just as a work of art, but as an object of property under copyright.[41]

[35] Winston (n 23) 1–15.

[36] N Jones and PW White, 'Gorboduc and Royal Marriage Politics: An Elizabethan Playgoer's Report of the Premiere Performance' (1996) 26 *English Literary Renaissance* 3.

[37] M Knapp and M Kabialka, 'Shakespeare and the Prince of Purpoole: The 1594 production of "The Comedy of Errors" at Gray's Inn Hall' (1984) 4 *Theatre History Studies* 71. Twelfth Night was performed at Inner Temple in 1602, an event still celebrated by the Inns today, available at www.innertemple.org.uk/who-we-are/history/historical-articles/gorboduc-or-the-tragedy-of-ferrex-and-porrox/.

[38] Raffield (n 24) 9.

[39] E Heinze, 'Power Politics and the Rule of Law: Shakespeare's First Historical Tetralogy and Law's "Foundations"' (2009) 29 *Oxford Journal of Legal Studies* 139. See also Q Skinner, *Forensic Shakespeare* (Oxford: Oxford University Press, 2014).

[40] HT Gómez-Arostegui, 'What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement' (2008) 81 S. Cal. L. Rev. 1197, noting at 1221–22 that only after 1660 did copyright claims come to the Court of Chancery, apart from one exception – *Wolfe v Payne*, C33/29, f. 143v, C33/30, f. 143v (Ch. 1563/4), which Gómez-Arostegui cites at fn 116 as the 'first copyright injunction ever granted by the Court of Chancery'. See also WA Jackson, *Records of the Court of the Stationers' Company, 1602–1640* (London: Bibliographical Society, 1957).

[41] Miller (n 3). For philosophical underpinnings see I Kant, 'On the Wrongfulness of Unauthorized Publication of Books (1785)' in P Guyer and AW Wood, *The Cambridge Edition of the Works of Immanuel Kant* (Mary J Gregor tr, Cambridge: Cambridge University Press, 1996) 27–35; LA Seneca, *De Beneficiis* (67 AD); *On Benefits*, addressed to Aebutius Liberalis (Translated by A Stewart, London: George Bell and Sons, 1887), available at www.gutenberg.org/files/3794/3794-h/3794-h.htm; NT Pratt, *Seneca's Drama* (Chapel Hill: University of North Carolina Press, 1983) and Aristotle, *Poetics* (A Kenny ed, Oxford: Oxford University Press, 2013).

Law and Theatre: Assessing the Theatrical Text and Authorship During the Elizabethan and Jacobean Eras (1558–1625)

In the Elizabethan period (1558–1603) and into the Jacobean era (1603–25) we can observe the practices of theatre working in tandem with early capitalist market forces. As today, the production of culture was one in which questions of ownership and value were not merely relevant – they were vital.[42] I explore theatrical production in the Elizabethan period here by focusing on five crucial characteristics: first, a type of 'ownership' of plays in performance, by theatre companies, and in print, by the Stationers; second, 'polyvocal' collaborative authorship; third, textual instability, as evidenced by, for example, *The Spanish Tragedy* which was printed in at least ten different versions; fourth, the changing nature of 'anonymity' in literary practice; and fifth, censorship.

As the Elizabethan age gave way to the Jacobean period, and eventually the 'interregnum' and restoration, I mark how during the seventeenth century there was a gradual shift towards greater recognition of the individual writer, presaged by the actions of Ben Jonson in the early 1600s and the posthumous publication of Shakespeare's *First Folio* in 1623. At the same time, the growing market and tensions between publishers and the Stationers' Company led eventually to the first copyright statute – the Statute of Anne in 1710.

Ownership of Plays in the Elizabethan and Jacobean Eras (1558–1625)

Although today we have no compunction about individual authorship and attribution – of 'Shakespeare's tragedies', 'Marlowe's plays' or 'the works of Ben Jonson' – it is important not to forget that in the Elizabethan period playwrights were not treated as authors in the sense of owning their writings. Statutory copyright had yet to emerge and printing was controlled by the Stationers' Company.[43] During the sixteenth and seventeenth centuries, although some play-texts could be said to exist as print-commodities, as they were registered at the Stationers' Company and printed for sale, usually in 'Quarto' form, a great many significant plays went unpublished – and even where a play was published, authorship was not always ascribed to the text.[44] The idea that the playwright could own property

[42] Winston (n 23). See also R Knutson, *Playing Companies and Commerce in Shakespeare's Time* (Cambridge: Cambridge University Press, 2001).

[43] R Deazley, *On the Origin of the Right to Copy* (Oxford: Hart, 2004). See also Blayney (n 34).

[44] Shakespeare's First Folio contained several previously unpublished plays – G Egan, 'The Provenance of the Folio Texts' in E Smith (ed), *The Cambridge Companion to Shakespeare's First Folio* (Cambridge: Cambridge University Press, 2016) 68–85.

in the dramatic text being performed by the company 'would have been difficult to comprehend for the majority of writers in the Elizabethan period'.[45] Playwrights could not enter their texts onto the the Stationers' register, nor could they own copyright privileges.[46] Playwrights lacked the essence of ownership: control. Once a dramatist had developed a text whatever 'ownership' a writer could claim was inevitably short-lived:

> Strictly speaking, a playwright owned a copy of a play, a manuscript distinguishable from a scribal copy only by the fact that it was a unique copy …[47]

Acting companies purchased such texts from writers for a flat fee of between £6–10; and in a practical sense, that transaction brought to an end any claim the writer might have had to 'own' the play.[48] Litman remarks:

> Theatre managers valued playwrights as they valued actors, and paid them in the same fashion. Scripts once acquired entered a theatre company's repertory, where they could be revived, adapted, rewritten, performed, and printed without any further license from the writer.[49]

After a play's performances had run their course, actors sometimes sold their copies of the play-text for print.[50] Thus, play-texts could be sold as print-commodities without the permission of the playwright and then published without attribution. It was the publisher who would register the play-text at the Stationers' Company in order to obtain the right to print the 'book' in perpetuity. To the extent the play operated as a print-commodity, it was the publisher who benefited from its exploitation; and it was the publisher who controlled the legal privilege, which could be asserted in a case of alleged 'piracy' at a number of legal venues, such as the Court of Assistants.[51] Concepts of authorship and ownership in the individualist sense were not absent entirely, but they were only dimly perceived.[52]

Apart from printed playbooks, during the Elizabethan period in England the most profound way that plays could be said to be 'owned' was not by individual

[45] B Salter, 'Taming the trojan horse: an Australian perspective of dramatic authorship' (2009) 56 *Journal of The Copyright Society of The USA* 789, 815. See also R Knutson, *The Repertory of Shakespeare's Company, 1594–1613* (Fayetteville: University of Arkansas Press, 1991).

[46] Blayney (n 34) 394–99.

[47] J Loewenstein, 'The Script in the Marketplace' (1985) 12 *Representations* 101, 102.

[48] ibid. Loewenstein notes that printers sometimes gave 'limited privileges' of revision to authors. See also Z Lesser, *Renaissance Drama and the Politics of Publication: Readings in the English Book Trade* (Cambridge: Cambridge University Press, 2004).

[49] JD Litman, 'The Invention of Common Law Play Right' (2010) 25 *Berkeley Tech. L. J.* 1381, 1390. See also T Stern, *Rehearsal from Shakespeare to Sheridan* (Oxford: Oxford University Press, 2000) 129–31 and 241–45 and J Milhous, 'The First Production of Rowe's "Jane Shore"' (1986) 38 *Theatre J.* 309, 312.

[50] Loewenstein (n 47) 105–06.

[51] Gómez Arostegui (n 40). See also E Arber (ed), *A Transcript of the Registers of the Company of Stationers of London 1554–1640* (London: Privately Printed, 1875), available at https://catalog.hathitrust.org/Record/001168984.

[52] L Bently, 'Copyright and the Death of the Author in Law and Literature' (1994) 57 *The Modern Law Review* 973, 978. See also M Woodmansee and P Jaszi (eds), *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1994).

authors but by acting companies.[53] Such companies emerged as a result of the growth of an early capitalist marketplace for theatrical works and performances, which benefited the shareholders of various medium- and large-scale theatre companies – entities which in effect can be described as early versions of the 'joint venture of limited liability'.[54] Theatres operated under severe economic pressures, knowing they could be forced to close by outbreaks of plague.[55] Nonetheless, when times were good the shareholders of companies like the Lord Chamberlain's Men (later the King's Men) or the Admiral's Men would receive a stable income.[56]

It is notable that, in general, early modern prologues and epilogues spoken on stage did not name authors, whether individuals or collaborators.[57] During the Elizabethan period actors on stage would instead refer to a playwright merely as 'our poet', increasing the sense that the theatre company not only owned the play, but that the role of the poet/writer was subsumed within collective management:

> On the margins of dramatic representation – in inductions and epilogues – the Elizabethan play is regularly represented by the speaking actor as 'ours,' the possession and, indeed, the product of the actors. Where the playwright is mentioned, he is almost never 'the Author' or 'the Playwright'; he is 'our poet,' an adjunct to the proprietary group of performers. Of course, playwrights almost always wrote the prologues to their scripts. Still, the marketplace was such that authorial assertions of preeminent domain were all but unthinkable.[58]

The acting company took ownership – and thus, control – of the play in the performance context, and would thereafter rework the text, adding edits and improvisations as it was performed.[59] In a way, what the company took control of was an early version of what Miller calls the performance commodity.[60] Unlike play-texts as print-commodities, this performance-commodity did not have the force of legal protection. Instead, mindful of competition and market saturation, theatre companies operated a system of informal, reciprocal social norms to regulate their activities, ensuring they did not perform each other's plays without permission.[61]

[53] R Dutton, *Licensing, Censorship and Authorship in Early Modern England* (London: Palgrave MacMillan, 2000) 91.

[54] Masten (n 12) 339.

[55] B Freedman, 'Elizabethan Protest, Plague, and Plays: Rereading the "Documents of Control"' (1996) 26 *English Literary Renaissance* 17, 19–25.

[56] See generally JJ Marino, *Owning William Shakespeare: The King's Men and Their Intellectual Property* (Philadelphia: University of Pennsylvania Press, 2011).

[57] T Stern, 'Review of Authorship and Appropriation: Writing for the Stage in England, 1660–1710' (2002) *The Scriblerian* 73. See also P Kewes, *Authorship and Appropriation: Writing for the Stage in England, 1660–1710* (Oxford: Clarendon Press, 1998).

[58] Loewenstein (n 47) 102. M Straznicky (ed), *The Book of the Play: Playwrights, Stationers, and Readers in Early Modern England* (Amherst, Boston: University of Massachusetts Press, 2006).

[59] JS Peters, *Theatre of the Book, 1480–1880: Print, Text, and Performance in Europe* (Oxford: Oxford University Press, 2000), 1, 4–5. See also Marino (n 56).

[60] Miller (n 3).

[61] B Lauriat, 'Literary and Dramatic Disputes in Shakespeare's Time' (2018) 9 *Journal of International Dispute Settlement* 45.

Thus, we can observe that even as early as the Elizabethan period plays provided two potential sources of value: print and performance. However, in practice dramatists neither owned nor controlled either one of these sources of value.

Theatrical Collaboration as Polyvocal Authorship in the Elizabethan and Jacobean Eras (1558–1625)

As contemporary readers of plays, or as theatre-goers, it is hard to escape a presumption of 'writing as composition' by a defined author. Yet, this assumption does not actually reflect the practices of Elizabethan dramatic authorship. To comprehend the nature of theatrical creativity during this period we are advised by theatre studies scholars like Cox and Kasten to 'dislodge authors and scripts' from the centre of our minds and open our perspective to the 'collaborative sense of early English dramatic activity by focusing on the conditions and constraints of playmaking, the networks of dependency, both discursive and institutional, that motivated and sustained it'.[62] A form of authorship certainly existed – but it must be contextualised 'within the social and material circumstances in which early English drama was enabled and inhibited'.[63]

The most obvious way that this collaboration manifested itself is in the work undertaken by playwrights labouring together. Masten notes that during the period 1590–1642 there is evidence that almost two-thirds of the plays referenced in the papers of the contemporary theatre manager Philip Henslowe 'reflect the participation of more than one writer'.[64] Working together – sometimes radically – was therefore central to the creation of plays during the Elizabethan and Jacobean periods. Virtually all major playwrights of the time – including Christopher Marlowe, Ben Jonson, Thomas Middleton, and of course, William Shakespeare – wrote plays collaboratively.[65] Attribution was not always given. As noted earlier, play-texts were sometimes printed without naming any author; and even where there were printed title-page statements of singular authorship these tended to obscure and simplify the practical circumstances of composition.[66]

[62] J Cox and D Kastan, 'Introduction: Demanding History' in J Cox and DS Kastan (eds), *A New History of Early English Drama* (New York: Columbia University Press, 1997) 1–6. See also J Clare, 'Shakespeare and Paradigms of Early Modern Authorship' (2012) 1 *Journal of Early Modern Studies* 137.

[63] G Egan, 'What is Not Collaborative about Early Modern Drama in Performance and Print?' (2010) 67 *Shakespeare Survey* 18, 20–28. See also P Pender and A Day (ed), *Gender, Authorship, and Early Modern Women's Collaboration* (London: Palgrave Macmillan, 2017) and Hirschfeld (n 22) 614–15.

[64] Masten (n 12) 347, referring to Philip Henslowe.

[65] B Vickers, *Shakespeare, Co-Author: A Historical Study of Five Collaborative Plays* (Oxford: Oxford University Press, 2002). See also Boyd (n 19) 460–61 and W Shakespeare, *The New Oxford Shakespeare: Modern Critical Edition – The Complete Works* (G Taylor, J Jowett, T Bourus and G Egan eds, Oxford: Oxford University Press, 2016) and G Edelstein, 'Collaborating on Credit: Ben Jonson's Authorship in Eastward Ho!' (2020) 50 *English Literary Renaissance* 233.

[66] Masten (n 12), 339.

The most famous example of a consistent writing partnership during the Jacobean era is that of Francis Beaumont and John Fletcher. Yet the Beaumont and Fletcher example is utilised by Masten to demonstrate that even attributing plays to a limited number of joint authors does a disservice to the creativity involved in theatrical authorship at this time. Masten argues that although authorship in their plays is 'intermittently present' it does not appear in 'anything approaching a definitive or monolithically singular form'.[67] As mentioned earlier, once a dramatist sold a script to a theatre company, the company took control of it and made significant edits, allowing for improvisation, thus 'unsettling' the text. Taylor views collaboration during this period as a type of artisan production.[68] Certainly, collaboration within theatre companies was the normal playmaking practice.[69] For Masten the 'ample evidence of the frequent revision of play-texts' indicates the existence of a 'a diachronic form of collaboration' involved in creating an iterative play-text.[70] Theatrical authorship ought, therefore, to be viewed as *polyvocal*: the 'joint accomplishment of dramatists, actors, musicians, costumers, prompters (who made alterations in the original manuscript) and … managers'.[71]

For Masten the type of collaboration at stake involved 'a dispersal of author/ity, rather than a simple doubling of it; to revise the aphorism, two heads are different than one'.[72] It is therefore appropriate to view the practices of polyvocal authorship as radical – not as merely 'a more multiple version' of singular authorship. This analysis does not erase or minimise the role of the writer – it contextualises it and enriches our understanding.[73] Only by taking this contextual approach can we observe 'the different configuration of authorities controlling texts' and 'constraining their interpretation'.[74] The writer played an important role, but the writer was only one active party within a greater collaborative enterprise.[75]

Masten opines that only by 'ignoring the theatrical as a mode of (re)production' can these texts be 'read from the post-Enlightenment perspective of individual authorship, the now-victorious mode of textual production and the site of Foucault's critique'.[76] Even the way play-texts are archived in the post-Elizabethan era can reveal a bias towards the existence of a mythological single

[67] ibid, 347.

[68] G Taylor, 'Artiginality: Authorship after Postmodernism' in G Taylor and G Egan (eds), *The New Oxford Shakespeare: Authorship Companion* (Oxford: Oxford University Press, 2016).

[69] See, eg H Hirschfeld, *Joint Enterprises: Collaborative Drama and the Institutionalization of the English Renaissance Theatre* (Amherst: University of Massachusetts Press, 2004) and D Nicol, *Middleton and Rowley: Forms of Collaboration in the Jacobean Playhouse* (Toronto: University of Toronto Press, 2012).

[70] Masten (n 12) 339.

[71] GE Bentley, *The Profession of Dramatist in Shakespeare's Time 1590–1642* (Princeton: Princeton Univ. Press, 1971) 198.

[72] Masten (n 11) 19. See also Hirschfeld (n 22) 619–20.

[73] Vickers (n 65).

[74] Masten (n 12) 338.

[75] J Loewenstein, *Ben Jonson and Possessive Authorship* (Cambridge: Cambridge University Press, 2002) 10–18.

[76] Masten (n 12) 341.

author. The will to nominate a play's 'date of composition' by its nature 'assumes a relatively limited amount of time during which a text was fully composed and after which it was merely transmitted and corrupted'.[77] This is obviously problematic in this broader understanding of collaboration.[78]

Instead of assuming retrospectively the existence of a singular author, Masten contends that we must accept that 'collaborative texts produced before the emergence of authorship are of a kind different (informed by differing mechanisms of textual property and control, different conceptions of imitation, originality, and the "individual") from collaborations produced within the regime of the author'.[79]

Even if we do not accept all Masten's contentions, it is clear that during the Elizabethan and Jacobean era the modern ideas of individual authorship and ownership did not yet hold sway – and, of course, copyright law as we know it did not yet exist.[80] As I now explain, the polyvocal nature of authorship left the text itself in an unstable state.[81]

An Unstable Text in the Elizabethan and Jacobean Eras (1558–1625)

Elizabethan and Jacobean theatrical texts defy easy categorisation because they 'strikingly de-naturalize the author-text-reader continuum assumed in later methodologies of interpretation'.[82] To understand what has survived as text it is necessary to accept the norms of company ownership and polyvocal authorship.[83] The writer may have originated a text, or adapted a text from an earlier work (for example, the plot and basic characters of Shakespeare's *The Comedy of Errors* are taken wholesale from an earlier work – *Menaechmi* by Plautus).[84] However, as outlined earlier, once the company took ownership, the text was shaped by several other parties (actors, musicians, costumers, prompters, managers). It is important, therefore, to acknowledge the 'inseparability of the textual and theatrical production of

[77] ibid, 340.

[78] R Knutson, 'Working playwrights, 1580–1642' in J Milling and P Thomson (eds), *The Cambridge History of British Theatre* (Cambridge: Cambridge University Press, 2004) 339–63.

[79] Masten (n 12) 346.

[80] T Stern, '"Whether one did Contrive, the Other Write,/Or one Fram'd the Plot, the Other did Indite": Fletcher and Theobald as Collaborative Writers' in D Carnegie and G Taylor (eds), *The Quest for Cardenio: Shakespeare, Fletcher, Cervantes, and the Lost Play* (Oxford: Oxford University Press, 2012) 115–30.

[81] A kind of polyvocal authorship can be observed in works of traditional folklore and cultural heritage, as well as some classics from the world of the ancient Greeks – L McDonagh, 'Protecting traditional music under copyright (and choosing not to do enforce it)' in Bonadio and Lucchi (eds) (n 2).

[82] Masten (n 12) 338.

[83] See S Orgel, 'What Is a Text?' in DS Kastan and P Stallybrass (eds), *Staging the Renaissance: Reinterpretations of Elizabethan and Jacobean Drama* (New York: Routledge, 1991) 84; J Knapp, *Shakespeare Only* (Chicago: University of Chicago Press, 2009).

[84] R Lyne, 'Shakespeare, Plautus, and the discovery of New Comic space' in C Martindale and AB Taylor (eds), *Shakespeare and the Classics* (Cambridge: Cambridge University Press, 2011) 122–38.

meaning in a context that did not carefully insulate the writing of scripts from the acting of plays'.[85] The result was that, in comparison with our modern understanding, the Elizabethan text was typically in a semi-permanent unsettled state – it would often change from performance to performance.[86] Writers, often different from those who originated the play-text, would add materials (new scenes, additional prologues/epilogues, new songs, etc) to existing texts. Virtually any play 'first printed more than ten years after composition and … kept in active repertory by the company that owned it is most likely to contain later revisions by the author or, in many cases, by another playwright.'[87] An example is *Dr Faustus* – a play attributed to Christopher Marlowe, but which also passed through several other hands, thus existing as a text 'patched' together.[88] As Masten relates, *The Knight of the Burning Pestle* (attributed to Francis Beaumont|) is a manifestation of Barthes' phrase in 'The Death of the Author' that a text is often 'a tissue of quotations drawn from the innumerable centres of culture'.[89] In a similar vein, the play registered with the Stationers and printed in 1594 as *The Taming of a Shrew* has little in common – other than a basic plot – with the text printed as *The Taming of the Shrew* in the posthumous 1623 *First Folio*.[90]

Writers were not the only creative parties making edits to the text during the Elizabethan period.[91] Actors too 'performed' authorship. The company would work collaboratively with a manuscript, revising it and allowing improvisation by actors during performances.[92] Improvisation was so commonplace the term 'tarltonising' (after the comedic actor Tarlton) arose to describe actors' improvisation in verse (though the term began to fall out of favour in the 1590s).[93] There is no doubt that improvisation was vital to the process until at least the late Elizabethan era.[94] The Lord Chamberlain's Men revised the plays in their repertoire continuously in

[85] Masten (n 12) 340.

[86] C Hoy, 'Critical and Aesthetic Problems of Collaboration in Renaissance Drama' (1976) 19 *Research Opportunities in Renaissance Drama* 4.

[87] GE Bentley, *The Profession of Dramatist in Shakespeare's Time 1590–1642* (Princeton, NJ: Princeton Univ. Press, 1971) 263.

[88] T Stern, *Documents of Performance in Early Modern England* (Cambridge: Cambridge University Press, 2009).

[89] Masten (n 12) 349.

[90] Marino (n 56) 48–74.

[91] Censors were also involved in 'editing' texts as discussed later on in this chapter.

[92] Masten (n 12) 339.

[93] C Lehmann, *Shakespeare Remains: Theater to Film, Early Modern to Postmodern* (Ithaca, NY: Cornell University Press, 2002) 80.

[94] Indeed, as I shall consider later on in the book, modern theatrical improvisation and devised theatre has deep roots in theatrical practice, whether in Greek, Roman or English theatre. See, eg Keller (n 20) 908–09, 'Much new dramatic work is created in these contexts. Sometimes a play without a prior history does open at a big commercial house, but the usual pattern involves a workshop production or a resident/regional theater production, and then possibly an off-Broadway engagement before an opening at a major New York or, occasionally, Los Angeles theater. Even those plays or musicals which are initially scheduled for a Broadway run usually have an extensive out-of-town "try-out" period. These earlier productions pro-vide opportunities to work through the play's problems, allowing major changes and revisions to be made in relative safety and obscurity.'

many ways, including updating topical references and adding/removing satirical comments on their rival companies' plays.[95]

Ultimately, Cox and Kastan remark that we should view this theatre world as one in which 'actors, annotators, revisers, collaborators, scribes, printers, and proofreaders, in addition to the playwright, all have a hand in shaping the text'.[96] The combination of authorial and textual instability confirms that theatrical playwriting was indeed 'polyvocal'.[97] Everyone – from those involved in the first performance to later archivists – could be said to perform a role in the authorship of the play.[98] It is this idea that inspired the title of this book: *Performing Copyright*.

Despite the evidence of polyvocal collaboration and unstable play-texts, later considerations of Renaissance drama have nevertheless tried to 'produce' an authorial 'univocality' which naturally privileges the writer.[99] To try to address this privilege, I consider here one of the most famous play-texts of the period – *The Spanish Tragedy*. As we shall see, this play provides a fascinating case study for the way authorship and texts were perceived at the time.

A Case Study on Authorial and Textual Instability – Thomas Kyd and *The Spanish Tragedy* 1594–1613

Along with *Gorbudoc*, *The Spanish Tragedy* was perhaps the crucial play of early modern English theatre. It cast an impression on almost every theatrical tragedy that came in its wake, including those of Shakespeare and Marlowe. It was performed very often at the Rose Theatre, and was among the most highly performed plays of the Elizabethan period and immediate post-Elizabethan era. As such it represents a useful case study of textual instability and authorial attribution.

The origins of *The Spanish Tragedy* can be traced to the mid-sixteenth century. It was published in at least 10 different versions during the period 1594–1613, demonstrating that the text was in an unsettled state during this period.[100] As noted earlier, multiple 'collaborators' – including actors and writers – were adding to the text as it was being performed. Most famously, Ben Jonson was commissioned

[95] Marino (n 56) 107–42.

[96] Cox and Kastan (n 67).

[97] Masten (n 12) 339.

[98] LB Petersen, *Shakespeare's Errant Texts: Textual Form and Linguistic Style in Shakespearean 'Bad' Quartos and Co-authored Plays* (Cambridge, Cambridge University Press, 2010).

[99] Masten (n 12) 340.

[100] E Smith, 'Author v. Character in Early Modern Dramatic Authorship: The Example of Thomas Kyd and The Spanish Tragedy' (1999) 11 *Medieval and Renaissance Drama in England* 129, 131–32. Smith shows that *The Spanish Tragedy* avoids the author function in favour of a 'character-function' which positions Hieronimo as the author of the play, that is until 1612 when Kyd began to be attributed. Indeed, more than one character in *The Spanish Tragedy* takes on the title of 'author' including Hieronimo, Lorenzo, and Andrea's Ghost. See T Kyd, *The Spanish Tragedie* (1587), available at www.gutenberg.org/files/6043/6043-h/6043-h.htm.

to write additional passages for an extant version of *The Spanish Tragedy* in the 1590s.[101]

Yet, despite the play's value as commodity in print and performance, and its undoubted influence, questions of attribution seem to have been an afterthought. As Smith argues:

> Given the evidence for the play's popularity, it might be expected that Kyd – or some other playwright – would want to claim authorship, or that an author would be subsequently added to playtexts published after his death … And yet none of the early editions or references to performances of *The Spanish Tragedy* associates the play with Kyd's name. There is no mention of Kyd on the title pages of the numerous editions of the play.[102]

By contrast, around the same period, Marlowe was attributed as the writer of a similarly popular play, *Dr Faustus*, with the printed text bearing Marlowe's name in the (posthumous) quarto of 1604; furthermore, Shakespeare and Jonson 'used, or allowed the usage of, their names to authorise their work in early publication'.[103] Kyd's authorship was not asserted clearly until around 1612, when Thomas Heywood's *An Apology for Actors* was published.[104] It is generally accepted today that Kyd was the originator of the script.[105] Yet, Smith argues that whether or not Kyd wrote *The Spanish Tragedy* is actually 'of lesser interest (as well as being ultimately unverifiable, in the absence of additional external evidence) than the effects of the absence of a named author-figure in the play's reception'.[106] What this reveals is that in the Elizabethan era it was even possible for the text of the most influential tragedy of the period to circulate in print and be performed widely in the absence of a definitive named author-figure.

In light of the way *The Spanish Tragedy* was perceived, Smith cautions against reifying the Elizabethan theatrical author 'in hindsight', emphasising that such early modern theatrical texts 'defy a post-Romantic scripting of the author-figure' because they are works 'frequently attributable to more than one hand, or with later revisions by the author or another writer, with cuts and alterations made by the actors'.[107] Such texts can be defined by their 'authorlessness' (in the modern sense) because the way they were created was 'plural and collaborative', that is, polyvocal.[108]

We can nonetheless observe the significance of the gradual change in the fact that even though *The Spanish Tragedy* was originally printed without attribution,

[101] ibid. See also D Kezar, 'Shakespeare's Guilt Trip in Henry V' (2000) 61 *Modern Language Quarterly* 431.
[102] ibid. See also B Vickers, 'Shakespeare and the 1602 Additions to The Spanish Tragedy: A Method Vindicated' (2017) 13 *Shakespeare* 101.
[103] ibid. See also Petersen (n 98) and Marino (n 56).
[104] ibid.
[105] D Freebury-Jones, 'The Diminution of Thomas Kyd' (2019) 8 *Journal of Early Modern Studies* 251.
[106] Smith (n 100).
[107] ibid.
[108] Masten (n 12) 337, quoting Jean-Christophe Agnew's comparison with the joint venture company.

eventually the name of an author-figure – Thomas Kyd – began to be ascribed to it (in the Jacobean era). This gives weight to the argument that 'the playwright as author-figure' grew in esteem and began to emerge in the public imagination during the seventeenth century.[109] There is little doubt that the luminaries Shakespeare and Jonson were central to this paradigm shift.

The Publication of Shakespeare's *First Folio* (1623) and the Beginning of his Acclamation as the English Author-Figure Par Excellence

Today Shakespeare's fame as an author is incalculable. I do not intend to probe his life or analyse the plays he wrote in detail – the academic literature on Shakespeare is voluminous and in many respects the plays speak for themselves as evidence of his poetic brilliance and insightful philosophical outlook. However, there are two aspects of his career that are worth highlighting here, as they are important for understanding authorship and ownership of plays during the period. First, it is notable that Shakespeare was active in theatre in capacities other than playwriting (acting, management); and second, the surviving Shakespearean texts are testaments not only to his brilliance, but also to his successful collaborations with other writers, and more generally to the vibrancy of polyvocal theatrical authorship.[110]

On the first, recalling the earlier discussion of whether writers 'owned' plays in the Elizabethan era, it is revealing that even William Shakespeare did not – and, in all likelihood, could not – rely on playwriting as a way to make a living. To obtain a steady income he needed to play multiple roles, becoming, in addition to a writer, an actor, a producer and, effectively, a business manager.[111] Thus Shakespeare fulfilled several different roles in in theatre companies over his career, most notably in the Lord Chamberlain's Men (and the successor company – the King's Men).[112]

[109] Kewes (n 57). See also Knutson (n 45).

[110] Vickers (n 65). See also J Clare, 'Shakespeare and Paradigms of Early Modern Authorship' (2012) 1 *Journal of Early Modern Studies* 137–53.

[111] Shakespeare was a founder of an acting company (The Lord Chamberlain's Men) and a shareholder in the Globe Theatre – D Price, 'Evidence for A Literary Biography' (2004) 72 *Tenn. L. Rev.* 111, 133–34. See also Knutson (n 45). Certain well-known actors, such as Richard Burbage, also benefited as shareholders.

[112] Vickers (n 65). The question of whether Shakespeare's works should be viewed primarily as performative texts or as literature to be read in print is one of the most vexed questions in all of English scholarship. I do not profess to provide a definitive answer here – nor could anyone. Yet it is certainly the case performance was the priority as it was the major way that Shakespeare would receive an income; print by contrast largely provided an income to the Stationers. Shakespeare may have received some benefit arising from increased fame due to publication, but this would have been secondary to his primary purpose of putting on plays successfully – see eg D Bruster, 'Shakespeare the Stationer' in M Straznicky (ed), *Shakespeare's Stationers* (Philadelphia: University of Pennsylvania Press, 2013) 112–31, 112–14.

For the second, given that neither the theatrical copyright 'work' nor modern authorship had yet been conceived in the terms we understand them today, we should not allow 'the singular figure of Shakespeare' in our modern imagination to obscure the fact that collaboration, in various forms, was a major – and perhaps the dominant – contemporary form of textual and theatrical production.[113] As noted earlier, Shakespeare was a serial collaborator.[114] Shakespeare crafted several plays with other writers, including *Titus Andronicus* (with George Peele), *Timon of Athens* (with Thomas Middleton), *Pericles* (with George Wilkins) and *Henry VIII* and *The Two Noble Kinsmen* (with John Fletcher).[115] This list was expanded as recently as 2016 when *The New Oxford Shakespeare* credited Christopher Marlowe as a co-author of the *Henry VI* cycle of plays (Parts One, Two and Three).[116] To view Shakespeare as a collaborator does not in any way lessen the stature of his works – rather it enriches our understanding of them.[117] Moreover, it would surely be unjust to allow Shakespeare's poetic brilliance to overshadow the substantial and essential input of other parties.[118] The texts that have survived have done so in varying forms – in the first published 'quarto' version of *Hamlet*, which is much shorter than the later versions, the famous 'To be or not to be' soliloquy does not assert 'that is the question' – it declares 'that is the point'.[119] Such variances should not necessarily be viewed as 'corruption' – they instead reflect the polyvocal nature of authorship that Masten describes.[120]

Indeed, although Shakespeare is the greatest and most iconic of all Elizabethan/Jacobean playwrights, it is arguable that at the time Ben Jonson had a greater sense of himself as an author. This is evidenced by Jonson's attitude to his published works, which, as I explore below, marks him out from his contemporaries (and, to some extent, from the prevailing norms of polyvocal authorship). By contrast, our modern understanding of William Shakespeare as English author par excellence begins with the posthumous publication of the *First Folio* in 1623 – organised by the actors John Heminges and Henry Condell – which called attention to his unique genius.[121] It included numerous previously unpublished plays, proving that several major Shakespeare works were not registered at all at the Stationers' Company during his lifetime, demonstrating how distant the world of print and publication often was from performance. While Shakespeare is undoubtedly the greatest playwright in English theatrical history, we turn now to Ben Jonson, perhaps the key *author-figure* of the time.

[113] Masten (n 12) 339.
[114] Vickers (n 65) and Boyd (n 19) 460–61.
[115] Vickers (n 65).
[116] W Shakespeare, *The New Oxford Shakespeare: Modern Critical Edition – The Complete Works* (G Taylor, J Jowett, T Bourus and G Egan eds, Oxford: Oxford University Press, 2016).
[117] Vickers (n 65).
[118] Marino (n 56) 5.
[119] Shakespeare (n 1).
[120] Masten (n 12).
[121] Egan (n 63).

Was Ben Jonson the First Self-conscious 'Author' in English Theatre?

Ben Jonson can be viewed as the pivotal self-conscious author working in the English theatrical tradition. Loewenstein argues that Jonson's attitude towards publication marks him out from his contemporaries and anticipates the later emergence of authors as possessive owners of copyright in their works:

> Not until 1709 did the Statute of Anne formally locate the origins of literary property rights in authors, as opposed to stationers, but the publication of Jonson's *Folio Workes* nearly a century earlier marks a crucial moment in that history of the cultural marketplace, and in the history of the bibliographic ego, from which later developments in legal history derive.[122]

Jonson's view towards publication was ahead of his time. Jonson arranged for printing of his preferred manuscript versions of plays and emphasised his authorial status by adding paratextual material (prologues, epilogues, dedications, etc) to manuscripts before printing.[123] McMillan opines that Jonson cared deeply about his literary status and 'made a campaign out of turning plays into respectable literature'.[124] By contrast, Gurr questions whether Shakespeare truly took an interest in the printing of his plays – for instance, in the case of *Henry V* Shakespeare allowed the theatre company to arrange for printing of the company's shortened performance text rather than his superior manuscript version, which only received posthumous publication.[125]

Jonson pursued multiple avenues of revenue to earn an income primarily from his writings. First, he 'sold plays to acting companies'; second, he made appeals for patronage based on his manuscripts; third, he sold 'masques' to the Royal court for performances at, for example, the Banqueting House at Whitehall; and finally, he sold 'verse' for registration at the Stationers' Company and thereafter print dissemination.[126]

During the 1590s Jonson formed a business relationship with Philip Henslowe, the prominent theatrical manager of the Rose Theatre and 'The Admiral's Men' – though Loewenstein cautions 'it would not be far from the truth to say that he was indentured to Henslowe'.[127] This relationship blossomed at the end of the Elizabethan era as the market for plays in printed form grew in significance. Henslowe arranged for Jonson's texts, including Jonson's paratextual additions, to

[122] Loewenstein (n 47) 110.

[123] Peters (n 59) 136. Although Jonson also worked as an actor (as Shakespeare did) his efforts to derive an income from his writings mark him out.

[124] S McMillin, 'Professional Playwriting' in DS Kastan (ed), *A Companion to Shakespeare* (Oxford: Blackwell, 1999) 226–38, 238.

[125] A Gurr, 'Shakespeare's Lack of Care for His Plays' (2015) 2 *Memoria di Shakespeare: A Journal of Shakespearean Studies* 161, 161–62. Gurr's view can be contrasted with that of Erne who makes the claim that Shakespeare did intend his plays to be read – L Erne, *Shakespeare as Literary Dramatist*, 2nd edn (Cambridge: Cambridge University Press, 2013).

[126] Loewenstein (n 47) 102.

[127] ibid, 103. Peters (n 59).

be registered at the Stationers' Company, which provided the acting company with a potential additional source of income once audiences for formerly popular plays had begun to dwindle.[128]

Jonson's self-conscious approach to authorship only increased during the Jacobean era. As noted earlier, acting companies typically purchased plays from writers for a flat fee and such transactions effectively brought to an end the writer's 'ownership' of the work;[129] and when the playwright was referred to on stage, it was typically as 'our poet' and almost never as the 'author' or the 'playwright'.[130] Jonson began to challenge these presumptions, engaging with acting companies with a higher level of agency than most writers. This is evident in the prologue he wrote for *Bartholomew Fayre* in 1614 which, unusually, referred to a contract between 'the Hearers' (the audience) and 'the Author' (Jonson, as playwright).[131] This was a radical moment in the history of authorship in theatre because it presented the playwright, rather than the actors, as the originator (not merely 'our poet') of the play in the mind of the audience.[132] It is not difficult to see how this individualist turn presaged the move, over the decades that followed, towards appreciating the unique 'voice' of the author. Indeed, the efforts of Jonson, and the posthumous appreciation of Shakespeare, meant that as the Jacobean era gave way to the Caroline period (1625–49), the perception of theatrical authorship was already beginning to stabilise around an author-figure. The idea that such an author should also own property in the play was not far off. On this too, Ben Jonson was ahead of his time, advocating publicly for increased legal rights for writers.[133] There is no doubt that the author's rights tradition in English theatre found an early paragon in Ben Jonson.[134]

How Reconceptualising Anonymity Influenced Authorship During the Seventeenth Century

Masten posits that although it does not identify anyone the term 'anonymous' signifies a definable 'space for identity, a need to know "who is speaking"'; as such, this supports Foucault's contention that 'the author has a particular point of emergence as a cultural fiction'.[135] Today we are intrigued by anonymity – at times it frustrates us because when reading a text or listening to a speech we want to know 'who is speaking'.

[128] ibid, 104. See also AW Pollard, *Shakespeare's Fight with the Pirates and the Problems of the Transmission of His Text*, 2nd edn (Cambridge: Cambridge University Press, 1920) 35–52.
[129] ibid, 102, noting that 'printers conventionally gave limited privileges of revision to authors'.
[130] ibid, 102.
[131] B Jonson, *Bartholomew Fair* (1614), induction, lines 58, 64–66, 73–82, available at www.gutenberg.org/files/49461/49461-h/49461-h.htm.
[132] Loewenstein (n 75) 103.
[133] J McKeough, K Bowrey and P Griffith, *Intellectual Property: Commentary and Materials*, 4th edn (London: Butterworths, 2007) 21.
[134] Peters (n 59) and McMillin (n 124).
[135] Masten (n 12).

Yet, in the Elizabethan age anonymity was not applied to texts.[136] As Masten relates, only in the late seventeenth century was the term ascribed to literature and dramatic playbooks.[137] As described earlier, the polyvocal nature of theatrical authorship of the time meant that dramatic texts passed through several sets of hands. Even where plays were published, they were often printed without written ascription of authorship – thus Masten quips that such texts were not even attributed as 'anonymous'.[138] In fact, Masten refers to Elizabethan play-texts as 'pre-anonymous' because anonymity as we know it had not yet 'emerged' – it would only do so as the author concept itself began to change:

> Anonymous, in other words, only assumes its textual associations as a marking of difference from a new concept of authorship.[139]

When, towards the latter half of the seventeenth century, the idea of an individual author began to gain currency, there was a concurrent turn towards recognising that same individual's 'authority' over the text. To stamp 'anonymous' on a text became a way to recognise the insistence of the authorship question. In other words, the use of anonymous as a placeholder brings up the Beckett/Foucault concern once more, our need to know *who* is performing the author function? Masten argues:

> The historicity of that need is registered in the word anonymous, which supports Foucault's contention that the author has a particular point of emergence as a cultural fiction.[140]

From the late seventeenth century onward the term anonymous began to 'signal the authorization of a text, the importance of someone, anyone, speaking' – indicating that the emergence of an author-figure was marked concurrently 'by the notice of its absence'.[141] As the understanding of 'anonymous' changed this coincided with a general shift towards focusing on authors over texts in literary circles and theatrical scholarship.[142] Tracing the 'authorial lineage' of the play became more important.[143] Therefore, questions of attribution and anonymity became more vital just as the individual theatrical author mythos began to materialise.

Censorship of Theatre Texts in the Sixteenth and Seventeenth Centuries

The final factor that is worth considering (briefly) in the context of theatrical authorship in the Elizabethan and Jacobean eras is the way that censorship, and

[136] Smith (n 100).
[137] Masten (n 12). See also Smith (n 100), noting that the first *Oxford English Dictionary* citation of this usage ('anonymous', 2) is dated to 1676.
[138] ibid, 363.
[139] ibid, 337.
[140] ibid, 337. See also Bently (n 52) 978.
[141] ibid, 337.
[142] Masten (n 12) 337. See also Bently (n 52) 978.
[143] ibid, 347.

the attendant threats of state sanction (actions for sedition) influenced the creation of play-texts. Although censorship is less useful to assisting this book's analysis of questions about copyright and authorship, and thus I do not go into it in great detail here, it undoubtedly played a part in the polyvocal theatrical authorship of plays. The power of the state to make edits to play-texts was significant. As Litman states, theatre was 'closely supervised by the crown'.[144] The key authority in the Elizabethan and Jacobean eras was the Master of the Revels, who was in charge of stage censorship.[145] Only once approved by the Master did a play-text become exploitable, and thus valuable, with respect to performance and print. For this reason, Loewenstein argues that once a text was approved by the Master of the Revels 'the mark of ideological control' was 'converted into something like an intellectual property right'.[146]

A classic example of the influence of the censor on a text is provided by the play *Sir Thomas More* concerning the Tudor lawyer who was eventually sentenced to death for his refusal to recognise Henry VIII as Supreme Head of the Church in England. As recorded by the British Library:

> The work was initially written by Anthony Munday between 1596 and 1601. The Master of the Revels, Edmund Tilney, whose role included stage censorship, refused to allow *Sir Thomas More* to be performed, perhaps because he was worried that the play's depiction of riots would provoke civil unrest on the streets of London. After the Queen's death in 1603, Shakespeare was brought in to revise the script, along with three other playwrights.[147]

We can thus observe that in this case the censor was 'making changes and demanding others' – effectively becoming a co-author of the manuscript along with the collaborating writers.[148]

Material Matters – Printing, 'Piracy' and 'Blocking' in the Pre-Statutory Copyright Era 1557–1709

As noted earlier, with very few exceptions, from 1557 the Stationers' Company held the exclusive right to print works.[149]

With printed plays becoming more popular in the book-selling marketplace, during the Elizabethan and Jacobean eras 'piracy' of printed texts – including plays – emerged as a major problem for publishers. In the posthumous Shakespeare *First Folio* published in 1623 Heminges and Condell refer to the

[144] Litman (n 49).
[145] R Dutton, *Mastering the Revels: The Regulation and Censorship of English Renaissance Drama* (Iowa: University of Iowa Press, 1991).
[146] Loewenstein (n 75) 31.
[147] See www.bl.uk/collection-items/shakespeares-handwriting-in-the-book-of-sir-thomas-more.
[148] Masten (n 12) 340.
[149] M Rose, 'The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne' (2009–10) 12 *Tulane Journal of Technology and Intellectual Property* 123.

existence of 'stolne, and surreptitious copies' of the plays.[150] Resolution of disputes arising over 'pirate' editions of books, including play-books, could occur through formal and informal mechanisms of quasi-arbitration that could be used to deal with the Stationers' disputes.[151] Claims could be taken to The Court of Assistants or The Court of Star Chamber. Yet, it is worth recalling that disputes over the right to print a given text could be resolved via law without any consideration of an author-figure.[152]

In the context of theatre, the existence of 'blocking' registrations posed a challenge. Theatrical impresarios, including Henslowe, sometimes deigned to register plays at the Stationers' Company to secure the exclusive right to print a particular text, a right which in some cases they had no intention of ever exercising.[153] Here we can observe, perhaps for the first time in England, that the publishers and the theatre were to some extent in competition for the public's attention. Registering a play but not actually printing it was an attempt by Henslowe (founder of The Rose Theatre and The Fortune Theatre) to prevent any other theatres from being able to access copies of the text in order to stage it.[154] The use of the play-book as print-commodity and the staging of the play-text as performance commodity could lead to an increase in each one's value – but the use of one could also affect the other negatively.

Piracy disputes and the 'blocking' registrations of plays indicate how unsettled the state of literary property was at the time of pre-statutory copyright. For licensing and registration, flexible, though complex, conventions had developed concerning the right to copy in such a way that avoided elaboration of ideas of literary property as belonging to authors.[155] Indeed, the modern conception of authorial copyright ownership was 'effectively preempted, if not mooted, by the original structures of copyright'.[156]

Nonetheless, as the seventeenth century went on, the Stationers' system proved inflexible – and even corrupt in some respects.[157] With the increase in competition and the tussle for control, authors began to come into focus.[158] The commodification of the play raised questions about ownership of its value:

> … within the theater, more than within the book trade, imperfectly rationalized economic relations and a marketplace made harrowingly unstable by plague and censor generated a new kind of theft and a new kind of ownership. Authors had been compensated, by stationers or, in the case of playwrights, by acting companies, for little more than the scribal labor of generating a unique but reproducible text – a scribal and not a creative act. But now that plays were being sold by acting companies and pirated by individual actors or individual stationers, an economic value relatively autonomous

[150] Erne (n 125) 280–83, referring to 'Heminges and Condell's "Stolne, and surreptitious copies" and the Pavier quartos'.
[151] Lauriat (n 61).
[152] Loewenstein (n 47) 105.
[153] ibid, 105.
[154] ibid, 105.
[155] ibid, 105. Litman (n 49).
[156] ibid, 105.
[157] ibid, 105–6.
[158] Barron (n 3).

> from either the author's scribal labor or the stationer's reproductive and disseminative labor began to inhere in script.[159]

The value of play-books, even in 'pirate' versions, had increased. Yet, the rights of playwrights as authors remained barely perceptible in a fog of legal relationships that benefited publishers and booksellers. A Star Chamber degree in 1631 had emphasised the Stationers' monopoly, and it was given statutory imprimatur via The Licensing Act 1662. Even so, the courts were beginning to perceive, and acknowledge, the possibility of authorial ownership. Although not a case about a theatrical text, the ruling of the Court of Common Pleas in *Stationers' Company v Seymour* (1677) is relevant as it raised questions about whether authors possessed a kind of common law literary property in their writings.[160] Gómez-Arostegui demonstrates that during the mid-to-late seventeenth century there was some implicit Parliamentary and judicial acceptance that authors owned a form of literary property in their writings, but it was never given definitive approval by the courts.[161]

The Licensing Act 1662 continued in force, via amendments, with some lapses, until 1695. The Stationers agitated for the renewal of their monopoly rights. The eventual outcome of this struggle was the push for statutory copyright. In time, this would bring the role of the author as *owner* to the fore. Simultaneously, from the Restoration (1660) onwards, a turn toward individual author-figures is visible in theatrical practice.

The Changing Nature of Theatre and the Playwright's Status, Post-Restoration (1660–1709)

The theatres were closed from 1642–60 during the English civil war and the rule of Oliver Cromwell. After the restoration of Charles II in 1660 the theatre market was revived – but in an altered state. Post-1660 the theatre market became more heavily regulated and restricted than it had been under Elizabeth I, James I or Charles I. Charles II issued a monopoly (patent) to two theatres – one run by William Davenant and the other by Thomas Killigrew.[162] Only these two could

[159] Loewenstein (n 47), 105–6.

[160] *Stationers' Company v Seymour* (1677) 1 Mod. 256. See also HT Gómez-Arostegui, 'Stationers v Seymour (1677)' in J Bellido (ed), *Landmark Cases in Intellectual Property Law* (Oxford: Hart, 2017) 21–58.

[161] R Deazley and E Cooper (eds), 'What is the Point of Copyright History? Reflections on Copyright at Common law in 1774 by H. Tomás Gómez-Arostegui' (2016) 4 *CREATe Working Paper* 1.

[162] D Ganzel, 'Patent Wrongs and Patent Theatres: Drama and the Law in the Early Nineteenth Century' (1961) 76 *PMLA* 384–96. In 1661 Davenant's 'Duke's Company' was based at Lincoln's Inn Fields but in 1671 moved to Dorset Garden. In 1663 Killigrew's company was based at Theatre Royal, Drury Lane. In Dublin, the Theatre Royal opened its doors in 1662. In 1682 the King's Company was taken over by Duke's to form United Company with Thomas Betterton. Betterton later received a licence from William III to found a new theatre, first at Lincoln's Inn in 1695 and in 1720 the Theatre Royal Covent Garden. Samuel Foote founded the Theatre Royal, Haymarket, in 1766, which became

stage performances of serious dramas, (though other theatres could perform comedy and pantomime).[163] Notably, women were allowed to perform on stage for the first time and the first female playwrights – such as Susan Centlivre – began to receive attention.[164]

Yet, the great blossoming of English 'Renaissance' theatre – typified by the polyvocal productions of the late sixteenth and early seventeenth centuries – was over. Collaborative writing between playwrights had its 'heyday at the turn of the sixteenth century' and thereafter gradually declined.[165] The theatre environment transformed from a context where 'creative originality and independence of voice had been little prized' to one where individual authors were increasingly appreciated and rewarded.[166] Thus, towards the end of the seventeenth century a more author-centric model emerged.[167] As Kewes states this can be evidenced by the fact that the post-1660 period saw 'a growing concern with the integrity of an author's œuvre'.[168] This manifested itself most obviously in changes to the way plays were catalogued – during the 1650s they were 'lists of titles of plays' – the plays rather than authors were the 'commodity for sale' in print; but by the time of Gerard Langbaine's catalogues of the 1680s–1690s 'the organizing principle shifts from play to author'.[169]

As the 1700s began there was a rise in public consumption of works of literature and drama.[170] As Stern remarks, the need to have 'a single identifiable author with a known body of work became an increasingly important sales pitch'.[171]

The theatrical marketplace had changed to the benefit of the dramatist. Even if their work is not as critically lauded today, post-1660 writers such as Dryden, Otway, Lee, Behn, and later, Congreve, Vanbrugh, and Farquhar, gained 'a contemporary esteem equal, even superior, to their illustrious predecessors Shakespeare, Jonson, and Fletcher'.[172] This increased further from 1699 when it became more common for playwrights to be identified in playbills.[173]

the third patent theatre, operating in summer. As the eighteenth century went on further letters patent were granted to theatres: Theatre Royal, Cork (1760), Theatre Royal, Bath (1768), Theatre Royal, Liverpool (1772), Theatre Royal, Bristol (1778) and Theatre Royal, Birmingham (1807).

[163] The patent monopolies on the performance of serious plays lasted until their revocation via the Theatres Act 1843 (6 & 7 Vict., c. 68).

[164] DP Fisk, 'The Restoration Actress' in SJ Owen (ed), *A Companion to Restoration Drama* (Oxford: Blackwell, 2001) 69–91. See also W Van Lennep, EL Avery, AH Scouten, GW Stone and CB Hogan, *The London stage, 1660–1800: a calendar of plays, entertainments & afterpieces, together with casts, box-receipts and contemporary comment: Compiled from the playbills, newspapers and theatrical diaries of the period* (Carbondale, Illinois: Southern Illinois University Press, 1960–1968), accessible at https://catalog.hathitrust.org/Record/000200105.

[165] Stern (n 57) 73.

[166] ibid.

[167] Kewes (n 57).

[168] ibid.

[169] ibid.

[170] Krause (n 13) 217.

[171] Stern (n 57) 73.

[172] Kewes (n 57).

[173] Stern (n 57) 73. See also T Stern, '"On each Wall and Corner Post": Playbills, Title-pages, and Advertising in Early Modern London' (2006) 36 *English Literary Renaissance* 57.

On the key issue of ownership, authors gradually began to be viewed as the 'sole begetters of their works'.[174] Kewes argues the existence of the Restoration 'benefit' – a custom of giving a portion of revenues from the playhouse's third night to the author as payment for a play – encouraged authors to write; though Stern notes that a similar benefit existed pre-Restoration in the 1620s.[175] Nonetheless, there is no doubt that the idea that the playwright ought to be viewed as 'owner' of the text became 'a matter of heated dispute from the 1660s onwards'.[176] In the aftermath of the 'glorious revolution' of 1688–89 and the Act of Union 1707, regulation of the right to copy by Parliament, in the form of legislation, would soon come to pass.

The Statute of Anne 1710 and the Recognition of Authors as Owners

In 1710 the first copyright statute – the 'Statute of Anne' – came into force.[177] The Act can be viewed as the foundation of legislative copyright in the modern UK and the common law world.[178] Historians of copyright – such as Rose and Deazley – have undertaken significant studies of the Statute of Anne in historical context.[179] I do not intend to explore this period in detail, but it is important to highlight some key issues that relate to authorship and ownership of plays.

The first question to consider is – why was the Act passed? The need for a copyright statute arose due to substantive conditions central to the print industry,[180] such as the existence of printing technology, the demise of the previous system of state licensing, a governmental acceptance of the concept of 'intellectual property', and a rapidly expanding market for books and play texts – and later, sheet music.[181] Consequently, the rationale behind the Statute of Anne was concerned primarily 'with "books" and their "proprietors" (ie, the Stationers), not authors and

[174] Kewes (n 57).
[175] ibid.
[176] ibid.
[177] An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasors of Such Copies during the Times Therein Mentioned 1710 (Imp) 8 Anne, c 19. (the Statute of Anne), available at http://avalon.law.yale.edu/18th_century/anne_1710.asp.
[178] Kewes (n 57).
[179] See, eg Rose (n 3) and Deazley (n 43). See also D Ross, 'Copyright and the Invention of Tradition' (1992) 26 *Eighteenth-Century Studies* 1. See also Feather (n 10). For further detail on these issues see generally J Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) (originally published 1689). See also W Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 *Yale Law Journal* 1533; B Sherman and L Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999) and Waldron (n 10).
[180] D Hunter, 'Musical Copyright in Britain to 1800' (1986) 67 *Music and Letters* 269, 274. See also Deazley (n 43) xix.
[181] Deazley (n 43) xix. See also J Raven, 'The Book Trades' in I Rivers (ed), *Books and Their Readers in Eighteenth-Century England: New Essays* (London: Continuum, 2001) 1–34.

their works'.[182] The assumption was that the Stationers would continue to assert control of cultural production.[183] The Statute of Anne provided that the owner of the book's 'Copy' possessed 'the sole liberty of printing and reprinting' it. An infringer would be liable to 'forfeit such Book or Books, and all and every Sheet or Sheets' giving the owner the right to 'forthwith Damask and make Waste Paper of them'.[184]

The second question is: how did this law affect the status of authors? As noted earlier, dramatists had largely lacked control over print and performance in the Elizabethan/Jacobean eras; and although the concept of an author's literary property under common law had been present in judicial reasoning in the mid-to-late seventeenth century it remained of ambiguous legality.[185] Although the 1710 Act was intended to protect publishers' interests rather than those of writers, the Act nonetheless anticipated the emerging importance of the author's role. As Bently notes:

> The 1710 Act refers to 'authors' and makes the continuation of the copyright term from 14 to 28 years dependent upon the author's survival … Additionally, the Stationers' use of the claims of authors in inducing Parliament to pass the Statute indicates that authorship also had some rhetorical power.[186]

In making the author's role explicit, the Act followed the logic of the rhetorical discussion of the author as *owner* of common law literary property in pre-1710 court rulings involving the Stationers, while also limiting the duration of copyright.[187] In the theatrical context, references to the role of the author in legislation can be seen in the light of the playwright's improved economic status at the dawn of the 1700s, which in turn inspired new conceptions of what constituted authorship.[188]

By the end of the eighteenth century the author-figure as *owner* had truly emerged in philosophy and law. Bently remarks that 'the link established in law between an author and a work, and the romantic conceptualisation of the work as the organic emanation from an individual author, emerged simultaneously at the end of the eighteenth century'.[189] The material and the philosophical worked in tandem as technology and trade allowed post-Enlightenment ideas about

[182] Bently (n 52) 975.

[183] Salter (n 45) 811. It is less relevant to authorship questions, but it is notable that statutory copyright, enforced in the courts, also brought with it even greater potential power to censor works of literature.

[184] Section 1 of the Statute of Anne 1710.

[185] HT Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 *Conn. L. Rev.* 1. For a Scottish perspective on the debate see H MacQueen, 'Literary property in Scotland in the eighteenth and nineteenth centuries' in I Alexander and HT Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Cheltenham: Edward Elgar, 2018) 119–38. See also Deazley and Cooper (n 161).

[186] Bently (n 52) 975. See also Feather (n 10).

[187] Gómez-Arostegui (n 160) at 51, referring to *Stationers' Company v Seymour* (1677) (n 160), *Stationers' Company v Bradford* (12 June 1700) C37/692 and *Stationers' Company v Partridge* (1709) HLS MS 1109.

[188] Stern (n 57).

[189] Bently (n 52) 974.

the individual to circulate in print, helping to create a new respect for authorial 'geniuses'.[190] Copyright law's framing of authorship in the late eighteenth century was thus influenced by a critical ferment – the confluence of the material and the philosophical.[191]

John Locke's *Two Treatises of Government* (1689), which advocated a theory of individual labour-property rights as natural rights, was an influential contemporary text.[192] Rose ties Locke's labour theory of property individualism to the the later romanticism of Coleridge.[193] Thus, at the end of the eighteenth century Lockean property discourse 'which speaks of a natural right of property in the products of labour' was blended with a growing acceptance that 'heroic' individual authors create literary, musical and dramatic works of art.[194] As Woodmansee remarks, the legacy is that 'a piece of writing or other creative product may claim legal protection only insofar as it is determined to be a unique original product of an intellection of a unique individual (or identifiable individuals)'.[195]

Our modern understanding of the author – in terms of the literary imagination and legal personhood under copyright – was certainly consolidated during the Romantic period.[196] In theatre there was a continuing shift towards recognising individual authorship, which created a presumption of originality on the part of the increasingly 'professionalised' writer in line with the ethos of the evolving copyright law.[197] Over time, writers began to benefit from the new legal form of authorship.[198] A more authorial view of composition took hold.[199] Thus, at the end

[190] Although many scholars accept that 'Romantic author' idealism influenced copyright law, not all scholars agree. Saunders claims the discourse of Romantic aesthetics is overstated and should not be allowed to overwhelm legal scholarship, viewing the fields of art/aesthetics and copyright as fundamentally separate – D Saunders, 'Dropping the subject: An argument for a positive history of authorship and the law of copyright' in B Sherman and A Strowel (eds), *Of Authors and Origins* (Oxford: Clarendon Press, 1994) 95–96. Barron is also sceptical of how influential Romanticism has been on the development of case law principles – A Barron, 'Copyright law and the claims of art' (2002) 4 *Intellectual Property Quarterly* 368, 374–80. For a comparative outline of early copyright theory in Germany see Kant (n 41).

[191] Salter (n 45) 792.

[192] Locke (n 179). See also S Stern, 'From Author's Right to Property Right' (2012) 62 *University of Toronto Law Journal* 29.

[193] Rose (n 3).

[194] Bently (n 52) 975. See also M Chatterjee, 'Lockean Copyright versus Lockean Property' (2020) 12 *Journal of Legal Analysis* 136.

[195] M Woodmansee, 'On the Author Effect: Recover Collectivity in The Construction of Authorship' (1992) 10 *Cardozo Arts & Ent. L.J.* 279.

[196] Censorship of plays by the Lord Chamberlain via the Theatrical Licensing Act of 1737 lasted until 1968.

[197] Kewes (n 57). See however Litman (n 49) 1395 noting that the Act 'made no immediate observable difference in the lot of dramatists'. The question of plagiarism in theatre grew in importance at this time – I reflect on this in ch 4 of this book.

[198] Krause (n 13) 217.

[199] E Cooper, 'Copyright and Mass Social Authorship: A Case Study of the Making of the Oxford English Dictionary' (2015) 24 *Social & Legal Studies* 509, noting that there were examples of collective authorship of literary works under the 1842 Act that do not fit within the idea of Romantic, individualist authorship.

of the eighteenth century the acceptance of Romantic 'genius' authors *as owners* was well under way.[200]

Nevertheless, the link between copyright and romanticism should not be overstated. As explored above, the idea of the theatrical author as a possessive public agent, as well as the rhetoric of literary property, can be observed in the post-Restoration (1660) period (and even earlier in the atypical figure of Ben Jonson). Moreover, as I outline below, the law at the end of the eighteenth century did not yet protect a 'copyright work' in the modern sense of a broad property-object encompassing a bundle of rights – only print was given statutory protection, with performance falling outside the scope of the Act.

Changes to Theatrical Culture Post-Statute of Anne 1710

When Queen Anne – whom the 1710 statute is named after – passed away in 1714, George I became the new King. Theatre was not valued as highly by the new monarch and as a result the status of actors in Crown circles lessened.[201] Nonetheless, the public remained in thrall. During the eighteenth century several small theatre companies 'sprang up' to compete with the two patent theatres by performing comedies, although 'extensive government regulation and uncertain finances kept them from gaining a foothold'.[202] When Parliament passed the Licensing Act in 1737 the performance of 'legitimate' or serious drama remained limited to the two theatre companies that possessed the royal patent. The Act affirmed that all scripts had to pass through the approval of the censor – the Lord Chamberlain – prior to initial performance.[203] The overall effect was to limit opportunity for 'serious' dramatists – it became harder to find venues for new scripts and some would-be dramatists 'shifted their efforts to poetry or novels'.[204] The market for printed novels was such that several great writers began to establish themselves, including Samuel Richardson, an author who was certainly aware of, and willing to assert, his copyright under the Statute of Anne.[205]

The restrictive theatrical scene may be one reason why the legacy of eighteenth century theatre is not as rich as that of the Elizabethan/Jacobean period. During the eighteenth century the works of Shakespeare were revived and adapted – albeit

[200] FM Scherer, 'The Emergence of Musical Copyright in Europe from 1709 to 1850' (2008) 5 *Review of Economic Research on Copyright Issues* 3, 11.

[201] Litman (n 49). See also RD Hume, 'Theatres and Repertory' in J Donohue (ed), *The Cambridge History of British Theatre: Volume 2 1660 to 1895* (Cambridge: Cambridge University Press, 2004) 53–70.

[202] ibid.

[203] Theatrical Licensing Act of 21 June 1737, 10 Geo. II c. 28.

[204] Litman (n 49).

[205] JR Alexander, 'Richardson and Copyright' (2012) 59 *Notes and Queries* 219.

often as 'tragedies with happy endings' as in the case of the Nahum Tate version of *King Lear* – with famous performances by leading actors such as David Garrick;[206] meanwhile Restoration comedies such as Congreve's *The Way of the World* (1700) remained popular.[207] Today the most respected of the eighteenth century playwrights who wrote for the London stage are two Irish writers of satire: Oliver Goldsmith (1722–74), whose most famous work – *She Stoops to Conquer* (1773) – continues to be revived frequently in the twenty-first century; and Richard Brinsley Sheridan (1751–1816) who wrote *The School for Scandal* (1777) and several other popular plays.[208] Authorship of theatrical works was more individualist than in the Elizabethan/Jacobean eras, but it still thrived on collaborative input, with several parties – writers, actors and theatre managers – 'playing at authorship'.[209] For example, Goldsmith engaged the actor and manager David Garrick to write the prologue to *She Stoops to Conquer*, which introduced the play's comedic style and themes to the audience.[210]

Post-1710 the legal print rights the individual playwright could claim continued to increase in practice. During the mid-to-late eighteenth century theatre companies began to agree contracts with writers that allowed the playwrights to keep ownership of the play in its printed form – this allowed writers to make agreements directly with the Stationers.[211] By the end of the eighteenth century the two 'patent' theatres began to pay authors flat fees rather than the prior system of partial performance 'benefit'.[212] The theatres intended to limit their cost outlay, but the impact on writers was that on average, by contracting with the publishers themselves they received a greater amount of money than in the earlier periods – as well as acknowledgment of authorial ownership.[213] As a result, Litman states, by the end of the 1700s 'it was becoming possible for at least some playwrights to earn a living writing for the theatre'.[214]

To understand the nature of the legal rights the dramatists possessed in this respect, the key cases decided during the eighteenth century and early nineteenth century on the question of what copyright protected in the context of drama must be examined. What these cases reveal is that legal claims over plays could no longer be limited to

[206] CB Hardman, '"Our Drooping Country Now Erects Her Head": Nahum Tate's "History of King Lear"' (2000) 95 *The Modern Language Review* 913.

[207] See www.bl.uk/collection-items/congreves-the-way-of-the-world.

[208] Sheridan, along with his compatriot playwright Charles Macklin, would come to influence the law on performance rights, as outlined later on in this chapter. See D Worrall, 'Charles Macklin and Arthur Murphy: theatre, law and an eighteenth-century London Irish diaspora' (2020) 14 *Law and Humanities* 113. See also www.bl.uk/restoration-18th-century-literature/articles/18th-century-british-theatre.

[209] EH Anderson, *Eighteenth-Century Authorship and the Play of Fiction: Novels and the Theater, Haywood to Austen* (London: Routledge, 2009) 1–20.

[210] See www.bl.uk/collection-items/first-edition-of-she-stoops-to-conquer-1773#.

[211] Litman (n 49).

[212] House of Commons Report from the Select Committee on Dramatic Literature with Minutes of Evidence (1832), available at www.copyrighthistory.org/cgibin/kleioc/0010/exec/ausgabe/%22uk_1832%22.

[213] Litman (n 49).

[214] ibid, 1397.

printed play-texts – the commodification of performance as a source of value in the theatre market led to numerous claims for exclusive rights to perform plays.[215]

Defining the Boundaries of Copyright Protection under the Statute of Anne 1710

The terms of the Statute of Anne stated that the owner of the book's 'Copy' possessed 'the sole liberty of printing and reprinting' it.[216] Kaplan argues that 'the draftsman was thinking as a printer would – of a book as a physical entity'.[217] It did not take long for this to became untenable. As we shall see, by the end of the eighteenth century it became clear that the courts viewed copyright as applying to an immaterial text, though one limited to the words on the page.

Deazley notes that one of the earliest cases taken under the 1710 Act by a living author, *Gay v Read* (1729), concerned the text of a dramatic opera (*Polly, an Opera* – also known as *The Beggar's Opera*); whereby, the author John Gay sought, and was granted, a preliminary injunction to prevent unauthorised printing of the playbook, which, after his death in 1737, was extended to a permanent injunction in *Baller v Watson* (1737).[218]

Early case law also saw significant copyright precedents developed in seminal rulings such as *Pope v Curl* (1741).[219] The case involved the writer Alexander Pope, who as one of the most 'professionalised' contemporary authors was assertive over his interests in court.[220] The court ruled that although the letters in question belonged to the recipient, the literary copyright remained with the author, and therefore the recipient did not have a licence to publish them.[221] The case was important for an early consideration of whether copyright protected not just books, but also something intangible: the literary content.

Two subsequent cases are central to this question and are known as the 'literary property debate' cases. As noted earlier, prior to the Statute of Anne there had been some rhetorical acceptance of the idea that at common law there existed a form of author's 'literary property'.[222] In *Millar v Taylor* (1769)[223] it was ruled that

[215] Miller (n 3).

[216] Section 1 of the Statute of Anne 1710.

[217] B Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967) 9. For a continental philosophical perspective of the distinction see F Kawohl and M Kretschmer, 'Johann Gottlieb Fichte, and the Trap of Inhalt (Content) and Form: An Information Perspective on Music Copyright' (2009) 12 *Information, Communication & Society* 205 and M Biagioli, 'Genius against Copyright: Revisiting Fichte's Proof of the Illegality of Reprinting' (2011) 86 *Notre Dame Law Review* 1847.

[218] Deazley (n 43) 60–64 referring to unreported case records in the National Archives, London – *Gay v Read* (1729) c.33 351/305 and *Baller v Watson* (1737) c.33 369/315.

[219] *Pope v Curl* (1741) 2 Atk. 342. The defendant was Edmund Curll but the transcript of the judgment refers to 'Curl'. See also *Tonson v Collins* (1761) 1 Black W. 301.

[220] M Rose, 'The Author in Court: Pope v Curll (1741)' in M Woodmansee and P Jaszi, *The Construction of Authorship* (Durham, NC: Duke University Press, 1994) 211, 228.

[221] Bently (n 52) 975.

[222] Gómez-Arostegui (n 160).

[223] *Millar v Taylor* (1769) 4 Burr 2303.

such a right did exist in the form of a perpetual exclusive right belonging to the author which was not removed by the time-limited right provided for in the 1710 Act. Yet, the outcome of *Donaldson v Becket* (1774)[224] was that any common law literary property right was extinguished as soon as the work was published (when it became in effect the statutory right under the 1710 Act).[225]

A substantive consequence of the debate was the application of the common law notion of property (object-ownership) to intangible, literary texts, which enabled the further conceptual development of statutory copyright law, including the emergence of the idea/expression distinction and the broader copyright work concept.[226] Discussion of the distinction between the material (the text printed in book form) and intangible property (the text as intangible content) would continue to raise important questions through the centuries that followed.[227] For present purposes, the key contemporary question was as follows: what happened if the printing of the text was not in dispute but rather its public performance?[228]

The Changing Appreciation of What Copyright Protected 1710–1832 – From the Print-commodity to the Performance-commodity

As stated earlier, by the Elizabethan era plays had become print-commodities with a measure of legal protection via the Stationers' monopoly rights. The Statute of Anne marked the first time that writers were, at least nominally, recognised as possessing explicit legal ownership rights over this print commodity. Notably, the Statute of Anne referred only to the protection of books/printed texts.[229] While the marketplace for printed playbooks continued to expand during the early-to-mid

[224] *Donaldson v Becket* (1774) 4 Burr 2408.

[225] Gómez-Arostegui (n 185). See also P Masiyakurima, *Copyright Protection of Unpublished Works in the Common Law World* (Oxford: Hart, 2020).

[226] R Kennedy, 'Was it Author's Rights All The Time?: Copyright as a Constitutional Right in Ireland' (2011) 33 *Dublin University Law Journal* 253. See also Stern (n 192).

[227] I Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Oxford: Hart 2010) 81–90 and 273–74. These questions include: was the intangible protected content limited to the words expressed or did it include other key elements that might fall into the category of ideas, like detailed plots, scenarios and characters? These are questions that continue to recur in copyright scholarship today.

[228] Translations were also the subject of much judicial debate at this time: *Burnett v Chetwood* [1816] EngR 26; (1720) 2 Mer 441, 441; [1816] EngR 26; 35 ER 1008, 1009 (Parker C). *Gyles v Wilcox* [1740] EngR 77; (1740) Barn Ch 368; 26 ER 489. *Newbery's Case* (1773) Loft 775; 98 ER 913. *Sayre v Moore* (Unreported, Lord Mansfield CJ, 1785), discussed in *Cary v Longman* [1801] EngR 198; (1801) 1 East 358, 361; [1801] EngR 198; 102 ER 138, 139–40 (Lord Kenyon CJ).

[229] The analogy with musical performance has been explored by several scholars – D Hunter, 'Musical Copyright in Britain to 1800' (1986) 67 *Music and Letters* 269, 274; M Carroll, 'Whose Music is it Anyway? How We Came to View Musical Expression as a Form of Property' (2004) 72 *University of Cincinnati Law Review* 1405, 1463; A Barron, (n 3) 106; and J Small, 'J.C. Bach Goes to Law' (1985) 126 *The Musical Times* 526. See also *Bach v Longman* 98 ER [1777] 1274.

eighteenth century, in the context of theatre tensions arose over performing – rather than merely printing – dramatic texts.[230] Miller argues that the courts at this time were grappling with understanding performance as a source of value worthy of protection, that is, as the performance-commodity.[231]

Theatre managers and playwrights often took copyright cases to the Court of Chancery, overseen by the Lord Chancellor, seeking injunctions.[232]

The first of the key Chancery rulings relevant to performance was in the 1770 case of *Macklin v Richardson*, which concerned the play *Love a la mode* by Charles Macklin.[233] Macklin had performed *Love a la mode* on many occasions but it had not yet been printed. This was deliberate – Macklin kept control over copies of the text to try to prevent others from performing it. To get around this, the defendants had employed a scribe to attend a performance and transcribe the play; the defendants then published the first act of the play in their magazine and intended to publish the second act. The defendants argued that since the play had been performed publicly, this ought to entitle anyone in the audience to make use of the play in any way they saw fit, including printing it. As a result of the literary property debate, there was ambiguity about whether, when a work had been performed, but not printed, an author retained a right at common law to authorise first publication. The court found for the plaintiff, granting an injunction to prevent unauthorised printing of the second act, holding that performance did not equate to publication. The ruling therefore confirmed that the right to authorise first printing of the play belonged to the author; but its consequences for performance were ambiguous. If a play was published in print, then it could be performed without permission or payment, since performances were not protected. However, the possibility of common law literary property in *unpublished* texts remained alive; moreover, if a playwright/company could maintain control over their copies of an unpublished play-text as Macklin had done, no other theatre would be able to perform it for the simple reason that they could not obtain the text.

This is an instance where the law affected theatre practices directly and considerably. Its impact among theatre practitioners was to encourage playwrights and theatres to hold back from publishing plays in print, so to keep an exclusive right to perform the work.[234] Gerland notes that in the 1750s and 1760s the publication of new plays provided lucrative revenues to printers, with several plays, such as Isaac Bickerstaffe's *Maid of the Mill*, selling out multiple print runs; but by the 1770s the supply of new plays in print dried up, exemplified by the fact that Richard Brinsley

[230] Kewes (n 57).
[231] Miller (n 3).
[232] O Gerland, 'The Haymarket Theatre and Literary Property: Constructing the Common Law Playright, 1770–1833' (2015) 69 *Theatre Notebook* 74, 79–80. More generally, Gómez-Arostegui (n 185) notes that Chancery was favoured over the King's Bench by most claimants in copyright infringement cases post-Statute of Anne because they preferred the injunctive remedies available at Chancery, rather than penalties and forfeitures available under the Act.
[233] *Macklin v Richardson* (1770) Amb. 694
[234] JR Stevens, *The Profession of the Playwright* (Cambridge: Cambridge University Press, 1992) 86.

Sheridan's popular play *The School for Scandal*, first staged in 1777, was deliberately kept unpublished (in authorised form) until the 1800s.[235] Miller relates that the effect was to create a norm that plays should not be performed without permission of the author; a norm that appears to have been in effect in spite of – or perhaps more accurately, because of – the absence of a performance right under the law.[236] Indeed, Gerland notes that between 1777–1800, the London patent theatres – Drury Lane, Covent Garden Theatre and Haymarket (which since 1766 had been the third patent theatre, issued to Samuel Foote) – generally cooperated so that only Drury Lane showed performances of *The School for Scandal*.[237]

In addition to court actions and the norms of co-operation, Boorman notes that arbitration was also used by theatre companies to resolve legal disputes.[238] In 1795 theatre proprietors Samuel Ireland and Richard Brinsley Sheridan signalled their willingness to go to arbitration, allowing the solicitor Albany Wallis to decide the terms for the staging of the play *Vortigern* (a play initially falsely attributed to Shakespeare).[239]

That the performance of a published play was not protected by copyright was emphasised in *Coleman v Wathen*, a case taken to the King's Bench in 1793.[240] The dispute concerned *The Agreeable Surprise* – a comic musical, the libretto of which had been written by the Irish dramatist John O'Keefe. O'Keefe assigned copyright to the Haymarket Theatre, where performances became extremely popular.[241] When the defendant staged an unauthorised public performance of *The Agreeable Surprise* the manager of the Haymarket Theatre – George Colman, a trained lawyer – took action, claiming the public performance undertaken without permission was equivalent to an unauthorised print publication under the Statute of Anne. The court rejected this analogy, with Kenyon CJ noting that the Statute of Anne 'only extends to the publication of the book itself'.[242] Therefore, a performance of the text from memory (by the actors) could not be described as akin to an unauthorised reprinting under the Statute of Anne (the implication being that a performance was not publication, and publication solely meant printing).[243]

[235] Gerland (n 232) 77.
[236] Miller (n 3).
[237] Gerland (n 232) at 81.
[238] F Boorman, 'Theatrical arbitration in late-Georgian England' (draft article on file with author).
[239] J Kahan, *Reforging Shakespeare: The Story of a Theatrical Scandal* (Bethlehem, PA: Lehigh University Press, 1998) 127–29. See also RB Sheridan 'Richard Brinsley Sheridan to Samuel Ireland, 9 Jun. 1795' in C Price (ed), *The Letters of Richard Brinsley Sheridan, vol. II* (Oxford: Clarendon Press, 1966) 17.
[240] *Coleman v Wathen* (1793) 5 D. & E. 245.
[241] WJ Burling, *Summer Theatre in London, 1661–1820, and the Rise of Haymarket Theatre* (London: Associated University Presses, 2000) 150–51.
[242] *Coleman v Wathen* (n 207) 245. See R Deazley, *Rethinking Copyright* (Cheltenham: Edward Elgar, 2006) 30.
[243] ibid. See also *Morris v Kelly* (1820) 1 J&W 481 and I Alexander, '"Neither Bolt nor Chain, Iron Safe nor Private Watchman, Can Prevent the Theft of Words": The Birth of the Performing Right in Britain' in R Deazley, M Kretschmer and L Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Cambridge: Open Book Publishers, 2010) 321, available at https://books.openedition.org/obp/1083?lang=en#text.

In the 1822 case of *Murray v Elliston*[244] the influence of the earlier *Millar* and *Donaldson* 'literary property' sagas became clear. The case concerned Lord Byron's *Marino Faliero*. Lord Byron had assigned the copyright to the plaintiff who published it in print. The defendant sought to put on a public performance of the play at the Drury Lane Theatre without the permission of the plaintiff copyright owner. The plaintiff based his claim on the common law right to literary property rather than on the Statute of Anne.[245] The court nonetheless ruled for the defendant, arguing that 'an action cannot be maintained by the plaintiff against the defendant for publicly acting and represented the said tragedy, abridged in the manner aforesaid'.[246] The case confirmed that an unauthorised performance of a published play was considered legally acceptable under the Statute of Anne, with the courts maintaining a print-centric approach to copyright.[247] As the theatre market suffered a decline in the 1820s, the prior system of monopoly patents and co-operative norms began to break down; that performances went unprotected became a particular point of controversy, leading to calls for reforms to assist in the revitalisation of the theatre industry.[248]

The Reforms Brought About by the 1833 Act and 1842 Act – The Right to Perform a 'Dramatic Piece'

In the early 1830s the writer and MP Edward Bulwer-Lytton began to consider reforms of copyright in the theatrical context. In 1832, Bulwer-Lytton established the Select Committee on Dramatic Literature to consider the full picture of theatre in what was (after 1801) the United Kingdom of Great Britain and Ireland.[249]

The committee took note of the fact that copyright protection was limited to printing plays. A play 'could be performed by any theatre that could get its hands on a script' due to the fact that performances of plays were generally believed to be in the public domain.[250] On this, Miller notes that the hearings revealed tensions between the beneficiaries of the print and performance commodities.[251]

[244] *Murray v Elliston* (1822) 5 B and A 657.

[245] R Deazley, 'Commentary on Dramatic Literary Property Act 1833' in L Bently and M Kretschmer, *Primary Sources on Copyright (1450–1900)*, available at www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1833.

[246] *Murray v Elliston* (1822) 5 B. & Ald. 657 at 661. CB Collins. 'Playright and the Common Law' (1927) 15 *California Law Review* 381, 382–83.

[247] YH Lee, 'The persistence of the text: the concept of the work in copyright law – Part I' (2018) *Intellectual Property Quarterly* 22, 33.

[248] Alexander (n 243) 325–31. See also Miller (n 3) 56–57.

[249] See Report from the Select Committee on Dramatic Literature: with the Minutes of Evidence (1831–32) Paper No. 679, VII: 1. K Newey, 'The 1832 Select Committee' in J Swindells and DF Taylor, *The Oxford Handbook of the Georgian Theatre* (Oxford: Oxford University Press, 2014) 140–55.The Statute of Anne had not applied to Ireland and so it was perceived as a market where piracy of playbooks thrived – Gerland (n 232). For a thorough assessment of Irish theatre history through a legal lens see WN Osborough, *The Irish Stage: A Legal History* (Dublin: Four Courts Press, 2015).

[250] Litman (n 49) 1398.

[251] Miller (n 3) 57–63.

The committee also found that since the late eighteenth century new, smaller theatres had been formed to challenge the dominance of the two 'patent' theatres.[252] These non-patent theatres were – despite it being against the law – increasingly performing serious dramas.

Shifts in the market contributed to the need for reform. Litman states:

> When there had been only two theatre companies, the risk from competition was small, since the companies appear to have followed an informal practice of declining to poach each other's scripts or actors. In those circumstances, publication of a new play netted the company or playwright some extra money from the publisher without threatening performance revenues.[253]

This had now changed. As noted earlier, publishers had begun to send stenographers to attend the performances of unpublished plays to write down the dialogue as 'new' play-text. They would then publish the unlicensed printed verses, sometimes – though not in the case of *Macklin* – facing few legal consequences.[254] The law needed reform to protect performances and to take account of the new theatres.[255]

The Dramatic Literary Property Act was passed in 1833.[256] It created a new right of representation that for the first time gave authors (or their assignees) the legal right to control public performances.[257] The 1833 Act provided the author of 'any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment' the exclusive right of performing or representing it at 'any place or places of dramatic entertainment'. The Dramatic Authors' Society was founded and acted as the first licensing agency for plays.[258] An example of the performance right being asserted by a dramatic author is *Planché v Hooper* (1844), a case where the Theatre Royal at Bath staged Planché's play *White Cat* without his authorisation.[259]

Nevertheless, several writers struggled to assert the right. Theatres and publishers often claimed to be the assignees of this authorial right based on prior assignments and thus claimed control of the performance right. This was a claim bolstered in *Cumberland v Planché*,[260] where it was held that the publisher of a play had in 1828 acquired the performance right as part of its contract to purchase the entirety of the copyright from the author. This was, of course, highly controversial because when the contract was agreed in 1828 the new right did not yet exist; yet it was held in *Cumberland* that the publisher could still exercise it, post-1833.[261]

[252] Litman (n 49) 1398.
[253] ibid.
[254] ibid, 1398–99.
[255] Alexander (n 227) 327–28. For an account of the debate over property in print and performance in contemporary France, see JC Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991.
[256] Dramatic Literary Property Act, 1833, 3 & 4 Will.IV, c.15.
[257] Litman (n 49) 1399–1401.
[258] M Banham, *The Cambridge Guide to the Theatre* (Cambridge: Cambridge University Press, 1995) 302.
[259] *Planché v Hooper* (1844) *The Times*, 19 January 1844, 7c.
[260] *Cumberland v Planché* (1834) 1 Ad & E 580; SC 3 N & M 537; LJ 3 KB 194.
[261] Deazley (n 245). See also *Wall v Taylor* (1882) 9 QBD 727 at 730.

Eventually this prompted an additional reform – an early proponent of which was the lawyer, MP and playwright Thomas Noon Talfourd – that was enacted in the form of the Copyright Act 1842,[262] which stated that the public performance right in the context of drama could be the subject of a separate assignment from the traditional 'print' copyright.[263] Furthermore, a dramatic piece's first public performance was stated to be akin to publication for the purpose of copyright law.[264] Shortly thereafter, the Theatres Act 1843 abolished the exclusive right of the patent theatres to produce serious drama on stage.[265] The combined effect of these reforms was that the performance commodity was now, finally, protected by the law.[266]

The Problem of Dramatisations Post-1833

Despite the reforms of 1833 and 1842, the definition of protected dramatic pieces as 'any tragedy, comedy, play, opera, farce, or any other dramatic piece' did not prevent unauthorised adaptations of *literary* texts such as novels. As novels were not 'dramatic pieces' within the meaning of the 1833 Act, authors could not control public performances of plays adapted from their novels.[267] In other words, although the *performance right* protected plays, under statute there was no *adaptation right* that would allow an author to prevent an unauthorised dramatisation and performance of a play based on, for example, a published story or novel.[268]

Cases such as *Reade v Conquest*[269] and *Toole v Young*[270] confirmed that copyright in the novel as literary text did not go so far as to prevent unauthorised parties from performing publicly plays based on such novels. The lack of such a right angered some of the prominent novelists of the period, including Charles Dickens.[271] It became a practice for novelists to create and 'stage' their own dramatisation of a novel in order to claim the performance right – for example Bram Stoker did this in 1897 by engaging the well-known Victorian actor Henry Irving to perform *Dracula* on stage for just two paying customers.[272]

[262] Copyright Act 1842, 5 & 6 Vict., c.45.

[263] C Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge: Cambridge University Press, 1999).

[264] Litman (n 49), 1400, suggests the 1842 Act mean that playwrights lost 'any common law public performance rights in their scripts upon the initial public performance'.

[265] Theatres Act 1843 (6 & 7 Vict., c. 68).

[266] Miller (n 3) 66.

[267] Lee (n 247) 34.

[268] B Lauriat, 'Charles Reade's Roles in the Drama of Victorian Dramatic Copyright' (2009) 33 *Colum J L & Arts* 1.

[269] *Reade v Conquest* (1861) 142 Eng. Rep. 297 (CPD). See also *Reade v Lacey* (1861) 70 Eng. Rep. 853, 854 (1861) (KB) and *Russell v Smith* (1848) 12 QB 217.

[270] *Toole v Young* (1874) 9 LR 523.

[271] JR Planché, *The Recollections and Reflections of J.R. Planché* (London: Tinsley Brothers, 1872) 50–51.

[272] Seewww.bl.uk/romantics-and-victorians/articles/bram-stokers-stage-adaptation-of-dracula–Lauriat (n 268). For more on theatricality in the Victorian era see B Murray, 'H.M. Stanley, David Livingstone, and the Staging of "Anglo-Saxon" Manliness' (2013) 129 *Scottish Geographical Journal* 150.

This was further emphasised in the cases of *Tinsley v Lacy*[273] and *Warne & Co v Seebohm*[274] where it was held that although it was not against the law to perform publicly an unauthorised dramatisation of a novel, to publish that dramatisation in a printed form would amount to copyright infringement.[275] Thus only if the theatrical adaptation were published would a copyright claim be available; a mere public performance did not violate the law.[276]

Authorship and Joint Authorship Under the 1833 Act and 1842 Acts

Singular authorship in the Victorian era was assumed to be linked with the physical act of, for example, putting pen to paper. This can be observed from *Kenrick v Lawrence*[277] – a case which involved a basic drawing protected by the Fine Art Copyright Act 1862.[278] Similarly, under the Copyright Act 1842, putting pen to paper appears to have been key. There was not yet a specific legal requirement that a copyright text (or dramatic piece) be 'original'. In 1900 it was held in *Walter v Lane*[279] that even a verbatim copy of a speech by Lord Rosebery as transcribed by a reporter could be protected by copyright.[280] Yet, as Gravells opines, *Walter v Lane* ended up having an unexpected afterlife as a precedent for the low threshold of originality:

> Most notably, and somewhat paradoxically, the case has come to be regarded as a legitimate starting point for judicial consideration of the notion of 'originality', which was, according to the majority of the House of Lords, neither an express nor an implied precondition of copyright protection under the then current 1842 Act.[281]

If singular authorship was viewed in relatively technical, functionalist terms, what about joint authorship? The possibility that there may be more than one author was not expressly covered by the terms of the Copyright Act 1842. Nonetheless, the cases of *Maclean v Moody* (1858)[282] and *Marzial v Gibbons* (1873–74) suggest

It is unclear how effective such 'copyright performances' were, legally speaking as noted in B Weller, *Stage Copyright at Home and Abroad* (London: The Stage, 1912) 5.

[273] (1863) 1 Hem. & M. 747.

[274] (1888) 39 Ch D. 73.

[275] E Cutler, *The Law of Musical and Dramatic Copyright* (London: Cassell & Co., 1892) 14–17.

[276] *Warne & Co v Seebohm* (1888) 39 Ch D. 73. Miller (n 3), Lauriat (n 268) and Lee (n 247) 36.

[277] (1890) 25 QBD 99.

[278] Fine Arts Copyright Act, 1862, 25 & 26 Vict., c.68.

[279] *Walter v Lane* [1900] AC 539. See also *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565.

[280] Copyright Act 1842, s 2 and s 3 (5 amp 6 Vict. c. 45).

[281] N Gravells, 'Authorship and Originality: The Persistent Influence of Walter v. Lane' (2007) *Intellectual Property Quarterly* 267, 278; J Pila, 'An Intentional View of the Copyright Work' (2008) 71 *The Modern Law Review* 535, 548. The case is cited in twentieth and twenty-first century cases such as *Express Newspapers v News (UK) Ltd* [1990] FSR 359 and *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565. See also the Israeli case *Elisha Kimron v Herschel Shanks* [1993] 7 EIPR D-157.

[282] *Maclean v Moody* (1858) 20 Sc. Sess. Cas. 2nd Ser. 1154.

it was acceptable.[283] However, joint authorship was explicitly envisaged in the context of dramatic pieces under sections I and IV of the Dramatic Literary Property Act, 1833.[284] This is the primary reason why the Victorian cases on claims of co-authorship centred on plays. There is, perhaps, another factor. In the Victorian era theatre went through periodic spells of decline and lull, but it nonetheless remained the primary public forum of art, with famous actors such as Henry Irving, Edward Gordon Craig and Ellen Terry being hailed for their performances;[285] meanwhile, the most popular playwrights included the Irish dramatists Dion Boucicault, Oscar Wilde and George Bernard Shaw.[286] Drama was in the public eye and the newly protected performance commodity was capable of generating substantial revenues – this made a successful copyright claim for joint authorship potentially lucrative.

Studying the facts of the disputes on drama and authorship reveals the power relations that existed between theatre managers and playwrights in the nineteenth century.[287] At the time it was common for theatre managers to try to prevent rival theatres from staging the plays that dramatists had previously written for them.[288] One tactic to this end was for the theatre manager to attempt to claim a share of ownership in the copyright in the dramatic piece, and thus the ability to stop that play from being performed elsewhere.

A relevant dispute came to court in 1856 – *Shepherd v Conquest* – where the courts ruled that the dramatist, not the theatre proprietor, was the author of the dramatic piece.[289] However, in the 1860 case of *Hatton v Kean*, the courts came to the opposite conclusion, holding that a theatre manager was the author of the dramatic piece in question – a dramatico-musical Shakespeare adaptation – in circumstances where it had been the manager who had 'employed' the dramatist-composer to create the work, even in the absence of written assignment.[290]

Levy v Rutley (1870–71) is the essential case of this period because it established the principle that joint authors of a dramatic work must pursue a common design.[291] The facts of *Levy* concerned the dramatic piece *The King's Wager; or*

[283] *Marzial v Gibbons* (1873–1874) L.R. 8 Ch App. 518.
[284] Deazley (n 245).
[285] ibid.
[286] See generally A Jenkins, *The Making of Victorian Drama* (Cambridge: Cambridge University Press, 1991). Since the principal jurisdiction of this study is the UK my focus is on the major Victorian dramatists who worked in London. But there is no doubt that at this time non-English language European theatre was more innovative than British theatre, with the works of eg Chekhov and Ibsen breaking down barriers of what 'modern' theatre could be. See, eg R Gilman, *The Making of Modern Drama* (New York: Farrar, 1972) and R Leach, *The Makers of Modern Theatre – An Introduction* (Oxford: Routledge, 2004).
[287] E Cooper, 'Joint authorship and copyright in comparative perspective: the emergence of divergence in the UK and USA' (2015) 62 *Journal of the Copyright Society of the USA* 245, 250.
[288] ibid. Cooper notes that such disputes were between theatre managers claiming to be 'employers' while claiming playwrights were mere 'employees'.
[289] *Shepherd v Conquest* (1856) 17 CB 427; 139 ER 1140, 1147.
[290] *Hatton v Kean* (1860) 29 L.J.C.P. 20, 25. See also *Barfield v Nicholson* (1824) 2 Sim. and Stu. 1; 57 ER 245.
[291] *Levy v Rutley* (1870–71) L.R. 6 C.P. 523. See also *Levy v Cave* (Ct. C.P.), *The Times*, 14 December 1870 at 11.

The Camp, the Cottage and the Court written by the playwright – Thomas Egerton Wilks. The plaintiff was a theatre manager who had added a scene and made some edits to the text before it was staged, later claiming that this made him a joint author of the play. This claim was rejected on the basis that there needed to be a *common design* between the two parties and this was sorely lacking in this case.[292] As Cooper states, *Levy* 'had merely made subsequent additions and alterations, there being no common design with Wilks'.[293] A similar ruling was made *Shelly v Ross*[294] where it was held that making minor alterations and edits to a piece of drama could not suffice as the basis of a joint authorship claim.

One aspect that is particularly notable about these decisions is acceptance by the courts of the *norms* of theatre practice. The courts took account of the fact that theatre managers – who often performed a role somewhat akin to the modern theatre director of today – often made alterations to play-scripts before putting them on stage. The courts rejected the idea that this ought to make such contributions sufficient to create a joint authorship interest. Cooper notes: 'The approach in *Levy* therefore ensured that the usual activities of theatre managers, in making subsequent alterations to play scripts, would not be sufficient to find a claim to joint authorship.'[295]

The immediate effect of these decisions was to support the position of the dramatists in their negotiations with theatre managers during the Victorian era. Even more importantly, these rulings also form the backbone of judicial analysis of joint authorship in modern copyright law, with *Levy* in particular continuing to be cited in contemporary case law.[296] As I explore in the next chapter, this case anticipates debates over theatrical authorship that continue today.[297]

What Were the Boundaries of the 'Dramatic Piece' 1833–1911?

As the twentieth century began, several theatrical copyright cases arose that gave some clarity to defining the boundaries of the dramatic piece under the 1833 Act. In *Tate v Fullbrook*[298] the case concerned a performative musical-hall sketch – 'Motoring or the Motorist'. The plaintiff had originated the general idea of the sketch and had enlisted a co-author to compose the dialogue. The defendant was a performer who had initially acted in the sketch, and who had later developed his

[292] I reflect further on this common design requirement in ch 3 when considering joint authorship of contemporary works of theatre.
[293] Cooper (n 287) 256.
[294] *Shelley v Ross* (1870–71) L.R. 6 C.P. 531; Bail Court 7 June, *The Times*, 8 June 1871 at 10.
[295] Cooper (n 287) 257.
[296] ibid, 258, noting divergence between UK and US positions can be traced to these cases.
[297] *Brighton and Dubbeljoint v Jones* [2004] EWHC 1157 (Ch); [2004] EMLR 507.
[298] *Tate v Fullbrook* [1908] 1 K.B. 821.

own sketch based on very similar characters and the same central comedic motif. Importantly, however, the dialogue was not the same in the defendant's work as in the plaintiff's sketch. In the first instance the court stated that infringement had occurred due to copying of 'the verbal composition of the author plus matters such as the general get up of the characters, scenic effects and the like'.[299] However, the Court of Appeal reversed the decision, stating the performing right under the 1833 Act applied only to printed text, namely, books and other written compositions.[300] Elements of the sketch apart from the words were not protected.[301] Kennedy LJ remarked that for the purposes of the 1833 a 'dramatic piece' could not 'exist without words'.[302]

A text-centric approach is also visible in the subsequent ruling in *Scholtz v Amasis & Fenn*[303] which confirmed that the dramatic piece as protected by UK copyright law was equivalent to its literal text, not the other key elements that formed part of the performed work.[304] The case concerned a comic opera written by the defendant that featured several elements – such as characters, plot, setting, etc – common to an earlier work written by the plaintiff. Rejecting the infringement claim, the court stated:

> Unless the embodiment of the plot in words had to a substantial extent been appropriated, the plaintiff's case must break down. The fact that plot and scenic effects had been obviously borrowed by one dramatist from another was only evidence of *animus furandi*.[305]

The above makes clear that following the enactment of the Statute of Anne[306] in 1710 a text-centric model of copyright emerged and flourished during the eighteenth and nineteenth centuries. Initially judges focused on whether the 'book' in question had been reprinted by the defendant; later they focused on the literal 'text' even when performed as a dramatic piece. The reluctance to extend copyright protection beyond literal textual boundaries demonstrates some 'inherent judicial conservatism'.[307] As Lee notes, the courts in the 1700s and 1800s were willing to construe the statutory language of 'printing' of copies to include 'partial copies' of text as constituting infringement, but rights of dramatisation (of eg novels) were not yet established.[308] In chapter four I discuss the nature of nineteenth century

[299] ibid, 829.
[300] ibid, 830. I reflect on dramatic plagiarism in ch 4 on copyright infringement.
[301] ibid, 830 and 833.
[302] ibid, 834.
[303] *Scholtz v Amasis & Fenn* [1905–10] MacG. C.C. 216.
[304] Cooper (n 3) 107–09, demonstrating that the relationship between the physical and the intangible was an elusive question not only in textual works in the nineteenth century, but also regards copyright in paintings (ie, the painting as intangible work of an artist and the painting as a valuable physical canvas).
[305] *Scholtz v Amasis & Fenn* [1905–10] MacG. C.C. 216, at 218.
[306] Section 2 of the Statute of Anne 1710.
[307] Lee (n 247).
[308] ibid.

plagiarism and copyright infringement in greater detail as part of my overall assessment of infringement in contemporary theatre.

For now, one final aspect of infringement that is worth noting: in the case of theatrical texts the use of a scene/scenario began in the Victorian era to be the subject of infringement claims in other jurisdictions, particularly in the US.[309]

US Comparison under the 1856 US Copyright Act

For comparative value, it is worth considering the 1868 case of *Daly v Palmer* in the United States of America.[310] The case involved a dispute under the US 1856 Copyright Act over the play *Under the Gaslight* by the American playwright Augustin Daly.[311] The play contains a then-innovative (now cliched) scene set on a railroad, whereby a character is tied to the track as a train approaches and is rescued just in time by another character. When a similar scene appeared in a play *After Dark* by the Irish playwright Dionysius Lardner 'Dion' Boucicault the plaintiff took action. Even though there were no elements of dialogue common to the two works, Blatchford J held that the second work infringed the first based on the similarity in the scenario, movements and sequence of events, because these formed 'part' of the work. Further, the court accepted that copyright could protect a piece of drama even if it featured no spoken words.[312] Blatchford J opined:

> The 'railroad scene', in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice … Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of anything that is spoken.[313]

An injunction was granted and as a consequence, the defendants changed the railroad scene in *After Dark* to avoid infringing upon the earlier play.[314] Despite some strained reasoning, this decision moved US law definitively ahead of its UK counterpart in accepting that dramatic copyright needed to be open to *non-literal* elements. It has therefore been cited as a ruling that established property rights in incidents, a topic I return to in chapter four.[315]

[309] Miller (n 3).
[310] *Daly v Palmer* 6 F. Cas. 1132, 1136 (S.D.N.Y., 1868).
[311] U.S. Copyright Act 1831, 21st Cong., 2d. Sess., 4 Stat. 436 and U.S. Copyright Amendment Act 1856, 11 Stat. 138.
[312] *Daly v Palmer* 6 F. Cas. 1132, 1136 (S.D.N.Y., 1868).
[313] ibid. Miller (n 3) 77–83.
[314] Lee (n 247) 40.
[315] See also TW Clarke, 'Circuit Court of the United States for the Southern District of New York: Augustin Daly v Henry D Palmer and Henry C Jarrett' (1868) 3 *American Law Register* 453. See also JA Morgan, *The Law of Literature: Volume II* (New York: James Cockcroft & Co, 1875) 322; *Kalem v*

International Copyright: The Berne Convention 1886

The birth of international copyright has been explored exhaustively by several prominent scholars;[316] it is not my intention to probe this history in detail. All that is necessary for present purposes is to note a number of key aspects of the 1886 Berne Convention, which made solid the copyright work concept in the international legal context.

The Convention arose in part due to advocacy of international protection of copyright by major literary figures such as Victor Hugo and Charles Dickens who were frustrated that 'pirate' version of their works were on sale outside of their national jurisdictions.[317] Notably, the Berne Convention protects 'literary and artistic works' including works of drama and 'dramatico-musical works', but no further definition is given.[318] National jurisdictions therefore have a great deal of freedom in defining these works.[319] Furthermore, the Berne Convention does not expressly state

Harper Brothers 222 U.S. 55, 61 (1911); *Chappell v Fields* 210 F. 864, 865 (2d. Cir., 1914); *International Film Service v Affiliated Distributors* 283 F. 229, 234 (S.D.N.Y. 1922); *Sheldon v Metro-Goldwyn Pictures* 81 F. 2d. 49, 55 (2d. Cir. 1936); *Shipman v RKO Radio Pictures* 100 F. 2d. 533, 535–536 (2d. Cir., 1938); MB Nimmer, 'The Subject Matter of Copyright under the Act of 1976' (1977) 24 *UCLA Law Review* 978, 1011.

[316] C Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006) and S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, 2nd edn (Oxford: Oxford University Press, 2006).

[317] Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886; revised 1896 (Paris), 1908 (Berlin), 1914 (Additional Protocol), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), 1971 (Paris) – as amended 1979) hereafter referred to as Berne Convention; available at www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. The Universal Copyright Convention 1952 was enacted to provide international protection standards for countries that were unwilling to accept certain terms of the Berne Convention. Today the Universal Copyright Convention is less relevant due to the requirement that countries accede to the TRIPS agreement for WTO membership. Both the Geneva (1952) and the Paris (1971) texts are available at www.unesco.org/new/en/culture/themes/creativity/creative-industries/copyright/universal-copyright-convention/. The later 'Rome Convention' was enacted to provide protection for other rights such as rights over sound recording and performers' rights. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention) with a link to https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/rome.pdf. See also WIPO Performances and Phonograms Treaty of 1996 – https://www.wipo.int/treaties/en/ip/wppt/. The terms of Berne were largely copied over into the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (1994) (hereafter referred to as TRIPS), available at www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm. The WIPO Copyright Treaty 1996 (hereafter referred to as the WCT) exists in compliance with Article 20 of the 'Berne Convention' and it complies with the Berne definition of 'literary and artistic works'. The WCT was enacted primarily to address the issues surrounding copyright and digital technology, available at www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806.

[318] Berne Convention, Article 2(1).

[319] However, the Berne Convention only covers 'literary and artistic works'. Ricketson and Ginsburg (n 316) 406–7. Ricketson and Ginsburg note that the Berne Convention in fact covers a number of works which may not always be classed as 'literary or artistic works'. Thus, the scope of this expression is wide. See United States Copyright Act 1976, s 102(a)(2), available at www.law.cornell.edu/copyright/copyright.act.chapt1a.html#17usc102.

that there is a requirement of 'originality'.[320] Nonetheless, Ricketson and Ginsburg state that there is 'a clear indication' that the notion of original intellectual creation is 'implicit in the conception of a literary or artistic work'.[321] When the Berne Convention was revised in 1908 it was decided that copyright should arise automatically, that is, that there should be no need for reservation.[322] It was also agreed that the minimum term should be 50 years after the life of the author.[323] As discussed further below, in 1911 these standards were brought into law in the UK.

The Imperial Copyright Act 1911

The Copyright Act 1911 was a piece of imperial legislation applying to the then United Kingdom of Great Britain and Ireland as well as to the wider British Empire. The Act stated that 'copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the time mentioned in every original literary dramatic musical and artistic work'.[324]

As noted earlier, the Copyright Act of 1911[325] brought the Berne Convention standards on matters such as duration of copyright term into UK law. Crucially, in the 1911 Copyright Act the protected subject-matter was defined for the first time via the more abstract concept of the 'work' as opposed to the 'book'.[326] This brought together under a central 'work' concept the literary (protected under the 1842 Act) and the dramatic (performances of which were protected under the 1833 Act). This took account of the changing nature of the jurisprudence in the copyright field – and it enabled judges in subsequent cases to focus more on the abstract or dematerialised subject of protection beyond the text, something particularly important in theatrical works.[327] Griffiths remarks that this 'represented a very important step away from a system under which rights were described in a manner that linked them closely with the material artefacts within which they were first recorded and towards a more abstract conception of the protected form'.[328]

[320] Ricketson and Ginsburg (n 316) 402–3.

[321] Berne Convention, Article 2(5). See also Ricketson and Ginsburg (n 316) 402–3, noting that the preparatory documents for the Brussels Revision Conference appear to acknowledge that the expression 'literary and artistic works' encompassed a notion of 'intellectual creation'.

[322] Convention for the Protection of Literary and Artistic Works 1908, Article 4 (hereafter referred to as Berlin Act), available at http://en.wikisource.org/wiki/Convention_for_the_Protection_of_Literary_and_Artistic_Works_(Berlin_Act,_1908).

[323] Berlin Act, Article 7.

[324] Copyright Act 1911, s 1(1) (hereafter referred to as CA 1911), available at www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110046_en_1.

[325] ibid.

[326] ibid.

[327] YH Lee, 'The persistence of the text: the concept of the work in copyright law – Part II' (2018) *Intellectual Property Quarterly* 107, 108.

[328] J Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33 *Oxford Journal of Legal Studies* 767, 769.

With the 1911 Act copyright truly became a bundle of rights.[329] Specifically, the 1911 Act gave protections to the rights 'to produce or reproduce the work or any substantial part thereof in any material form whatsoever'; to 'perform … the work or any substantial part thereof in public'; to make adaptations including translations and dramatisations including 'any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered'.[330] Reference to 'substantial part' made clear that infringement of the protected work could take place even if only a portion had been copied.[331] The 1911 Act also made clear that copyright encompassed the right to make translations and adaptations – not mere unauthorised publication of the literal text. The tortuous debates – first over performance and later over the right to make theatrical adaptations – were seemingly over.[332] In the chapters that follow I explore how the concepts of authorship/joint authorship (chapter three) and infringement (chapter four) have been developed in post-1911 copyright jurisprudence via the work concept; but it is notable that traces of the pre-1911 reasoning on common design (in joint authorship cases) and the literal text (in infringement cases) remain evident in contemporary copyright jurisprudence.

Conclusion

Over the course of this chapter I have demonstrated that the boundaries of what we now conceive of as 'the work of authorship' shifted continually in theatre practice and law during the period 1558–1911.[333] The period saw the rise of two separate property objects and sources of value – the print-text commodity (including partial reproduction of text) and the performance commodity – which would eventually be subsumed into the legal concept of the copyright work.[334] By 1911 the playwright as author owned the entirety of the property rights encompassed by the work. The commodification of the theatrical play – its transformation via law into an apparently stable object of property – during this period provides an example of how 'legal procedures invent the tradition which they purport only to continue'.[335] In the Elizabethan and Jacobean eras writers lacked ownership of either of these commodities, with the Stationers possessing legally enforceable printing monopolies and theatre companies holding a type of informal ownership of plays as performance texts.

Here, we should be in no doubt that the polyvocal creativity of Elizabethan drama – a radical form of 'shared writing' – poses a challenge to modern

[329] ibid.
[330] Copyright Act 1911, s 1(2).
[331] Sherman and Bently (n 179) 173–76.
[332] Lee (n 327) 108.
[333] Bently and Biron (n 18) 270–76.
[334] Miller (n 3).
[335] A Pottage, 'Introduction: Fabricating persons and things' in A Pottage and M Mundy (eds), *Law, Anthropology, and the Constitution of the Social – Making Persons and Things* (Cambridge: Cambridge University Press, 2004) 1, 6.

assumptions abouts authors and texts. It can be difficult for us as readers and audience members in the twenty-first century to move past 'the Enlightenment legacy of that necessary individual' but it is necessary that we try to do so.[336] By understanding theatrical creativity and industry we can trace theatre's influence on the development of copyright law, as well as the impact of law on theatrical practices.

So essential was polyvocal creativity in theatre that for the period 1558–1625 Masten even challenges Foucault's idea of the existence of a post-authorial 'constraining figure'.[337] He argues that the Jacobean text *The Knight of the Burning Pestle* (ascribed to Beaumont) 'defies even the ideally liberal constraint Foucault imagines' as fiction 'passing through something like a necessary or constraining figure'.[338] A similar argument could be made about *The Spanish Tragedy*.[339] By contrast, an unstable text such as *The Taming of The Shrew* could be viewed as passing through the constraining figure of Shakespeare while still accepting the input of others in the Lord Chamberlain's Men.[340] Yet, it is Ben Jonson, more than Shakespeare, who stands out as a self-conscious 'possessive' author in theatre at this time, aware of the value of what he contributed as a writer (to the print and performance commodities) and thus cognisant of the need to assert his voice as author-figure in print and on stage.[341] Jonson, along with posthumous appreciation of Shakespeare, helped lay the groundwork for the idea of individualist authority to come to prominence in theatre after the Restoration in 1660. Nonetheless, the Elizabethan/Jacobean periods demonstrate that it is possible for a collaborative product – the play – to be created successfully in an environment that does not prize, or reward, individual authorship through property rights.

Post-Restoration, someone akin to that author-figure emerged gradually in widespread theatrical practice and, eventually, in legal personhood (author) and property objecthood (copyright work). Thus, Loewenstein argues that the gradual development of the 'abstract notion of the copyright work' from the seventeenth century to the twentieth century began with the 'expansion of authorial rights within the seventeenth-century literary market'.[342] By the time of the Statute of Anne 1710, the dramatist had grown in esteem and authorial attribution of plays in print and in stage playbills had become the norm. Although the primary immediate beneficiaries of the 1710 Act were publishers, the Statute referred to 'authors' and over the eighteenth century it enabled writers to become increasingly assertive of their rights in the legal sphere at the Courts of Chancery and the Kings' Bench.

Copyright scholarship has long grappled with the consequences of legal authorship post-1710, with the Romanticism of the late eighteenth century and early-to-mid nineteenth century seen as providing the intellectual justification

[336] Masten (n 12) 352.
[337] Foucault (n 11).
[338] Masten (n 12) 352.
[339] Smith (n 100).
[340] Marino (n 56).
[341] Loewenstein (n 75).
[342] Loewenstein (n 47) 102.

for individual ownership rights. Nonetheless, an author-figure began to emerge in theatrical practice and in law well before the 'Romantic' era. Romanticism may have helped cement the concept of authorial ownership but it did not originate it.

Certainly, the Romantic conception of authorship appears to have influenced the law and, consequently, ideas of ownership of texts.[343] Bently argues there is a 'complimentary and reinforcing connection' between the 'emergence of the proprietary author at the end of the eighteenth century' and the 'growth of the powerful, modern, romantic conception of authorship'.[344]

Yet, even if the connection is not causative, but merely 'reinforcing', it remains worth examining, since enforcement at law fortifies the author function at the economic, societal and cultural levels.

We can trace individualist notions of authorship and ownership as the law evolved from the Statute of Anne through subsequent case law over performance rights. This culminated in nineteenth century reform legislation in 1833 and 1842, whereby the law moved from the mere protection of playbooks (from unauthorised printing and reprinting), to preventing unlicensed performances of play-texts.[345] These threads were joined together by the 1911 Copyright Act, which for the first time in UK law protected not 'books' or 'dramatic pieces' as separate entities, but dramatic works – property-objects encompassing a bundle of rights.

Along with collaboration, a notable recurring theme throughout the history of English theatre is the significance of informal norms. In the Elizabethan era, normative cooperation ensured different companies did not compete to perform each other's plays.[346] In the period 1770–1800 the London patent theatres cooperated to ensure unpublished plays such as *The School for Scandal* were performed at only one venue.[347] This provides one more link between theatre in history and today's theatre world, where the norms of theatre practice remain of great importance, as I outline in chapter three.

However, before I turn to analysis of present day copyright law in the next chapter, it is worth contemplating copyright law's underlying philosophy. As legal property, copyright is at the core of a system that perpetuates individualist notions of authorship. Ownership of property rights is more straightforward – and transactions easier to complete – when there are fewer owners. Royalties and licence fees may be seen in this context as the supposed 'return' on capital investment in the author function.

Here we are haunted by the questions raised by post-modernism: Barthes envisaged that once published the text cannot be controlled by the author and can only be understood through mediation between reader and other texts; Foucault asked us to imagine texts circulating without the need of an author-figure.[348] Yet, Masten

[343] Bently (n 52) 973, referring to the claim of Foucault that the modern author was born in the 1700s.
[344] ibid, 978.
[345] Miller (n 3).
[346] Lauriat (n 61).
[347] Gerland (n 232).
[348] Bently (n 52) 973. See also Foucault (n 11) and Barthes (n 11).

states that even Foucault must admit that it is, ironically enough, a form of 'pure romanticism' to imagine a culture devoid of all such mechanisms.[349] Some version of the author-figure is an inevitability. Redefining the Beckett/Foucault point, Masten finally asks: 'What, or rather how, does it matter who are speaking?'[350]

One answer is that the 'what' and the 'how' matter *in law* when parties are in dispute.[351] What does it matter who is the author-figure? How was the work created? These questions matter because that author-figure who created the work is in law the owner, in the first instance, of the dramatic work as an object of property. Latour and Lowe acknowledge this reality with their quip that 'the notion of the author' has become 'fuzzy' which complicates the issue of 'what happens to copyright royalties'.[352] This question – what happens to ownership in an era when authorship has been thoroughly deconstructed – demands to be answered.

Thus, in theatre when parties are in dispute over such questions lawyers and courts are given the difficult task of answering questions of authorship and ownership in a way that does justice to the parties (and, arguably, the wider theatre culture). This task begets its own questions regarding how modern drama typically gets created in the twenty-first century, and who typically claims the role of author (or joint author). When collaboration proceeds smoothly, certain parties (actors, directors, producers) may not need the property rights typified by authorial copyright; but when disputes occur, such rights can offer leverage to one party over another.

Can we as copyright lawyers define the author and the work in a way that complements Barthes' and Foucault's critical literary approach; or are law and theatre studies two different systems, incapable of communicating with one another?[353] How much attention should judges pay to literary or aesthetic matters?

Having undertaken analysis of the period 1558–1911, I now turn to how it may aid the recognition of authorship in the present. In the chapter that follows, I explore how authorship is performed in modern theatre (referring to empirical research); I consider how copyright law responds when disputes arise; and finally I query whether legal reform is required to better take account of theatrical practice.

[349] Masten (n 12) 351.
[350] ibid, 352.
[351] See generally M Rose, *Authors in Court: Scenes From the Theater of Copyright* (Cambridge, MA: Harvard University Press, 2016).
[352] B Latour and A Lowe, 'The migration of the aura, or how to explore the original through its fac similes' 1, 5–6, available at www.bruno-latour.fr/sites/default/files/108-ADAM-FACSIMILES-GB.pdf – originally published in T Bartscherer (ed), *Switching Codes: Thinking Through Digital Technology in the Humanities and the Arts* (Chicago: University of Chicago Press, 2010) 275.
[353] N Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004).