The nineteenth century witnessed a series of revolutions in the production and circulation of images. From lithographs and engraved reproductions of paintings to daguerreotypes, stereoscopic views, and mass-produced sculptures, works of visual art became available in a wider range of media than ever before. But the circulation and reproduction of artworks also raised new questions about the legal rights of painters, sculptors, engravers, photographers, architects, collectors, publishers, and subjects of representation (such as sisters in paintings or photographs). Copyright and patent laws tussled with informal cultural norms and business strategies as individuals and groups attempted to exert some degree of control over these visual creations.

With contributions by art historians, legal scholars, historians of publishing, and specialists of painting, photography, sculpture, and graphic arts, this rich collection of essays explores the relationship between intellectual property laws and the cultural, economic, and technological factors that transformed the pictorial landscape during the nineteenth century.

This book will be valuable reading for historians of art and visual culture; legal scholars who work on the history of copyright and patent law; and literary scholars and historians who work in the field of book history. It will also resonate with anyone interested in current debates about the circulation and control of images in our digital age.

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Cover design by Anna Gà...
The nineteenth century witnessed a series of revolutions in the production, circulation, and reproduction of images. Thanks to changes in printing and imaging technology and shifts in the practices of artists, publishers, and photographers, images became more readily available, in a wider range of media than ever before. Working in the new field of lithography, artists produced portraits, landscapes, caricatures, and depictions of events done ‘on the spot’, which were distributed quickly and cheaply. The development of photography led to the circulation of radically new forms of images such as daguerreotypes, ambrotypes, tintypes, cartes-de-visite, and stereographs. The quest to reproduce paintings and photographs spurred numerous experiments with printing techniques and photomechanical processes; meanwhile, a ‘mechanical turn’ in sculpture led producers and artists to invent materials and practical machines for the mass production of their work. Engravings became a common feature in books, magazines, and newspapers, profoundly affecting the experience of reading.

1 The impact of industrialization on nineteenth-century sculpture remains an under-explored area in the history of art and visual culture. In England, new materials such as fired artificial stone — also known as ‘Coade Stone’ — were widely used in architecture and sculpture in the Georgian era. See Caroline Stanford, ‘Revisiting the Origins of Coade Stone’, The Georgian Group Journal, XXIV (2016), 95–114. For U.S.
The circulation of images across various formats and media, and the ways in which such circulation can transform the viewing experience, have generated considerable interest among specialists of art history and visual culture. But the role that intellectual property laws played in shaping the production and dissemination of visual works has received far less attention. The increasing ease with which images circulated often went hand-in-hand with a desire — on the part of artists, publishers, collectors, and others — to exert some form of control over that circulation. The title of this book, Circulation and Control, evokes this tension, which has often been at the heart of debates about the ownership, reproduction, and appropriation of creative works envisioned as a form of intellectual property. Although other areas of law have undeniably had an impact on the circulation of images (censorship and obscenity law immediately come to mind), the essays in this book are concerned with intellectual property (IP), a broad area of law whose most well-known branches are copyright, patent, and trademark.

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visual arts, IP laws have often been looked to as a means of exerting some kind of control, such as by reserving the exclusive right to display or reproduce a work of art, or by licensing the right to use a particular technical process for making or duplicating visual works. Yet the history of such efforts has so far received relatively little scholarly attention, especially compared to the history of copyright for books and other printed texts.\(^4\)

With contributions by scholars in law, art history, the history of publishing, and specialists of painting, photography, sculpture, and graphic arts, this book considers the multifaceted relationships between IP laws, artistic practices, and business strategies that shaped the production and circulation of images in the United States, the United Kingdom, and one of its colonies (New Zealand) during the ‘long’ nineteenth century. Many of the essays in this volume explore contested rights to make and sell copies or reproductions of visual works, to reproduce their design in a new format or medium, or to make what are now called ‘derivative works’ (that is works directly inspired by a copyrighted work, such an illustration from a famous novel). In this respect, the area of IP law that is given the most attention in this volume is copyright. However, patent law is also considered by two of the essays, which explore how individuals and groups attempted to use patents to protect photographic processes and the designs of sculptures. Although art’s relationship to trademark law is not addressed here, recent work has explored how designers and firms looked to trademark law as a mechanism for controlling the reproduction of images, not least for advertising posters produced through the new medium of lithography.\(^5\)

\(^4\) There are some recent exceptions. See the section entitled ‘Existing Studies and New Lines of Inquiry’ later in this chapter.

Indeed, it should be mentioned at the outset that our volume makes no claim to exhaustively cover the full gamut of IP law during this formative period, nor does it adequately treat the immense range of creative productions that might be considered under the umbrella of art and visual culture. As research progresses, it may be possible to write a succinct history of IP legislation and case law as it affected various branches of the visual arts. The collaborative project that led to this volume has, however, a different aim: to bring together an interdisciplinary group of scholars from law and the humanities — as well as specialists of nineteenth-century art and visual culture based in museums and libraries — to produce a series of case studies that examine interactions between artistic practices, business strategies, and questions of IP as they emerged throughout the nineteenth century. A mix of disciplinary backgrounds and expertise enables us to better understand the interactions between law, culture, and industry, and to better appreciate the specific factors that made different conceptions of IP in visual works seem relevant (or not) to various artists, distributors, and collectors of artworks. In short, we endeavor to consider how artistic practices and legal norms shaped each other. In that respect, this book builds on an interdisciplinary approach to the history of IP that does not limit itself to changes in legislation and judicial interpretation, but also considers the development of cultural norms and business practices that individuals and groups used in an effort to exert some degree of control over the conditions of copying and reuse of creative works.

6 The topics and methodological approaches that are explored in the individual chapters, as well as gaps in coverage that readers may identify, result in part from the way the project proceeded. The editors of the present volume issued a call for papers in 2016 for a conference on the general theme of ‘Images, Copyright, and the Public Domain in the Long Nineteenth Century’, which was held at the Winterthur Museum, Garden & Library in the spring of 2018. In part because of restrictions related to funding and in part owing to our own institutional affiliations, we limited the geographic scope to the United States, the United Kingdom, and its colonies during the nineteenth century. We received many more proposals than we possibly could have accommodated, but did our best to include a mix of professional and disciplinary backgrounds among the contributors, and to cover a range of artistic fields. Some of the gaps that we identified at the first conference were filled by soliciting new contributions in advance of a second meeting, held in Paris in 2019, but certain areas remain under-represented.

7 Important touchstones in the development of this approach include The Construction of Authorship: Textual Appropriation in Law and Literature, ed. by Martha Woodmansee.
This introductory chapter will begin by offering an overview of some of the period’s major developments in artistic media and visual culture. It will then survey existing scholarship on the history of intellectual property by considering the small but growing literature on copyright for visual works in relation to the much larger historiography on copyright for printed texts. Finally, it will discuss the structure and main themes of the volume. Like the other contributors to this book, we have written with a broad audience in mind. While some readers may be more familiar with the legal scholarship than with the history of art and visual culture, others may be well-versed in the history of technology or the art market but not as familiar with legal concepts and sources. With such differences in mind, we have included a broad range of references in the notes.  

New Visual Media and Artistic Practices

One of the defining features of the nineteenth century is how science, technology, and industry produced new visual media, transforming artistic processes of creation and conditions of viewing. Building on recent developments in chemistry, new media such as lithography and photography produced images that created new visual experiences of the world with representations ranging from the fine arts to the documentation of people, events, landscapes, and natural or scientific phenomena. Lithography (derived from the Greek for ‘writing on a stone’) was developed in Germany by a playwright, Alois Senefelder, at the end of the eighteenth century. A planographic printing process based on the principle that water and oil do not mix, lithography entailed the direct drawing of a design with a greasy medium on a limestone slab. Using the properties of gum arabic and acid to affix the image on the

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Readers who are less familiar with the abbreviations used in citing legislation and court decisions may find it useful to consult the Cardiff Index to Legal Abbreviations, http://www.legalabbrevs.cardiff.ac.uk. Another excellent web resource for copyright history, which is cited by many of the chapters that follow, is Primary Sources on Copyright (1450–1900), ed. by Lionel Bently and Martin Kretschmer, http://www.copyrighthistory.org/cam/index.php.
stone, the lithographer then inked the stone and passed it through a flat-bed press, transferring the design to the paper.⁹

The design process in lithography, once mastered, was faster than intaglio engraving or etching, and produced an infinitely greater number of copies. These qualities made lithography an ideal medium for the dissemination of reproductions of artworks to an expanding consumer public, the topic explored in Erika Piola’s contribution to this volume. Additionally, the hand-drawn quality of a lithographic image was one of the technique’s defining characteristics. Allowing the direct transfer of a design from stone to sheet of paper, lithography created what was first conceived as a multiplicity of autographic originals. Artists produced a wide range of images, including portraits, landscapes, social and political caricatures, scenes of everyday life, and depictions of events, such as fires and steamboat accidents. Lithographs could be produced with a virtually infinite print run as long as the stone itself was properly maintained. It is this latter feature that positioned the medium at the forefront of the transformations taking place in the printing industry, and which contributed to the rise of mass visual culture. Making the quick and cheap publication of images possible, lithography could respond to the latest event or talk of the town and lead to a variety of unauthorized reproductions — a practice that seems to have been rampant in the United States.¹⁰

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Chromolithography, an extension of the medium to color printing, was developed towards the end of the 1830s. It involved multiple stone drawings, each printed with one colored ink. In contrast to lithography, which found rich creative terrain both in the fine and commercial arts, chromolithography became the dominant medium of commercial printing, and served particularly well firms specializing in the production of advertisements, product labels, etc. Some firms, like L. Prang and Company in Boston, improved on the methods of chromolithography to produce high quality reproductions of paintings which imitated not only the colors of the original work but also its texture and the surface of the painter’s brush strokes. These reproductive prints became known as ‘chromos’. They were so perfect in their imitation of the original paintings that they not only sparked debates about the merits of art reproduction in artistic circles but also led to the singularization of ‘chromo’ as a specific category for copyright protection in the US Copyright Act of 1870.11

Photography, a means of producing an image based on the chemistry of silver, was developed through the application of recent discoveries in chemistry, combined with the use of materials that had long been part of artistic practice, such as the portable camera obscura, a light-tight box equipped with a lens that projects an image of the outside world onto its interior wall. The first commercially successful photographic process, the daguerreotype, produced a stable unique positive image on a silver-coated copper plate brought out by exposure to light in a camera obscura. In 1839, the daguerreotype was given free circulation by the French Government’s purchase of Louis-Jacques Mandé Daguerre’s process, leading to its popularity beyond national borders. Around the same time, William Henry Fox Talbot in England used sensitized paper for his photographic experiments. His technique, patented in 1841, created a negative that could be used to make multiple identical

positive prints. Talbot’s negative process made it possible to envision a photograph as a multiple rather than a single original. At the crossroads of art and science, photography transformed the status of an image as representation: its seemingly indexical relationship to the world brought about a new framework for the discourse on objectivity and truth in visual representation. But as Shannon Perich’s chapter in this book suggests, the history of photographic practices and materials was also shaped by patent claims and licensing deals. Unlike Talbot’s calotype, Daguerre’s process was widely publicized and its use unimpeded by patent claims. In the United States, various efforts by inventors and photographers to claim exclusive rights over new inventions or improvements on existing processes were part and parcel of the cultural and material history of photography in the nineteenth century.

In parallel with the development of lithography and photography, wood engraving generated an immense number of images produced through a combination of artistic talent, technological innovation, and mechanical operations. Thomas Bewick developed the wood-engraving technique in Britain at the end of the eighteenth century. In contrast to woodcuts, which used the plank of the wood and traditional wood-carving tools, Bewick used an engraver’s burin to carve the end grain of the wood, resulting in small but highly-detailed images. Wood-engraved blocks could be printed together with texts and became part and parcel of the industrialization of the publishing industry in the nineteenth century, driving the expansion of the illustrated press. With the development of stereotyping and electrotyping processes that duplicated a relief-printing matrix, the matrices of individual wood engravings could be reproduced on metal and sold to other publishers, creating a secondary market for images. Focusing on illustrated newspapers, Thomas Smits’s contribution to this volume explores the business opportunities and legal challenges involved in the transnational trade in wood engravings depicting current events.

While photography initially appeared ill-suited to the large-scale production of images, two crucial technical developments turned it into a medium that was well-adapted to the visual industry: the invention

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of a transparent support for the photographic image, which enabled its transfer onto a sensitized printing matrix (woodblock, lithographic stone, or metal plate), and the development of a mass-produced sensitized paper. Photomechanical processes, or the production of a printing matrix with the help of a photographic image, were a major interest of the printing industry early on, finding applications in all areas of visual culture, from the illustrated press to fine art publishing. Photogravure, which involved the transfer of a photograph onto an intaglio plate, combined the fine tonal gradations of a photograph and the rich material qualities and stability of an intaglio print. Intaglio engravings were costly to produce and thus often used for the high-quality reproduction of a work of art. By contrast, wood engravings were relatively cheap to produce. The illustrated press started transferring photographs to wood blocks for engraving in the late 1850s, a process initially known as photoxylography. The transferred image was manually cut using the original sketch or photograph as a guide. Later, the relief line block process used a sensitized gelatin that hardened with light and required less manual intervention. Both processes preceded the half-tone by several decades and gave the image departments of illustrated magazines and newspapers many opportunities to appropriate and adapt existing photographs or wood engravings for their purposes. The artists who transferred the image to the block were free to alter its size and orientation, or to work from fragments of several images, which could be rearranged or combined into an entirely new composition.13

In the photographic studio, the development of prints on albumen paper, an improvement on Talbot’s salted paper negative, played a critical role in the rise of commercial photography, leading to the development of two characteristic products of the nineteenth century: the carte-de-visite and the stereoscopic view. Introduced in 1851 by

Louis-Désiré Blanquart-Evrard, albumen paper allowed for a much better reproduction of details, which was particularly well adapted to the collodion glass negative. Most importantly, albumen paper could be manufactured on an industrial scale. Albumen prints soon became the most widely-used means of producing a photographic print. Cartes-de-visite were typically full-length portraits printed on albumen paper and pasted onto a paper board the size of a visiting card. They became immensely popular. Portraits of celebrities in particular sold by the thousands to people of widely different backgrounds and means. They were often collected and stored together with family portraits in albums. Stereoscopic views, or stereographs, were pairs of photographs of the same subject taken with a two-lens camera. When viewed with a device that also included two lenses, eye-distance apart, a single image of startling depth appeared, creating a new virtual experience of the world. Stereographs, which are discussed in Will Slauter’s chapter, encouraged the viewer’s mental projection into the realm of representation, be it a tableau vivant, an exotic locale, a military encampment, or an international exhibition.¹⁴

Nineteenth-century technological developments not only led to the genesis of radically new (and often cheap) types of images. They also affected the production and consumption of older artistic media such as painting and sculpture, and accompanied new sorts of visual experiences that became more common and accessible: art exhibitions, fairs, performances, panoramas, lantern-slide shows, sightseeing and window shopping all became essential features of nineteenth-century cultural life. Public exhibitions of paintings, often shown together with drawings, lithographs, photographs, watercolors, and sculpture, took place at mechanics’ institutes, athenaeums, art-union galleries, local and international fairs, theaters, photographic studios, frame-makers and print-sellers’ shops, and other venues. Viewing a painting often went hand-in-hand with being offered a subscription to its intaglio engraving, reading about it and looking at its wood-engraving reproduction in an illustrated newspaper, or finding it in another medium at the print shop. Similarly, the experience of seeing a famous marble sculpture such as

¹⁴ There is a considerable body of literature on cartes-de-visite and stereographs. See Anne McCauley, Industrial Madness: Commercial Photography in Paris 1848–1871 (New Haven: Yale University Press, 1994); and the references in Chapter 5 of the current volume.
Hiram Powers’s *The Greek Slave* — further discussed in Karen Lemmey’s chapter — was often mediated by graphic reproductions, industrially produced replicas in plaster, or newly-developed ceramic processes like Parian ware.

This proliferation of art objects and reproductions was noted by writers, publishers, and artists — the latter often finding out about an unauthorized replica by seeing it for sale in a shop. Some commentators decried the danger of blurring the distinctions between an artist’s creative genius present in the original work and a soulless, mechanically-produced copy. Others applauded what they called the democratization of art enabled by reproductions, and the shift from an art world supported by elite patronage to one rooted in the marketplace. At the same time, as imaging and printing technologies expanded, so did the markets and networks for the distribution of their products. Although artists and publishers sometimes expressed concern about a lack of control over the uses and reuses of their works, they also benefited from the exponential growth in markets for visual works. This growth was supported by informal networks connecting dealers and publishers across national borders and oceans, and by European and American imperial expansion. Consequently, the visual arts and experiences that emerged out of nineteenth-century urban culture impacted and reached a more socially, ethnically, and racially diverse range of people than ever before. Yet as the markets for visual works grew across regional, national, and imperial boundaries, the ability of artists, owners of artworks, and subjects (such as sitters in paintings or photographs) to control the circulation of a given work and the commercial exploitation of it became more uncertain.

**Existing Studies and New Lines of Inquiry**

The history of intellectual property is a growing interdisciplinary field that attracts scholars from law, the humanities, and the social sciences. The history of copyright in particular has benefited from cross-disciplinary...
exchanges among legal scholars, literary historians, and specialists of the history of printing and publishing. Such cross-fertilization has had a lasting impact on how the history of copyright for books and other printed texts is understood, and provides an important source of inspiration for the current volume. Lyman Ray Patterson’s classic book Copyright in Historical Perspective (1968) drew upon research by bibliographers and historians of printing to chart the transition from the system of licensing and royal privileges in early modern England to the first copyright statues on both sides of the Atlantic in the eighteenth century. The literary scholars Martha Woodmansee and Mark Rose offered pioneering studies of the construction of authorship that connected debates about literary property to the commercial practices of the book trade in the eighteenth century. More direct collaboration between literary scholars, book historians, and law professors working in this area was promoted by the gatherings organized by Woodmansee and Peter Jaszi that led to their co-edited volume, The Construction of Authorship: Textual Appropriation in Law and Literature (1994). Major works by John Feather, Adrian Johns, William St Clair, and others offered historical studies of copyright and piracy that foregrounded the cultural norms, business strategies, and rivalries that determined which books were produced where, and how unauthorized (but not necessarily illegal) reprints affected access to culture and knowledge. Studying disputes over exclusive rights (such as copyright) has also revealed power struggles among communities over questions of appropriation, as well as important forms of cultural and political resistance, as Phillip Round’s work on Native American printing and book cultures has shown. 

at https://www.ishtip.org, provide an indication of the range of work being undertaken in this field.

16 Lyman Ray Patterson, Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968).
The slow and contentious process of establishing international copyright agreements during the nineteenth century, and the recurring problem of cross-border ‘piracy’ (the term was often used even in situations where the reprinting was not illegal) became an important topic of study for literary historians such as Melissa Homestead and Meredith L. McGill, as well as for legal scholars such as Catherine Seville and Robert Spoo. More generally, several generations of scholarship at the crossroads of book history and copyright history have revealed the value of studying the law in relation to the organizational structure of the book trade and shifts in the practices of writers, publishers, and readers. Such work has highlighted how, in many circumstances, copyright statutes and their judicial construction mattered less than the cultural norms and trade customs that individuals and groups established (or sought to establish) in an effort to regulate the production and circulation of texts. It is therefore necessary to study how law, culture, and business shaped one another, and to think of the history of IP as a history of norms and practices, rather than solely a history of legislative and judicial developments.

This book focuses on the visual arts in the nineteenth century, a topic which has not hitherto benefited from as much interdisciplinary inquiry into the relationships between IP, cultural norms, and business practices as has the realm of printed texts. But like writers, artists were concerned


with the relationship between their creative work and what preceded it; they were also interested in their work’s future prospects and their own posterity as creators. Painters, sculptors, graphic artists, and architects took steps to ensure that their work continued to live in various forms and media. In order to shape the circumstances in which their creations were made public, they collaborated with or disputed with their peers, art institutions, patrons who sat for portraits, collectors who owned their work, and printmakers and publishers who reproduced it. They worried about such questions as who had the right to display or copy their work, in what circumstances, and in what format, medium, or manner. They lobbied for new legislation or initiated lawsuits to defend what they believed to be their rights over the products of their creative labor. In these endeavors, creators did not always present a unified front. Additionally, their concerns often collided with those of other stakeholders — be it a competitor, the purchaser or commissioner of an artwork, or the sitter in a portrait — over questions of ownership in an object and its ‘design’, or the right to control reproductions of a person’s likeness.

The relative paucity of scholarship that examines legal questions raised by the copying and reproduction of artworks in relation to commercial and artistic practices is all the more surprising given the fundamental role that imitation, emulation, copying, originality, and influence have long played in artistic discourse and practice, as well as in the foundational texts of art history. Artists and writers have employed various concepts to characterize the subtle and complex relationships that connect a work of art to its antecedents. Mimesis, imitation, emulation, and copying are terms usually associated with the early modern period in Europe and the writings of Roger de Piles, Denis Diderot, and Johann Joachim Winckelmann. Originality, reproduction, influence, plagiar, appropriation, translation, citation, repetition, replication, and détournement are all terms associated with prolific modern and post-modern artistic discourse and practices located in the interconnected and global art world that resulted from European and North American colonial expansion in the eighteenth and nineteenth centuries.\(^\text{22}\) Originality, a notion that indexes the artist’s subjectivity

\(^{22}\) For a recent discussion of these concepts over various geographical areas and periods, see Georg Baselitz et al., ‘Notes from the Field: Appropriation: Back Then,
and authorship in the work of art, gained traction in European and North American artistic practices over the course of the nineteenth century, the period examined in this book. This concept tended to focus attention on an individual artist’s agency at the expense of the structure of the art world with its studios, institutions, and exhibition practices, its patronage system, and its expanding consumer market with links to the printing and publishing trades. Necessarily embedded in a dialectical relationship with its opposite — be it reproduction, copy, or replica — originality not only constituted itself in artist’s studios and literary and aesthetic discourse, but also in the way creators, patrons, and business partners negotiated and articulated their rights over visual representations. These aesthetic and commercial developments shaped discussions of copyright reform, leading to the notion of originality being incorporated into the language of copyright statutes. In the United Kingdom, for example, the Fine Arts Copyright Act of 1862 explicitly protected ‘original’ drawings, paintings, and photographs, affirming a statutory threshold of ‘originality’ that would necessarily lead to debates about what constituted an ‘original’ photograph, for example.

Although the role that artists, their patrons, and business partners played in shaping legal norms — and how such norms interacted with artistic creation during this period — have remained on the margins of art historical inquiries, this book builds upon a small but growing literature on the topic. In the contemporary art world, the seemingly boundless circulation of images that has accompanied the rise of new media in recent decades has led to new practices and critical inquiries centered on creative reuses and transformations. Interest in how

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In Between, and Today’, The Art Bulletin, 94 (2012), 166–186. This series of short essays written by specialists of various fields foregrounds the fundamentally appropriative and transformative nature of artistic creation, and therefore the critical importance of specific approaches and conditions in which artists have utilized and positioned their own creative practice vis-à-vis what preceded them. Only one of the contributions in this series evokes the regulatory power of intellectual property law, and the way it signals connections between the aesthetics and politics of culture in today’s global art world.

Ronan Deazley, ‘Commentary on Fine Arts Copyright Act 1862’, in Primary Sources on Copyright, ed. by Bently and Kretschmer, http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1862. As Deazley notes, the 1814 Sculpture Copyright Act had contained the phrase ‘new and original’. On these questions, see also the more recent work by Elena Cooper cited later in this chapter.
copyright law affects artists’ practices and legacies was one of the motivations for a 2002 volume edited by Daniel McClean, a specialist of art and cultural property law, and Karsten Schubert, a contemporary art dealer and publisher. Titled *Dear Images: Art, Copyright, and Culture*, the volume also included two chapters on the nineteenth-century UK, as well as a historiographic essay by Kathy Bowrey that began with the following observation: ‘The history of copyright has overwhelmingly been concerned with literature and not art’. Since that time, a number of important articles and book chapters have appeared, by both legal scholars and historians of art and photography, treating various aspects of the history of copyright for engravings, maps, and photographs. Some of these studies were related to an AHRC-funded web resource launched in 2008 entitled *Primary Sources on Copyright (1450–1900)*. This indispensable open-access site features primary sources (including statutes, proposed bills, reported court opinions, and polemical literature such as pamphlets) from several countries, as well as scholarly commentaries that situate the documents in their historical contexts. Members of the editorial team of *Primary Sources on Copyright*, along with other scholars in law and the humanities, also produced *Privilege*


and Property: Essays in the History of Copyright (2010), a wide-ranging set of essays covering several countries and time periods. Though most of the essays focus on printed texts, three of them do explore copyright in relation to the visual arts. Moreover, the general approach of that volume — which studies copyright law in relation to social norms, cultural developments, and business practices — was an important inspiration for this book.

Another milestone was reached in 2018, when two major book-length studies of the history of copyright for art appeared: one, by the art historian Katie Scott, focuses on early modern France, and reveals the interplay between art theory, royal institutions, the economy of the print trade, and notions of IP in the visual arts. The other, by the legal scholar

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27 Privilege and Property, ed. by Deazley, Kretschmer, and Bently, https://www.openbookpublishers.com/product/26. The essays by Ronan Deazley, Frédéric Rideau, and Katie Scott discuss selected aspects of the history of artistic copyright. Since then, other important collections on the history of copyright have appeared, including Copyright and Piracy: An Interdisciplinary Critique, ed. by Lionel Bently, Jennifer Davis, and Jane C. Ginsburg (Cambridge: Cambridge University Press, 2010), https://doi.org/10.1017/cbo9780511761577, which includes essays by Daniel McLean and Jonathan Griffiths on copyright’s relationship to the contemporary art market; and Research Handbook on the History of Copyright Law, ed. by Isabella Alexander and H. Tomás Gómez-Arostegui (Cheltenham: Edward Elgar, 2016), https://doi.org/10.4337/9781783472406, which includes an important essay by Elena Cooper, ‘How Art was Different: Researching the History of Artistic Copyright’ (pp. 158–173).

28 As the editors of the volume state in the introduction: “Copyright law” needs to be understood as having been only one mechanism for the articulation of proprietary relationships: other legal norms (personal property, contract, bailment), and, more interestingly, other social norms, allowed for systems of ascription and control, flows of money, as well as the transfer and sharing of ideas and expression. Copyright history is not just another branch of positive law’. Martin Kretschmer, with Lionel Bently and Ronan Deazley, ‘The History of Copyright History: Notes from an Emerging Discipline’, in Privilege and Property, ed. by Deazley, Kretschmer and Bently, pp. 1–20 (p. 6).

Elena Cooper (who is also a contributor to the present volume), covers the United Kingdom from the mid-nineteenth century through the early twentieth century. Scott’s study shows that the complex system of royal and corporate privileges that developed in France between the sixteenth and eighteenth centuries was grounded in conceptions of artists’ rights and obligations as formulated in art theory, at the academy, and in artists’ studios. Evolving notions of imitation, emulation, and invention are crucial to this history. Importantly, Scott shows that the notion of intellectual property that emerged in the entanglement of privilege, artistic discourse, and commercial practice in France became so closely tied to the identity of the artist that this property could not be easily alienated with the sale of the artwork. Scott’s book reveals the eighteenth-century roots of a fundamental question that works of art raised as artists envisioned the status of their work as property: whether the intellectual property in the work of art was independent of the possession of the material work itself. This question also preoccupied artists in Britain and North America during the period; Marie-Stéphanie Delamaire’s chapter in the present volume highlights how it motivated Gilbert Stuart’s attempts to control the reproduction of his iconic portrait of George Washington in the United States.

Like Scott, Cooper also situates the development of legislation and case law in relation to cultural, aesthetic, and commercial trends. Her account of the lobbying that ultimately led to the 1862 Fine Arts Copyright Act in the United Kingdom — and the debates about copyright reform that continued for several decades after 1862 — highlights the different and sometimes conflicting interests of individuals and groups representing various fields of artistic endeavor. Sculptors, painters, engravers, print sellers, and photographers often had different ideas about what copyright should protect, and these ideas reflected economic interests and institutional connections, as well as the aesthetic and political ideals that these groups sought to promote.

Smart Museum of Art, the University of Chicago, 2005). It is important to note, however, that the notion of a ‘reproductive print’ itself is a modern concept, coined by Franz Wickhoff in 1899, and denotes a late nineteenth-century development. Franz Wickhoff, ‘Beiträge zur Geschichte der Reproducirenden Künste: Macantons Eintritt in den Kreis Römischer Künstler’, Jahrbuch der kunsthistorischen Sammlungen des allerhöchsten Kaiserhauses, 20 (1899), 181–194.

30 Elena Cooper, Art and Modern Copyright: The Contested Image (Cambridge: Cambridge University Press, 2018), https://doi.org/10.1017/9781316840993.
Cooper shows that in order to understand the convoluted path that copyright for visual works took in the nineteenth and early twentieth centuries, it is crucial to examine the complex and evolving relationships among the different groups that made up the art world, including the role of art patrons and collectors (whose interests were not always aligned with those of artists), public galleries (which sought to broaden public access to art), and publishers, whose arrangements with artists and disputes with rivals fundamentally shaped the debates, litigation, and legislative lobbying that took place during the period. Cooper and Marta Iljadica, in their jointly-authored contribution to this volume, extend this line of analysis by reconstructing the different interests of architects, painters, photographers, and the public, revealing how and why architects failed to achieve the sort of copyright protection they sought. Cooper’s monograph, building on articles and chapters by legal scholars such as Lionel Bently and Ronan Deazley and art historians such as Anne McCauley, has helped to elucidate the development of copyright law for artistic works in nineteenth-century Britain. The present volume includes several new essays on Britain and one of its colonies, New Zealand. These chapters explore aspects that have received less attention, such as protection for architecture and illustrations of the news, as well as the experiences of women and indigenous people as creators or subjects of protected works.

In the case of the United States, the other main country under consideration here, the existing literature on art and intellectual property is far more limited. Major studies, such as Oren Bracha’s book on the history of IP in the United States, have acknowledged some of the challenges faced by those who sought protection for artistic works under a copyright regime built around notions of literary authorship and the commercial practices of the book trade. Recently, Robert Brauneis has taken a closer look at the legislative history of the 1870 Copyright Act, which extended protection to drawings, paintings, and sculpture (photography was protected under a separate statute passed in 1865). As Brauneis shows, it was not inevitable that works of fine art would simply be assimilated into the existing framework of copyright

31 Cooper, Art and Modern Copyright; and Cooper, ‘How Art was Different’.
32 Bracha, Owning Ideas, pp. 88–93, 120–123.
33 Brauneis, ‘Understanding Copyright’s First Encounter with the Fine Arts’.
law; among the proposals for artistic copyright in the years leading up to the 1870 act, some would have recognized the specific concerns of artists by introducing different rules and procedures than those already existing for printed texts.

Much of the existing scholarship on the history of copyright for artistic works has been produced by legal scholars, who have considered the relationship between literary and artistic copyright and the extent to which the visual arts challenged existing legal frameworks and thereby influenced the overall history of copyright. As Cooper put it, ‘Contests over nineteenth-century images, in presenting the law with new questions and different changing technological, commercial, and aesthetic contexts, resulted in powerful, varied and rich debates about the concept or “image” of copyright’.34 The notion that visual works were different from texts, and that distinct genres of art should be subject to specific copyright rules, was expressed on numerous occasions during the nineteenth century.35 The world of art raised new questions and pushed policy debates in unforeseen directions. In particular, the relationships among artists working in different media, with different aesthetic ideals and institutional affiliations, and the different business models that they developed, led to different sorts of legal and commercial arrangements to those that existed for literary works. The development of IP norms for visual works was therefore related to, but also sometimes in tension with, the history of copyright for printed texts.

In the world of books, the exclusive right to print and sell a particular work had long been seen by publishers as a means of protecting their investments in producing and distributing the book. The business was based on selling multiple printed copies of the author’s work. The economics of image circulation were often quite different, and business strategies evolved in important ways during the period under consideration in this volume. First, the rise of mass visual culture led to a profound transformation of print culture as the acquisition and publication of images became an increasingly important part of book and periodical publishing. Rose Roberto’s chapter on illustrated reference books, Thomas Smits’s chapter on illustrated newspapers,

34 Cooper, Art and Modern Copyright, p. 249.
35 See Cooper, ‘How Art Was Different’; and Brauneis, ‘Understanding Copyright’s First Encounter with the Fine Arts’.
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and Oren Bracha’s chapter on the textual and visual iterations of the bestselling novel *Ben-Hur* explore, each in their own way, the shifting relationships among printed texts, visual culture, and copyright law. Second, the relationship between a work of art’s value and its publication was also changing during the nineteenth century as a result of far-reaching transformations that affected the national and international art market and the expansion of art’s consumer base to various groups whose interests did not necessarily coincide.\(^{36}\) One of the major changes that affected the art market was the growing importance of a group of buyers and collectors who came from a new social class: an increasingly rich and powerful middle class that supplanted traditional patronage (royalty, aristocracy, and state commissions) and brought with them a new speculative outlook on art buying and collecting.\(^{37}\)

Cooper’s study of the British context that led to the 1862 Fine Arts Copyright Act elucidates how some of these concerns affected the relationships among the different groups that constituted the British

\(^{36}\) The commodification of the fine arts has long been seen as a fundamental shift happening in Europe and the United States during the middle decades of the nineteenth century, a shift theorized by influential writers in the last century. Walter Benjamin, in his *Arcade Project*, not only brought to the fore the new conditions of art production but also elaborated on the new accessibility of the visual arts to the masses, and what he saw as the consequent loss of ‘aura’ in the original work of art. Recent studies by art historians interested in mass visual culture and business practices have refined our understanding of this paradigmatic shift and its impact on artistic value. See Michael Leja, ‘Fortified Images for the Masses’, *Art Journal*, 70 (2011), 60–83, https://doi.org/10.1080/00043249.2011.10791072; and Michael Leja, ‘Mass Art’, in *Encyclopedia of Aesthetics*, ed. by Michael Kelly, 2nd ed. (Oxford: Oxford University Press, 2014), https://doi.org/10.1093/acref/9780199747108.001.0001.

art world, and informed debates over intellectual property in the UK at that time.\textsuperscript{38} Tensions between elite viewers and the masses were equally important to court cases brought against alleged copyright infringers during the period. The chapters by Simon Stern and Will Slauter in this volume hint at some of the tensions between social classes and aesthetic hierarchies in reproductive media, and at how these tensions played out in copyright disputes in the UK. Indeed, the technical transformations that affected the work of art in reproduction not only made a work of art more accessible to the masses; they also affected the work’s status and the value associated with an original.\textsuperscript{39}

Authorship in original artworks and reproductions was a layered concept. A painting often existed in more than one copy — each version differing from the other in size and small iconographic details. Additionally, paintings and sculptures (and their reproductions) often entailed the intervention of more than one hand, as can be seen in Karen

\textsuperscript{38} Cooper, \textit{Art and Modern Copyright}.

Lemmey’s contribution to this book. Even though we tend to look at an engraving after a painting as a derivative image that is not fundamentally different from a photographic reproduction, its status and place in the visual economy of the nineteenth century was entirely distinct. Prints that we call ‘reproductive’ today were then considered translations of the original painting, and the creative role of the interpreter was acknowledged in the collaborative authorship at play in its production. In addition, the fundamental notions of emulation, invention, and imitation that had dominated artistic theory and practices since the seventeenth century lost traction over the course of the nineteenth century. This was a very slow process, in which the industrialized manufacture of art reproductions only gradually shifted attention to the dichotomy between originality and creation, on the one hand, and copy and reproduction on the other. During most of the period covered by this book, numerous artistic practices of repetition and collaboration co-existed, and involved a range of practitioners whose livelihood depended on the production and sales of images based on other works of art. Their actions raised new questions about the boundaries between acceptable appropriation and illegitimate copying. Slauter’s chapter in this volume highlights such a case of questionable appropriation, and in the process shows how the producer of a tableau vivant stereoscopic view after a painting envisioned his own artistic creation during an important transition period in the history of photography and its relation to the other visual arts.

Another important change was the transnational expansion of major art dealers and publishers, who did not always adopt the trade practices and legal frameworks of the countries in which they operated, and thus introduced new norms and contractual arrangements based on their own understandings of what constituted ‘property’ in a visual work. The international and colonial dimensions of copyright for artistic works remains to be studied in more detail, though some of the chapters in this book do contribute to this area of inquiry. Thomas Smits’s chapter explores the international trade in illustrations of the news, and the difficulties faced by those who sought to use existing copyright laws to claim exclusive rights over images first published in a foreign periodical; Jill Haley discusses photographic copyright law and commercial practices in colonial New Zealand; Rose Roberto studies a transatlantic
partnership between major publishers of illustrated reference works. Marie-Stéphanie Delamaire examines both the transatlantic context in which Gilbert Stuart worked and the international origins of the unauthorized reproductions of his portraits; these were created in China and shipped to the United States, where they would have competed directly with Stuart’s own originals. It is nevertheless clear that the international dimensions of IP norms and practices deserve further study. Works circulated across national borders. Bilateral and multilateral copyright agreements (most famously the Berne Convention from 1886 onward) represented attempts to create effective international protection, but there has been very little study of how the various treaties (and the national laws passed in accordance with those treaties) actually affected the production and circulation of visual works. The shared customs and business arrangements that creators and distributors of art works attempted to use to control the cross-border copying and reuse of visual works also merits further study.

As several of the chapters in this book reveal, the different uses to which photography was put over time threatened to upset existing relationships and business models. The history of copyright for photography in the United States has received a fair amount of attention, but most of the existing scholarship crystallizes around an 1884 Supreme Court decision involving an unauthorized reproduction (via lithography) of a photograph of Oscar Wilde by Napoleon Sarony. The earlier period, just before and after the passing of the 1865 Copyright Act Amendment (which extended copyright to photographs in the United States), has recently begun to attract some attention. Even within


41 Zvi Rosen has recently located a draft copyright bill dated 1864, which differs in interesting ways from the law that was ultimately passed in 1865. Zvi Rosen, ‘The Forgotten Origins of Copyright for Photographs’, Mostly IP History (blog), 10
the realm of photography, there is significant space for future work on how notions of IP were shaped by the practices of photographers, and several of the contributors to this volume offer new insights in this area. Shannon Perich, for example, explores a series of attempts to use patent laws to license photographic processes in nineteenth-century America, uncovering the strategies of the individuals involved and the extent to which their actions succeeded or failed. The collective efforts of photographers to have their rights recognized, and to receive payment and credit for their work, is examined in Katherine Mintie’s chapter on American photographers’ struggles against newspaper publishers at the end of the nineteenth century.

The question of IP in other fields of visual culture, such as painting, sculpture, architecture, and the graphic arts, has received far less attention than photography, and this book seeks to help correct that imbalance. The essay by Delamaire, for example, studies how the painter Gilbert Stuart responded to unauthorized reproductions of one of his famous portraits of George Washington to explore emerging concepts of artistic property in the late-eighteenth and early-nineteenth centuries. In the realm of sculpture, Karen Lemmey details how several American artists sought to use design patents to protect and monetize their work, though not always successfully. Elena Cooper and Marta Iljadica focus on copyright for architecture, situating efforts by British architects to secure protection for their buildings in relation to the claims of painters and other artists to freely portray the urban landscape. And with respect to prints and lithographs in nineteenth-century America, Erika Piola highlights the crucial role of lithographic publishers and other intermediaries such as frame makers and art associations.
Structure and Common Themes

In order to draw attention to certain shared themes and preoccupations, the book is divided into three parts. The first part, titled ‘Who Owns What?’, spans the period from 1735 (when the first statute extending copyright protection to engravings was passed in Britain) through the early twentieth century. The five chapters in this part proceed in roughly chronological order, but alternate between developments in the British Isles and in the United States to explore some of the ways that visual works challenged established frameworks of copyright law. Isabella Alexander and Cristina S. Martinez examine a court case brought under the first British statute designed to protect visual works, the Engravings Act of 1735. The litigation introduced important questions that continued to be debated during the nineteenth century: what kinds of works were eligible for protection? Who could qualify as the owner of the copyright? How would courts interpret terms such as ‘invention’ and ‘design’ in determining a work’s eligibility for copyright and the scope of protection? The case discussed by Alexander and Martinez was brought by a woman, Elizabeth Blackwell, in an effort to protect botanical illustrations after nature, and thus provides an opportunity to study the complex relationships between gender, creativity, scientific knowledge, and copyright law.

The case studies featured in Part 1 center on individual creators and entrepreneurs working in specific media and genres, who acted as plaintiffs or defendants in litigation aimed at upholding exclusive rights over a particular work. The arguments of the parties, the published judicial opinions, and the outcomes of the cases are analyzed not only for their contribution to copyright doctrine, but also for what these disputes reveal about contemporary artistic and commercial practices. Focusing on such disputes uncovers what individual artists and entrepreneurs thought should be protected by copyright law and why. Litigation was the exception rather than the rule, since most parties sought to avoid the expense and trouble of going to court. It should not be assumed that the positions taken by the parties represent universally-held values within a given field; indeed, sometimes individuals went to court in an effort to impose new rules or to obtain legal clarification of principles that were disputed at the time. But by forcing the parties to articulate
their claims, such disputes often brought to the surface routine business practices and cultural norms that might not otherwise be made explicit if the parties had not felt strongly enough to proceed with litigation and continue all the way to a judgment. Many disputes were settled out of court, and therefore left fewer traces in the historical record.

Disputes over partial and trans-media copying are given particular attention in Part 1, since they raised the fraught question of what constituted a copy. To take an example from Simon Stern’s chapter, did a panorama based on the design of a famous painting or engraving count as an infringing copy, given that the public paid to view the panorama but did not actually purchase any tangible ‘copy’ of it? In the case analyzed by Oren Bracha, could the copyright owner of a bestselling novel stop others from producing a magic lantern show that illustrated scenes from the novel? The case studies in the first section span almost two centuries, and much of their value lies in how they contextualize the disputes. But taken together, they also confirm a general trend of expansion in terms of the rights of copyright owners — from literal, verbatim copying of texts to the right to control ‘derivative’ works — such as the magic-lantern slide show of Ben-Hur at the heart of the dispute in Bracha’s chapter. However, this history is neither smooth nor linear, since each new combination of technology, artistic practice, and business strategy provided an occasion to test the limits of the law, lobby for new forms of protection, or ignore the law in favor of other shared norms or commercial arrangements.

Whereas Part 1 focuses on specific disputes, many of which resulted in court rulings, Part 2, titled ‘Agents of Circulation’, draws attention to different individuals and groups involved in the production, distribution, and reuse of images. In some cases, commercial arrangements and rivalries sparked discussions of IP or attempts to obtain legal protection of some kind. Some of these entrepreneurs, such as the publishers of illustrated newspapers examined by Thomas Smits, went to court in an effort to enforce exclusive rights against rivals in their field, only to find that existing laws were poorly suited to their needs. Others, such as the major publishers of reference books that feature in Rose Roberto’s chapter, created international business partnerships in an attempt to forestall piracy and exploit the market on both sides of the Atlantic. The makers and distributors of lithographic prints discussed in Erika
Piola’s chapter did not make systematic use of copyright (some of the works were registered for copyright while others were not); the art unions seem to have been more likely to have recourse to copyright, but this isn’t the heart of the story, since what mattered was unions’ role in making reproductions of artworks available to a broad audience through a membership subscription system.

The chapters in Part 3, ‘Navigating Intellectual Property’, further explore the interplay of law, artistic practice, and business strategy by highlighting how individuals and groups dealt with questions of exclusivity, authorial credit, and control over their works. Some lobbied for new legislation, either independently or as part of professional associations, as can be seen in the chapter on architects and painters by Elena Cooper and Marta Iljadica, and in Katherine Mintie’s chapter on photographers and newspaper publishers. Other artists tried to take advantage of existing laws, as the essays by Karen Lemmey and Shannon Perich on two different types of patents (design patents as applied to sculpture and utility patents as applied to photographic processes) reveal. Others went to court to test a new law, as in Jill Haley’s study of an early photographic copyright suit in New Zealand; here the litigation exposed interesting questions about the rights of photographic subjects and the emergence of a celebrity culture surrounding the indigenous Māori people.

Further research is needed on the interactions between artistic practices, IP laws, and the commercialization of artworks, not only in the countries covered here, but in other parts of the world and the connections among them. Our approach was not to commission a series of essays on designated topics by known specialists to be as comprehensive as possible. Rather, we organized two international conferences in 2018 and 2019 in an effort to identify emerging research in this area and to encourage individual scholars to develop essays based on their own expertise. Given this process, the shape of the volume reflects a number of common concerns that emerged from our discussions, while simultaneously offering a range of individual perspectives and examples that we hope will inspire further research in this exciting field.
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