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Katie Scott, *Becoming Property: Art, Theory, and Law in Early Modern France*. New Haven, Conn.: Yale University Press, 2018. 384 pp. Tables, illustrations, notes, bibliography, and index. \$75.00 U.S. (hb). ISBN 9780300222791.

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In late 2008, the professional photographer Patrick Cariou sued the artist Richard Prince for copyright infringement. Images from Cariou's photographic book *Yes Rasta* (2000)—altered in various ways—were the basis for Prince's *Canal Zone* (2008), a series of mixed-media works. In 2011 a lower court judge found in favor of Cariou, writing that Prince's appropriation was not fair use because "Prince's own testimony shows that his intent was not transformative... though Prince intended his overall work to be creative and new.... Prince testified that he doesn't 'really have a message' he attempts to communicate when making art." [1] On appeal two years later, a second judge countered that what matters in determining fair use is "not simply what an artist might say about a particular piece or body of work," but the work itself. Prince, the judge ruled, had "presented images with a fundamentally different aesthetic," making his work "transformative as a matter of law." [2] These opposing decisions rehearse the familiar word-image debate that long has shaped ideas about the status and rights of the artist, as well as scholarship on the history of copyright. That debate is brilliantly upended in *Becoming Property: Art, Theory, and Law in Early Modern France*, Katie Scott's magisterial volume on visual art and the law in the long eighteenth century. Scott argues for the "legal agency of the image"—its role not just in interpreting the law but in shaping fundamental ideas about intellectual property—and for the constitutive role of art theory in legal discourse (p. 18).

In the broadest sense, *Becoming Property* traces the historical development of copyright and its early modern predecessor, privilege, from the late fifteenth century until after the passage of the Literary and Artistic Property Act (or "Act of Genius") in 1793. The crucial distinction between privilege and copyright is that the latter is a right of natural law. Privilege belonged to a feudal world of royal benevolence, honor, loyalty, and gifts, and yet it was embedded in commercial interests. In principle, the ideal of copyright is to balance incentive for artistic creation against the value of the public domain for inspiring new creations. That balance operates through term limits on copyright. Even before privilege shifted to copyright, frequent term renewals had effectively begun to substitute the natural right of the author for the king's power. As Scott notes, "the history of intellectual property is also a history of authorship" (p. 15), one that complicates Michel Foucault's history of the concept while confirming his "intuition" that the long eighteenth century was a key moment in its development. [3] It was in this period "that questions about the nature of intangible property in art works and about the extent, purpose and desirability of such

property were formulated and debated at length for the first time” (pp. 15-16). Scott’s book is not just the story of how art became intellectual property, but an analysis of its *becoming* property—an uneven and contested process that often took place not in legal discourse but in cracks and fissures opening onto broader discussions of art theory and artistic identity.

Legal and personal conceptions of authorship collided, for example, in 1755, when the artist François Boucher took to the pages of the *Mercure de France* to expose a deception. According to Boucher, a set of prints circulating under his name was in fact based on a set of drawings furtively removed from his studio by rogue students.[4] From a legal perspective, the reproductive printmaker, Claude Duflos, was in the right—as owner of the drawings, he was entitled to the right to copy them—to transform them into intellectual property. Boucher’s objection was personal—he rejected the prints, writing that he could not recognize himself in them. Scott identifies Boucher’s language of disavowal as that used in questions of paternity, making the compelling argument that Boucher did not see the work as property to be owned or exchanged, but as offspring to be acknowledged or disinherited.

Boucher’s accusation against Duflos seems inconsistent with what we know about the medium and the artist. Printmaking, as the art historian Jennifer Roberts recently has reminded us, is intrinsically an art of alienation.[5] And Boucher generally was all too happy to allow the “sharing of his trace” through reproduction by others in prints and a dizzying array of decorative media—he has even been called an “Andy Warhol avant la lettre.”[6] But even Warhol had his *Oxidation* paintings—when silk-screening was supplanted with urinating or ejaculating onto copper panels on the floor—embodiments of Georges Bataille’s notion of *l’informe* or formless, that which “has no rights in any sense and gets itself squashed everywhere, like a spider or an earthworm.”[7] Indeed formlessness (in its eighteenth-century usage) is at the root of Boucher’s accusation: Duflos’s prints were based on “des desseins informes.”[8] Usually translated as “deformed,” the original term suggests a formlessness that precedes, exceeds, resists the orders of logic, discourse, or law. Copyright depends on the repeatability and dematerialization of form, able to be separated from its material substrate. What bothered Boucher was not the estrangement of immaterial form, but the uncanny return of the formless—the material detritus of his studio subjected to that “taking shape,” that wearing of a “mathematical frock coat” that turns art into property and instrumentalizes it.[9] While Scott retains the conventional translation of *informe*, the alternative underscores what I find to be one of the most fascinating and exciting threads explored in Scott’s book: the uneasy relationship between material and immaterial in questions of intellectual property in the visual arts.

This thread, I would argue, makes the book all the more timely: the development of digital art and sharing or “remix” culture has generated demand for revising intellectual property law.[10] We are invited to enter the utopian, refractive mirror world of “copyleft,” in which “all rights” are “reversed” (a trope that recalls the material phenomenon of reversal in printmaking) or to negotiate NFTs through Ether and Ethereum, otherworldly names that belie the substantial physical (material) impact of NFTs on the environment of *this* world.[11]

Scott tightly weaves meticulous archival research together with incisive discourse analysis and dazzling visual analysis. The task of navigating the book’s dense treatment of this complex subject matter is made easier by its unusual structure. The historical development of early modern privilege and copyright is divided across the book’s first and final chapters. The three middle chapters approach eighteenth-century copyright thematically. This structure is mirrored

at the chapter level, through calculated disruptions intervening in the form of case studies. Visually set out from the rest of the chapter through a shift in font and alignment, the case studies cleverly perform on a structural level what they show on the level of content: that the history of early modern copyright cannot be conceived as a smooth narrative, and that one must look not just at the decrees of the institution, but at the vagaries of how those decrees are interpreted in practice.

In chapter one, “‘Ut Pictura Poesis’: Matters of Privilege and Property,” Scott focuses on illustrated books, teasing out the separate trajectories of privilege for text and image. It was not until the 1600s, with the introduction of intaglio printing, that illustrations began to be tailored to specific texts and printmakers were able to “pursue profit individually in the market and become authors in the legal sense” (p. 53). As artists became more attuned to privilege, emphasis shifted from material to design. Scott argues, however, that while intellectual property depends on immateriality, art helped people to visualize intellectual property as a “tangible thing” (p. 18). This argument plays out in the chapter’s case studies, which is where Scott’s virtuosic visual analysis is brought to the fore. Scott draws a line between the conceptualization of ideas as “property” and the development of illusionistic techniques, such as perspective, for conjuring up things in space. She demonstrates how Jean-Baptiste Oudry’s illustrations for an edition of La Fontaine’s *Fables* made a visual case for privilege by equating themselves with La Fontaine’s text. They are not accessories to the fables, but rather use pictorial illusion and lively naturalism to mediate between viewer and nature. This is not unlike La Fontaine’s own strategy—his fables pull from Aesop and other sources but perform their originality through the author’s frank and candid voice, as if told first-hand from his own observations of nature.

The second chapter, “Emulation: Privilege and Plagiarism” examines the “social and ethical dimensions” of privilege within the “privileged” institution of the Académie royale de peinture et sculpture (p. 94). For Academicians, privilege held symbolic rather than commercial value—it conveyed honor and belonging in a space where emulation was encouraged and plagiarism condemned, though usually not in a legal sense.[12] With the growth of a public sphere for art, attitudes toward copying and imitation began to shift. The popularity of the Salon is linked to a rise in anxiety over imitation and in privilege requests. Scott argues that the increased circulation of prints conditioned viewers to be more attuned to similarity and difference between paintings by removing the distracting element of color, leaving behind only contour and *disegno*. At the risk of turning Scott’s intriguing and nuanced argument into a reductive teleology, one might think of it as Michael Baxandall’s famous “period eye” of the Renaissance—trained to assess material value—updated for the age of print.[13]

In chapter three, “Imitation: Crimes of Likeness,” Scott confronts the fascinating question of portraiture and its conflicting definitions for patrons, art theorists, and the law. If a portrait’s goal is to accurately record the physical properties of a person, can an artist claim ownership over nature? From the perspective of art theory, a successful portrait is one that captures the constantly shifting, animated surface of the sitter through the manipulation of color and light, rather than coldly but accurately recording the contours of their features like an authorless machine. This distinction is also recognized in privilege discourse: an exact reproduction of the physical subject is not intellectual property—it contains nothing of the artist. For a portrait to appeal to future audiences who cannot assess its accuracy in recording the person, it must be more than an exact transcription. But for it to appeal to a patron—for it to have social value—it must be accurate. One begins to detect the return of repressed materiality in a case involving

Napoleon's death mask. The mechanical process of casting is found to not constitute infringement, but the material power of the mask itself is experienced as "a work of terrible and sublime genius" (p. 238).

The fourth chapter, "Invention: The Secrets of Color," explores the intersection of artistic and technological invention in the case of Jacob Christoph Le Blon's color printing process. Because this invention had potential scientific utility, Le Blon was issued a patent-privilege instead of a copy-privilege—a distinction that complicates traditional art theoretical hierarchies. While copy-privilege protects design and narrative—the immaterial, intellectual "idea" expressed by a print—patent-privilege protects process, made visible not in design but in the material substance of the print. Scott asks, "what kind of author is to be found in invention as material practice?" (p. 244). To answer this, she analyzes prints by Le Blon and his successor, Jacques Gautier. It is here that we find explicit discussion of the uncanny return of the material. Gautier's boldly colorful anatomical prints—described by critics as "dirty"—seemed to materialize his presence, making them sit uncomfortably with the transparency required of scientific invention.

The book's final chapter, "Art and Industry: Intellectual Property and the French Revolution," brings us up to and beyond the 1793 Act of Genius. An important premise of Scott's thesis, however, is that this is not a history of before and after. Instead of a clean break between past and present, or privilege and copyright, we find continuities and contradictions. In one case, invention is conceived as that which takes place before materialization, and the author's individual creative genius trumps the common good of the nation. In another case—involving wallpaper based on prints after a painting by Marguerite Gérard—we find that even genius has its limits. Those limits, it turns out, are at the boundary between art and industry. The wallpaper maker, Pierre Simon, prevailed, his use of the composition justified by the commercial nature of his material and technological processes. Anticipating poststructuralism, Simon's lawyer questions "the extent to which creativity was ever, in fact, personal" (p. 299). (Conveniently, the prints are after a painting by a woman artist, a category all too often associated with copying and lack of originality.) Inverting the hierarchy between the liberal and mechanical arts, Simon argues that originality is constituted by touch, not composition, and that the mechanical labor involved in copying bears comparison against the intellectual labor of designing. In the book's concluding words, the leitmotif of intellectual property's repressed materiality resounds with an ironic twist: "at the very moment that law first recognised genius and the liberal and intellectual status of fine art, matter and transferable skill returned to haunt it" (p. 304).

In *Becoming Property*, Scott assimilates the complex abstractions of early modern French law into a cogent history while simultaneously conjuring the fibrous, inky, pigmented matter in which the law was tested and formed. This monumental work of scholarship is an essential reference for art historians and book historians, and for scholars of the legal and economic histories of early modern France.

## NOTES

[1] *Cariou v. Prince*, 784 F.Supp.2d 337 (2011).

[2] *Cariou v. Prince*, 714 F.3d 694 (2013).

[3] Michel Foucault, "What Is an Author?" (1969), in Donald F. Bouchard ed., *Language, Counter-Memory, Practice: Selected Essays and Interviews*, trans. Donald F. Bouchard and Sherry Simon (Ithaca: Cornell University Press, 1977), pp. 113-138.

[4] *Mercure de France*, March 1755, 145. The original text—"des desseins informes, furtivement tirés par les élèves de ce Peintre"—is often translated (including in the book presently under review) as "furtively drawn by" the students. Elsewhere, Scott translates it as "furtively removed by." I find the latter translation to be more convincing: it seems more likely that a student in Boucher's workshop would need to conceal theft than the act of drawing. It also leaves open the possibility that the drawings were abandoned sketches made by Boucher himself—that they were not "ill-formed" but unfinished. See Katie Scott, "Reproduction and Reputation: 'François Boucher' and the Formation of Artistic Identities," in Melissa Hyde and Mark Ledbury eds., *Rethinking Boucher* (Los Angeles: Getty Research Institute, 2006), p. 99.

[5] Jennifer L. Roberts, "Contact: Art and the Pull of Print, Lecture 6: Alienation," The 70th A. W. Mellon Lectures in the Fine Arts, National Gallery of Art, Washington, DC, May 30, 2021. <https://www.nga.gov/research/casva/meetings/mellon-lectures-in-the-fine-arts/roberts-2021.html>.

[6] Ewa Lajer-Burcharth, "Image Matters: The Case of Boucher," in Elizabeth Cropper ed., *Dialogues in Art History, from Mesopotamian to Modern: Readings for a New Century*, Studies in the History of Art 74 (Washington, DC: National Gallery of Art, 2009), p. 284. See also Ewa Lajer-Burcharth, *The Painter's Touch: Boucher, Chardin, Fragonard* (Princeton: Princeton University Press, 2018), p. 26.

[7] Georges Bataille, "Formless," in Allan Stoekl ed. and trans., *Visions of Excess: Selected Writings, 1927-1939* (Minneapolis: University of Minnesota Press, 1985), p. 31.

[8] See note 4.

[9] Bataille, "Formless," p. 31.

[10] See Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2009).

[11] For copyleft, see David M. Berry, *Copy, Rip, Burn: The Politics of Copyleft and Open Source* (London: Pluto Press, 2008). For NFTs, see Tina Rivers Ryan, "Token Gesture: Tina Rivers Ryan on NFTs," *Artforum* 59, no. 7 (May 2021).

[12] For a contemporary example of the social meanings of privilege (or copyright), see the second ruling on *Cariou v. Prince*. In support of the finding that Cariou's market was not damaged by Prince's appropriation, the decision enumerates the many celebrities invited to a dinner for Prince's gallery opening, including "the musicians Jay-Z and Beyoncé Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, [and] model Gisele Bündchen." *Cariou v. Prince*, 714 F.3d 694 (2013).

[13] Michael Baxandall, *Painting and Experience in Fifteenth-Century Italy* (Oxford: Oxford University Press, 1972).

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