Authorship and Ownership

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Review Essay

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Baldwin, Peter. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton, NJ: Princeton University Press, 2014. Pp. 552. Cloth. $35.00. ISBN: 978-0691161822.

Bosse, Heinrich. *Autorschaft ist Werkherrschaft. Über die Entstehung des Urheberrechts aus dem Geist der Goethezeit*. Munich: Wilhelm Fink, 2014. Pp. 236. Cloth. €29.90. ISBN: 978-3770557875.

Dommann, Monika. *Autoren und Apparate: Die Geschichte des Copyrights im Medienwandel*. Munich: S. Fischer, 2014. Pp. 427. Cloth. €24.99. ISBN: 978-3100153432.

We think that the person who has written a book should have some legal and economic control over it; we even think of the author of a work as its owner. Yet it took some time for ideas of author control and ownership to enter the realm of literature and acquire the obviousness that they enjoy today. After all, you do not own a literary text the way that you own a material object—say a chair you have bought—which you can make use of however you decide until you give it away, sell it, or throw it out. To begin with, the literary work fulfills its mission only when it is released to a public, rather than guarded as an exclusive possession. But the author who lets publishers disseminate the text among readers does not typically invite anyone to manipulate and change that text; even after having sold it in some way, the author wants to retain some control. If literature is property, it seems that authors want to share what they own, but retain authority over what they have sold.

The imperfect analogy between material property and literary works has often caused consternation among legal scholars, especially in the German tradition. Historically, German jurists have been reluctant to apply the term *Eigentum* to literary texts, even though they could be sympathetic to the desire of authors for recognition and compensation.[1] The concept of property, they felt, should remain restricted to tangible things that lend themselves to circumscribed possession, as it had been historically, in the tradition of Roman law.[2] In the realm of literature, the designation *Eigentum* would be employed in a metaphorical and hence legally confused and confusing way.[3]

For a long time, ownership was also viewed as an alien category in the republic of letters. Words do not belong to any one person, nor do the rules of grammar, nor the teachable procedures for generating persuasive speech, nor even particular utterances,

at least not as long as they are seen as elements of an extended communication. If two people are engaged in a discussion, we do not expect one of them to claim specific contributions as his or her exclusive property; why carve up a conversation? And if the realm of literature as a whole is viewed as continuously unfolding speech, with each performance representing yet another instantiation of human eloquence, the division of discourse into sharply delineated, owned units seems almost antisocial.

How, then, did the conjunction of the legal and the literary come about? How were literary pieces converted into something which authors could plausibly own? Heinrich Bosse's *Autorschaft ist Werkherrschaft* from 1981 poses this very question and the republication of this book in 2014 with a new afterword by Wulf D. von Lucius confirms the continued relevance of the issue in the era of digital reproduction, as well as the book's status as a canonical piece of scholarship. According to Bosse, the propertization of literary works was, historically, not the single, obvious, and therefore dominant solution to the problem of achieving an adequate distribution of rewards among writers. It instead constitutes one possible way of managing the production and dissemination of books legally and economically, an arrangement that emerged only after another, well-established mode of regulation had begun to seem inadequate. The core issue or problem, which these successive legal regimes sought to address, had to do with the mechanical reproducibility of texts. Once a printer releases a book to the market and it becomes successful, other printers can produce copies and offer a cheaper edition. From the advent of the age of printing, printers and booksellers did exactly this: they reprinted popular books at a lower price, or in a different region. Those involved in the business of books routinely had to compete not just with the catalogues of other publishers, but with other editions of the works they themselves had put out.

Princely rule offered the first legal framework for the printing and reprinting of books, a framework that endured for about three centuries in Germany. The German emperor or a local sovereign could grant a particular publisher a privilege, the exclusive right to print a book or a set of books, partly to protect the publisher from competition but also to prevent the corruption of strenuously gathered knowledge. Authorities regulated the book trade by putting some of its agents under special protection. Violations of these temporary monopolies awarded by the sovereign were typically penalized by fines. Over time, the result was an accumulation of exceptions to the general freedom to reproduce works. These collections of locally respected protections of particular works were, however, both difficult to survey and inevitably spotty.[4]

Toward the end of the eighteenth century, however, the market for books in the vernacular expanded and the lack of a general and comprehensive ban on copying attracted more and more attention, or caused more and more irritation, especially among publishers in northern Germany whose books were systematically reprinted by publishers elsewhere, often with support of local political powers protecting their

mercantile interests. What had been perceived as a nuisance in the book trade had grown, some parties thought, into a threat. The production and reproduction of printed material seemed to outstrip the granting of privileges and compelled publishers to identify and promote another source for the exclusive right to disseminate a work. They eventually came to identify this source, Bosse claims, in the relationship between publisher and author. Publishers could claim that they owned the works that they had rightfully acquired from someone else, namely the author. The original ownership of the author of the text was handed over to the publisher, who then should be protected from piracy. In this way, the figure of the author was enlisted to regulate competition among publishers. The author, Bosse writes, stepped in to perform the function previously held by the sovereign.[5]

This construction of authorship as a legal device to structure market activities did not quite happen overnight, at least not in the German-speaking areas of Europe. It was the gradual outcome of a long debate that, as regional and national differences show, did not necessarily have one self-evident conclusion and did not issue in one universally accepted legal form. In his book, Bosse repeatedly emphasizes how the discussion of unrestricted copying leads to a series of questions regarding the character of literature, none of which receives a universally accepted answer: can one own a piece of writing? How does a text come about and what does it consist of, such that it can be owned? What in a book can function as property and what cannot?

Some believed that words and thoughts, once they had entered into a public realm, could no longer be owned in any meaningful way. Formulations offered to the public in some way cannot be reabsorbed by the speaker or writer, just as a secret revealed to the world cannot be made secret again. Hence the idea of continued ownership over circulating statements was nonsensical, a flimsy conceptual foundation for the regulation of a trade. Others argued that texts, precisely because they must always remain intimately associated with the individuals who expressed themselves in them, could never fully be transferred into the possession of someone else. It is impossible to alienate all aspects of a literary work, and it can therefore never acquire the status of mobile property, which changes hands through an exchange.

Bosse lingers on a contribution from 1793 by Fichte, who differentiates between various dimensions of a book, each of which can be in the possession of different sets of agents. The reader who purchases a book becomes the owner of the actual material thing, the bound paper object. Reading the book, he or she also appropriates the thoughts that the book contains, although these are now the joint property of both author and reader; the author does not lose his or her thoughts by sharing them with others. Finally, the author retains the ownership over the particular sequence and configuration—the form—of his or her thoughts, because this form is particular to him or her and will remain so forever. Even when readers retransmit the thoughts they have gathered from a book, these thoughts are bound, Fichte claimed, to appear

in an altered form, expressive of those who now relay them. In Fichte's view, a book constitutes a composite of the alienable, the shareable, and the inalienable.

As a whole, however, the debate turned literature and property into co-occurring concepts, even in the contributions of the many skeptics, and converted the relationship between author and reader into something like a transactional partnership: the addressee of a speech was replaced by the buyer and consumer of works. Trailing the debate initiated in the 1770s, authorities in various German regions also began introducing legislation forbidding the reproduction of books referring to the author's ownership, but this happened unevenly across the German lands. Baden was the first principality to establish, in the legal code, the author's "Schrifteigentum," in 1806.

The title of Bosse's work captures the general tendency that he discerns, or his thesis: authorship consists in the legally recognized and sanctioned control over literary works: *Autorschaft ist Werkherrschaft*. The word "Werkherrschaft," introduced by the legal scholar Ernst Hirsch (1902–1985) as a replacement for property or "Eigentum," denotes the right of authors to exercise juridical control over the (commercial) utilization of the works they have created. Authorship, then, is fundamentally a principle of the legal system. We may think of "author" and "work" as concepts indigenous to literature, terms for the basic elements of the literary universe separate and foreign to the worlds of politics, law, and economics. According to Bosse, however, the institutionalization of authorship is the premier modern way in which the realm of literature becomes legible to a legal system designed to ensure the proper functioning of a market.[6] There were of course writers before the era of authorship and they could be celebrated and monetarily compensated, but there was no general, automatic and societally efficacious linkage of persons to works.

Yet the construction and justification of this legal concept of authorship depends on a romantic understanding of the singular, expressive self.[7] For Fichte, it is the radically individual manner in which people join together words and thoughts that turns the composed works into their exclusive possessions. Authors of texts cannot avoid disclosing who they are when they articulate their thoughts and this individualization of expression supports the legal status of individual authorship. To Fichte and others, each work is both a revealing embodiment of the writer's spirit and something necessarily opaque and alien to the reader, who must seek to decipher it. The idea of the expressive self corresponds to the modern practice of hermeneutics, which posits that textual and interpersonal understanding is never immediate or automatic but must be laboriously achieved. In Bosse's account, the expressive self, interpretive attention, and authors' rights are interdependent. Around 1800, the author figure emerges as the object of cultish veneration in the literary sphere and a device for the rightful distribution of rewards on the market. Nowhere, Bosse indicates, has romanticism been more enthusiastically and enduringly absorbed than in the field of jurisprudence.

The triumph of romanticism was perhaps more pronounced in Germany than

elsewhere, and the protection of an author's rights has often been more rigorous, or more rigid, in German-speaking Europe than, for example, in the US. Peter Baldwin's *The Copyright Wars*, inscribes this German history in a more encompassing international, or at least transatlantic, narrative. The wars that the title points to take place among interests groups: producers, distributors, and consumers of literature, or authors, their publishers, and the wider public. But the copyright wars have also been waged by countries, insofar as national discussions have at different times been dominated by one interest group or the other: the subtitle of Baldwin's book reads *Three Centuries of Trans-Atlantic Battle*.

The basic conflict is simple and stays constant. So simple, in fact, that Baldwin feels that the essence of today's debate over aggregation sites and digitally available tunes and films would be comprehensible to people two centuries ago, despite the technological advances; the interests at play remain the same. On one side we find authors and artists, who strive to retain control over works and maximize compensation. Opposing them is the public, which prefers cheap and easy access to cultural commodities. Since authors do want the public to read their books and the public relies on authors writing them, the talk of a "war" might be a little misleading, and yet there is a protracted and constantly renewed fight over the terms of the author-public transactions.

Accounts of the emergence of authors' rights tend to highlight the indignation of writers and publishers whose books were instantly copied and sold at a cheaper price. Such piracy partially deprives creators of their livelihood and may even discourage them from making further contributions to a shared culture, although authors are hardly motivated by material interests alone.[8] The public's demand for culture at no or little cost, one could say, has a tendency toward self-subversion.

Yet there were very serious defenders of rogue printers in eighteenth-century Germany, who claimed that widespread access to inexpensive books helped spread literacy, educate the populace, and generally raise the level of the culture in which the authors themselves participated. On the basis of quantitative data for publishing trends, Eckhard Höffner has shown that the gradual strengthening of authors' rights over the course of the nineteenth century dampened the rate of the publishers' collective output in Germany.[9] As publishers enjoyed stronger legal protection, they felt less pressure to discover new authors and introduce new books at a quick pace and were instead content with sustaining themselves more through the sales of already acquired and monopolized works. Höffner even speculates that the rapid cultural development in Germany in the latter half of the eighteenth century and early nineteenth century can be partly attributed to a relatively unregulated book market, which was more competitive and hence livelier than other European regions. Compared to their neighbors, Germans had more access to affordable books. Authors' concerns with their rights and publishers' successful struggle to prohibit the production of

low-cost copies can, both Höffner and Baldwin maintain, lead to a more subdued literary marketplace.

Peter Baldwin also shows how the conflict between authors and publics acquired a distinctly international, even geopolitical dimension over the course of the nineteenth century, mainly because different countries enjoy different cultural status. Culturally dominant nations with a developed literary life tend to want to shield or expand the rights of authors, since this coincides with a defense of their national culture, whereas nations with emerging reading publics and a smaller or less established literary heritage side with the public and argue for fewer restrictions on the reproduction and dissemination of works. During much of the last three centuries, France but also Germany has fallen in the former category, and the US in the latter. Schematically speaking, Americans lawmakers, attuned to a reading public composed of voters, have historically often advocated for rather short terms of protection for authors and insisted on the need for overt requests for copyrights, whereas representatives of France and Germany, more beholden to cultural elites, have favored longer terms and automatic protection. It is part of Baldwin's story, however, that America's cultural status has changed over time, and, with it, its view of copyright. As the US has risen to become culturally hegemonic, its influential entertainment industry has successfully called for consolidated legal control over its products. Nations that are net exporters of culture normally focus on fighting piracy.

Yet within each culture, the tension between author and public interests persists. In an interesting chapter, Baldwin shows how the National Socialist ideology in some ways magnified the conflict, adding bombastic rhetoric to a dilemma without resolving it. In line with the Nazi cult of the exceptional, heroic creator, legal experts in the Third Reich defended the rights of the author, as did representatives of the Italian fascists. The law should recognize titanic achievements by authors, but not the mere materialism of capitalist disseminators, that is, publishing companies and media corporations. At the same time, National Socialists emphasized how all art stemmed from the racial community and must ultimately be expressive of and beneficial to it. The outcome of these contradictory impulses seems to have been a strangely inflated version of the normal copyright wars, in which "elitist, aesthetic, and aristocratic principles" within Nazi ideology jostled with "egalitarian and populist ambitions."[10]

But the main focus of Baldwin's transatlantic comparison is ultimately the divergence between two competing legal paradigms, Anglophone copyright and continental authors' rights. In the eighteenth century, many involved in the debate about the book trade in Britain, France, and Germany pushed to remove privileges awarded individual publishers and to instead systematically attach rights over literary works to the authors who produced them. If authors owned their works, this was the thought, they could sell them to publishers. Moving closer to the marketplace, authors would escape the servility of patronage and publishers would be released from the reliance on

royal favors. In the world of books, contracts would replace submissive relationships. Gradually over the nineteenth century, however, national debates drifted apart, as the notion of literary property came under increasing scrutiny in different traditions and legal systems.

The copyright tradition in the anglosphere institutionalized a sort of "terminal property form" or "temporary monopoly," as the literary scholar Paul Saint-Amour puts it.[11] Authors and their publishers who bring new works into the literary market have the right to be shielded from the threat of competing editions, but only for a limited time. Even in an age of hyperextended intellectual property rights, literary works are eventually transferred to the public domain, where they can be accessed by all. This is a compromise supposed to sustain the incentives to the living author who needs to earn a living, but also to ensure that the common culture is regularly enriched. At some point, monopolies are dissolved and new disseminators can make Shakespeare or Goethe available. Ultimately, private property is subordinated to the greater good, as expiring rights automatically move "innovation from the private to the public sphere, from the genius to the commons."[12] Baldwin argues that copyright was shaped by an overriding concern for social utility, rather than an anxious defense of property's absolute inviolability.

Legal scholars and lawmakers in the continental tradition, by contrast, seem to have found the idea of literature as property tenuous. As both Bosse and Baldwin point out, the aim of the eighteenth-century entwinement of authorship and ownership was to prepare writers for the market by giving them the opportunity to sever the ties to their creations. Yet the emphasis on the intimate connection between creators and their products, which justified ownership to begin with, began to obstruct the process of detachment. If literary works expressed the individual who wrote them, how could they ever be completely alienated? Authors should instead be able to retain aesthetic control even after they had assigned the right to print and disseminate a work. As unique and distinct emanations of creative personalities, then, works could never really drift apart from their authors and, consequently, literary texts could not be thought of as alienable property, which meant that they could not constitute property at all. Over the course of the nineteenth century, Baldwin reports, legal scholarship in Germany tended increasingly to abandon the concept of "geistiges Eigentum" and instead relied on the concept of "Urheberrecht"—the rights of the creator.

In practical terms, the divide between anglophone copyright and continental authors' rights meant that authors in the Anglosphere relinquished their works more completely, and that these works subsequently moved into the public domain more swiftly, whereas writers on the continent enjoyed stronger control over their works for longer. These differences, which have more or less faded due to the "copyright creep" or the gradual extensions of copyright limits in the US, were often read as symptomatic of oppositional ideologies.[13] The legacy of romanticism plays a role in the

German movement from literary property to the strong authorial claims supported by "Urheberrecht," whereas the copyright system converts personal expressions more fully into objects ready for transactions. When the systems have come up against each other in negotiations of international agreements, their representatives have exchanged predictable accusations: Americans have been accused of promoting a comprehensive commodification of culture, whereas Europeans have been called elitist, unconcerned with culture's accessibility.

Baldwin traces how German legal thinkers sought to separate literature from property in order to preserve the intrinsic inalienability of personal expression, but the German philosophical tradition also includes a more solemn, noninstrumental notion of ownership to begin with. From a utilitarian perspective, property rights are conducive to the prosperity and hence happiness in society; that is the basis for their philosophical defense. But German philosophers, particularly Hegel, have developed what Alan Ryan has called a "romantic theory of ownership," according to which property is indispendable for the demonstration and cultivation of individual agency.[14] The free will, Hegel holds, must become embodied in the world and recognized by others, which it does through the legally protected exclusive control and perceptible manipulation of things.

In the German tradition, a conception of the expressive individual seeped into discussions of property, turning it into an "integral part of personality."[15] The resulting philosophical position suggests another way of conceiving of the relation between authorship and ownership. If the supporters of authors' rights emphasized the inalienable qualities of literary works and fought against the commodification of personal expression, Hegel and others brought expression and property together, but by converting owned things into a kind of media: it was not authorship that should be recognized as ownership, but rather ownership as authorship.

Authors are entitled to control over their works—this is a principle of western cultural economy since the end of the eighteenth century. As Monika Dommann shows in her *Autoren und Apparate. Die Geschichte des Copyrights im Medienwandel*, recording devices, broadcasting technologies, but also popular gadgets and toys, have often disturbed but not quite ended the reign of authorship as ownership. In Dommann's history, "Autoren" are constantly pitted against "Apparate"—devices which allow for new modes of preservation and transmission, but also render forms of creativity and performance visible outside of the paradigm of writing and conventionally defined authorship.

In the early nineteenth century, the ownership of musical pieces developed alongside the ownership of literary texts. Musical notes were printed material and therefore covered under the legislation against reproduction, or "Nachdruck." The composer, who often signed and dated musical scores as well as provided instructions for the performers, appeared as yet another author. Early legal commentators

on music rights even viewed the collectors and transcribers of traditional music as legitimate candidates for authorship, insofar as they had made the effort to discover, evaluate, interpret, and transpose circulating tunes into scores. Those who moved the tradition lacking a clear owner into the realm of documentation could make a legitimate property claim; they, too, were authors. Richard Strauss, an important advocate for composers' rights in Germany, once composed a piece entitled "Aus Italien," which partly relied on a Neapolitan folk song, but he was successfully challenged by Luigi Denza, an Italian composer who had once transcribed the melody and claimed its copyright.

While the composer could be installed as the author, new recording devices required more extensive revisions of existing legal arrangements. The gramophone, a device for the mechanical recording and reproducing of sounds invented in 1878 and widely used toward the end of the nineteenth century, bypassed the manuscript altogether. Recordings of live events generated new legal questions. Who owned the sound of voices and instruments? Who should profit from a particular performance of an opera, now stored and made reproducible? Only the composer of the piece, or the record manufacturer, or also the recorded artist? Responding to this new situation, German legal experts of the early twentieth century detached the concept of an artistic work from writing and included the performers in the circle of "Urheber." The individual musical performance could also be characterized by originality and should be rewarded. Yet Dommann mentions that many legal commentators only wanted to extend protection to performances of recognizably composed pieces, whereas improvisations or traditional tunes did not have the status of an artistic work. The performer was an originator, an "Urheber," but only in alliance with a composer.

Each chapter in Dommann's book relates some episode in a two-century narrative of the technological destabilization and legal reconfirmation of authors' rights. New possibilities of recording, storing, and copying trigger a debate between interest groups who stand to profit or lose from the novel mode of dissemination, and initiate a related attempt to reformulate, and in this way defend, authors' rights. The rise of commercial radio, for instance, made the issue of ownership of music pressing, and accentuated old conflicts between composers, performers, and manufacturers, but also conjured up new battles, between the gramophone industry and growing radio companies that disseminated the music. The tape recorder, widespread in the postwar era, issued yet another challenge for author-based copyright, for now individuals could record music from the radio, manipulate it and even disseminate it, well beyond the reach of the originator; in response, some called for fees attached to the ownership of tape recorders.

In Dommann's account, authorship as ownership emerges as a principle for the legal and economic constitution of culture that looks embattled but is never completely abandoned. Significantly, the individualist premise that it embodies remains in force,

even with the rise of the entertainment industry. But in the book's final chapter, on the period after 1945, this ingrained individualism does come under some pressure, but not necessarily because of the appearance of a new generation of technical devices. Instead, exponents of new cultural and political movements begin to question copyright's applicability to more distributed, communal processes of creation.

During the era of decolonization, western countries encouraged new African and Asian nations to sign international copyright conventions, and while they often accepted and endorsed copyright law, their representatives nonetheless resisted the exclusion of folklore traditions. At World International Property Organization conferences during the 1960s, delegates from Africa pointed out that traditional music and other folklore expressions were rarely the product of identifiable individual composers or authors and yet they should not for that reason simply be understood as age-old works without an author available for legal representation. Instead, folklore was a current rather than past phenomenon and belonged to distinct communities such as families and tribes rather than emerging from some mysterious realm of anonymity.

In the more immediate postwar period, this discussion remained somewhat marginal, but it gained momentum in the 1980s and 1990s, as postcolonial scholars and advocates began to put pressure on the western biases of copyright. Even as critics have questioned the conventional, banal distinction between contoured individuals in the West and groups in the non-western world as ethnocentric in itself, copyright legislation founded on romantic norms does seem to shut out distributed and incremental processes of creation within collectives.[16] The dominant legal form for the cultural economy requires us to discern clearly delineated inventions and assign them to particular individual authors, a procedure that may be inadequate and inappropriate in some cultural contexts. But what brings this question to the fore is not yet another technocentrically defined confrontation between writers/composers and innovations, which are the main focus of Dommann's book, but rather political debates over the protection of shared cultural resources. There are, one could say, tensions between the author figure and traditional sociocultural contexts, and not just between authors and devices—"Autoren" and "Apparate."

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Notes

1. See Ulrich Möller's treatment of the prominent German legal scholar Carl Friedrich von Savigny (1779–1861). Ulrich Möller, *Die Unübertragbarkeit des Urheberrechts in Deutschland. Eine überschießende Reaktion auf Savignys subjektives Recht* (Berlin: Berliner Wissenschafts-Verlag, 2007), 5.
2. Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton, NJ: Princeton University Press, 2014), 76.
3. Ludwig Gieseke, *Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845* (Göttingen: Otto Schwarz, 1995), 213.

4. Gieseke, *Vom Privileg zum Urheberrecht*, 66.
5. In her studies of medieval craft guilds, Pamela Long has challenged the customary focus on the romantic period as the context of origin for modern conceptions of intellectual property. She argues that medieval craft guilds fostered proprietary attitudes towards intangible craft knowledge and thus possessed some notion of intellectual property, although it was collective or corporate rather than individual. See Pamela Long, "Invention, Authorship, 'Intellectual Property,' and the Origin of Patents: Notes toward a Conceptual History," *Technology and Culture* 32, no. 4 (1991): 846–884.
6. For comments on how the category of the "work" makes literature compatible with legal and economic system, see also Steffen Martus, *Werkpolitik: Zur Literaturgeschichte kritischer Kommunikation vom 17. bis ins 20. Jahrhundert* (Berlin: De Gruyter, 2007), 21.
7. Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Ithaca, NY: Cornell University Press, 2003), 8.
8. For a critique of the so-called incentive theory of authorship, see Robert Spoo, *Without Copyrights: Piracy, Publishing, and the Public Domain* (Oxford: Oxford University Press, 2013), 9.
9. Eckhard Höffner, *Geschichte und Wesen des Urheberrechts* (Munich: Europäische Wissenschaft, 2010).
10. Baldwin, *The Copyright Wars*, 178.
11. Saint-Amour, *The Copywrights*, 2.
12. Saint-Amour, *The Copywrights*, 2.
13. Saint-Amour, *The Copywrights*, 4.
14. Alan Ryan, *The Making of Modern Liberalism* (Princeton, NJ: Princeton University Press, 2012), 586–599.
15. Baldwin, *The Copyright Wars*, 404.
16. Valdimar Hafstein. "The Constant Muse: Copyright and Creative Agency." *Narrative Culture* 1, no. 1 (2014): 9–48.