**ISHTIP Zoom Event, 22 April 2021**

**‘Commodification of creativity’, Kathy Bowrey (UNSW) in conversation with Martin Fredriksson (Linköping) and Brad Sherman (Uni of Queensland)**

**Chair: Prof Eva Hemmungs Wirtén (Linköping University)**

**Eva Hemmungs Wirtén:** [00:00:00] Welcome to this zoom event, organized jointly by ISHTIP, the International Society for the History and Theory of Intellectual Property and the European Research Council funded project, Patents as Scientific Information, 1895 to 2020, or PASSIM. I'm Eva Hemmungs Wirtén. I'm a Professor of Mediated Culture at Linköping University, Sweden. I am one of the current directors of ISHTIP and I'm also the project leader of PASSIM. I'll be chairing this hour long conversation, which is the first of three conversations we have lined up in the ISHTIP/PASSIM constellation during April and May. The next one will be with Hyo Yoon Kang on May 4th. And then we have Fiona MacMillan on May 20th.

These events serve a double purpose. They are opportunities to engage with topics that have been and no doubt will continue to be of interest to a wide range of scholars for whom ISHTIP has represented a particularly important and creative meeting place. However, as we all know, during the past year, we've all had to cancel postpone and resync events and have been forced to put much of the interdisciplinary dialogue we all value very much and hold. Last years' annual ISHTIP workshop will take place online this summer. And it would be quite different from the usual format. In 2022 however, we hope to meet again in person in Gothenburg. So these conversations are in one way and important way of trying to keep the momentum going at a very difficult time. And that goes, I would say for both the ISHTIP and the PASSIM project.

Today we'll be focused on Kathy's new book, *Copyright, Creativity, Big Media and Cultural Value* published by Routledge earlier this year. Kathy, of course, is my co-director and Professor at the Faculty of Law and Justice at the University of New South Wales in Australia. Neatly reflecting the dual structure of ISHTIP between the law and the non-law, and when I wrote this, I realized that was a bit reductive for people like me coming from non law, but anyway, sort of the double, you know, structure of ISHTIP accommodating different disciplinary backgrounds, we have two commentators with us today with different disciplinary backgrounds, Martin Fredriksson who is Associate Professor at the Interdisciplinary Unit Tema Culture and Society (Tema Q), at Linköping University. He has worked for many years on copyright history and is also a member of the PASSIM project. And Professor Brad Sherman comes from Law at the University of Queensland, with a longstanding track record in a broad range of IP scholarship, but also with a strong historical profile.

So before giving the word to Kathy, just a few practical things. Martin and Brad have prepared comments and questions, but after they've done their business, so to speak, I will open the floor to comments, questions and reflections from all the participants. If I understood it correctly, this will all be recorded, Kathy. Yes. I can see the recording dots up there. At that time when we open up the floor for general comments, I would please ask you to use the chat, to ask for the word and perhaps identify yourself at that time. And then I'll try to keep track of everybody properly. I find it quite difficult to see people when we're talking about how many are we now, oh, 56 participants.

That's wonderful. Anyway, so that the chat may the best way to sort of channel questions. And I will do my best to keep to this hour so that we are lean and mean in the discussion. Well, not mean perhaps, but you know, you know what I mean? So with that, I'll just hand over to Kathy, please. If you have a few words or an introduction, let's kick this off.

**Kathy Bowrey:** [00:04:20] Okay. Thanks very much Eva for chairing and thanks very much to Martin and Brad for agreeing to comment on the book. I'd also like to thank everybody for coming along. Also, sorry, just start with all these things, but a special thanks is owed to a lot of people, including many people in the room here, who've actually read lots of very long drafts of this books including many who read the 200,000 words that is not actually not in the book, which I now feel very guilty about and I do really appreciate their kindness. Also thanks to Marie Hadley for proofreading the book for me.

Ok, so why did I write it? I really love culture and I'm really fascinated by creativity and novelty and creative reworkings of the familiar. I think, you know, culture and creativity really matters to who we are and how we think we belong. But we, we really don't spend much time talking about how cultural production is supported in intellectual property communities. There's lots of chatter about why laws don't work particularly well for creators. There's also discussions about cultural diversity, but not in ways that I think the discussion is actually very useful to help creators or to change legal and business practices.

I think copyright is fraught because many creators look to it as their universal right and feel like it should be doing more. But there's also not much around that actually helps creators to understand what it is they should be focusing on in their dealings with distributors and with platforms and to make better decisions that have potential to enrich and reward them. And we're at a time where 20th century mass media has morphed into something else, but it's not really clear what that something else is. I think that we're at a really interesting time where creators could actually do a lot differently if they had a better understanding about how profits are made.

I'm a historian. And I think that history really helps us understand how we got to where we are. But of course, also as a legal historian, it's much easier to go through and talk and reflect on historical contracts than it is to expose and discuss the nitty gritty of current ones. So in terms of the historical work of the book, I'm interested in explaining how and why people found what the opportunities and rewards were and what they did with them.

The greatest advocates and representatives of authors and author interests today are celebrity novelists and sound recording artists. They have a particular interest in how they understand their rights and use them and how they achieve their artistic and commercial goals. So the book is geared a bit to exposing some of those dimensions in particular.

The book starts with picking up where many of us understand copyright, which is really with romantic theories of authorship, but, well, I think what is often forgotten is that romanticism was really about fine art and high literature. It wasn't about popular culture at all. It wasn't about novels.

And there's a huge gap from where you get from a theory, which is actually about quite specific forms of cultural production, to something which actually supports mass commodification. So in Chapter two and three of the book I focus very much on explaining the new commodity forms of the late 19th century-- newspapers, syndication, the arrival of cheap publications, multiple editions of different works for different kinds of markets. And these are the dimensions that I think actually really drive modern copyright practice, not the assertions of author rights or international law reform or extensions of rights. I also talk a little bit about the gender of professional authorship in passing and also make some observations about the lack of economic literacy amongst the professional writers that start to emerge at the time when new forms of commodification become important, when that kind of knowledge becomes particularly valuable to them if they actually know how to deploy it. Then I turned to discussing some deal-making, which leads to a successful career as a writer, by comparing three early crime writers and how they understood their property rights differently.

The first two, Hugh Conway and Fergus Hume, aren't probably very well known to people. They both, however, wrote blockbusters and made very bad copyright deals. They were in fact very average copyright deals, but they were very bad in light of the enormous success they ended up having. In literary history, both of these writers are commented on as people who were served poorly by the law. Copyright did them a grave injustice, but actually when you went and I found their contracts and their dealings with publishers, I found out that both of them actually wrangled further money out of their publishers. And so there's something kind of missing in that story about how, I guess the cultural concepts that actually circulate about the economy affect outcomes. Conway threatened to unleash the equivalent of the Twitter verse onto his publisher and said that he would expose him at his club.Hume was a wordsmith who renegotiated royalties for later additions of his books when he had no right to do that. But these modest efforts really pale in significance in comparison to Arthur Conan Doyle. Conan Doyle's first contract was actually worse than either Conway or Hume’ s, but what he did, which was really distinctive, was that he really actually understood how to actually create a living as a professional writer. This required having an ongoing income stream, so he structured all of these financial dealings to deal with that, which is why he developed the characters of Sherlock and Watson and the formula that we all know. One of the conundrums, of course, is that copyright doesn't protect characters really at all. UK copyright, certainly doesn't, but that was irrelevant. It really wasn't what the law defined as his creation, that mattered. It was actually how he actually used the rights that were available to him that created the empire that came from those characters. However, the cost he bore was that, as he put it, that a dog has to return to his vomit. He was really unhappy and dissatisfied creatively with the financial success that he actually had.

In the following chapter, chapter four, I trace how national rights came to be internationalized leading to the English language world publishing markets being split into two. This is no news to all of us, but how did that actually happen? Most copyright history shows the US and the UK in a fractious relationship due to American piracy. My work is actually focused on showing the extent of collusion between the British Society of Authors, the Colonial Office and American publishers and British publishers in order to undermine the publishing industries that were developing in Canada and Australia. A lot of this advocacy centers on a figure who's really unknown today, the romance novelist, Hall Caine. And he deliberately set out to use his celebrity and that of his wife, to cajole, to mislead and to win over opposition to Canadian copyright independence. These efforts really only helped to establish and protect the well-known author, and friends of theirs. It didn't really help up others as it didn't really improve the situation for authors coming behind them. But it did really help establish the global branch offices of the large American and English publishers run from New York and London. Another thing I discuss in that chapter is some of the American religious roots to copyright and piracy discourse.

In chapter five, I then stretch out from the publishing industry to look at drama and film, and I show how dramatists were cut out of film rights. After 1911 Hollywood came to dominate international film markets, even though they didn't necessarily have copyrights to enforce in international markets. So this chapter is really about starting to understand cross industry relations and connections, and the bundling together of content to generate income for multinationals. It comes about as a consequence of allowing anti-competitive practices to go unchecked at a time when the US was actively promoting things like business collusion abroad, and was conducting activities that were illegal in the US in foreign markets. And as part of that, I show how a very significant Australian film company, Greater Union Theatre, were up to their necks in this activity and promoting American standard term contracts, take it or leave it very unfair film distribution contracts. There were lots of government inquiries into this behavior. It wasn't uncommented on or unnoticed but they, but they continued to get away with it. I talk about why that happened. Greater Union unsurprisingly perhaps strung me along a lot, but didn't over four years of negotiations, ultimately cooperate with the archival work.

Neither did the EMI trust in the end. Even though they let me into their archive a few times when they saw what I'd found and chosen to write about, they became rather intimidating. The work that I found in the EMI trust archive is in chapter six. And that's really my favorite chapter in the book. It's about the gender of music and the sound recording industry as it emerges, and the promotion of an idea, the idea of a technology company, based on a discussion of the early recording career of Dame Nellie Melba, the Australian opera singer. Again, there was a lot of collusion and unfair dealing by executives of the precursor companies to EMI and involving Melba's lover to get her to front the marketing campaign for the gramophone.

And then I link this early 20th century history to contemporary studies of gender in the recording industry. And I argue that it's a mistake to think that the heart of the recording contract is the copyright. I talk about it as really the commercializing of a gendered identity of a celebrity, and I suggest that until that's fully understood that the gender politics of performance and the abusive relationships that mark the sound recording industry in particular are unlikely to change.

In the final chapter, I acknowledge that many contemporary writers and artists --- and focus in particular on Margaret Atwood, Radiohead and Banksy -- also engage in critique of copyright and strive to retain a space for art alongside making a living. Then I show how the legacy of copyright history impacts upon those critiques and their possibilities. It's not all bad news. I believe there's a space for experimentation and greater empowerment of authors and artists on their own terms. But this is not really simply about promoting stuff. It really involves playing with identity and celebrity, alongside much more creative engagement with copyright and trademark in particular. For those of you interested in a less hurried introduction, the introduction to the book can be found on SSRN and ResearchGate but that's basically what's it about. Thanks Eva.

**Eva Hemmungs Wirtén:** [00:15:23] Thank you, Kathy. So I'll hand over to Martin first, I think.

**Martin Fredriksson:** [00:15:29] Yes. Well, thank you. And thank you. Thank you for, for letting me, well, not letting me read it. You can't stop me, but for letting me comment on it. It's a really, really rich, super exciting book which has a lot of food for thought and I really enjoyed reading it. And, as you can tell, it's got an impressive span, covering an impressive span of media, periods and content, but it's also got a very interesting, or I think a very important mission. An important mission in the sense that it sort of departs from and is complicating a quite a simplistic narrative about authorship and especially about the relationship between authors, authors and publishers, or authors and industries.

So, so… the book explains it this way: "corporate greed is presumed through decision making. The creator is addressed as a noble, but disempowered victim rather than as an agent of their own destiny. And the public are characterized as chumps fed homogenized diet dictated from London, New York and Hollywood". So, so this is kind of the simplistic narrative that the book argues against and argues against very, very, very convincingly and very thoroughly, showing, highlighting the agency of the author in a sense, through time and sort of complicating this idea of the author as a victim, without playing down the actual power dynamics, without white washing anything. And I think that's, that's a very rich and very important achievement of the book. But that quote also sets out a triangular relationship between the author between the publisher/the corporation and the audience. And I think the audience is also a very important and interesting dimension here in this story that I would like to focus a bit more on.

The audience has kind of written into this book as I see it, as a third actor that never really takes the center stage, but it's very important for the relationship between the author and the publisher/corporation, in a sense. And I think, there are especially two chapters where I see that the role of the audience being sort of being highlighted. The first is the chapter about the crime novel and especially Arthur Conan Doyle, and also chapter six about Melba, which is also my favorite chapter, where I really liked that one. I like all chapters, but I think the Melba chapter is particularly exciting. And I think it's, I think it's intriguing to see in chapter two, how, how, sorry- in chapter three on the crime novel, how the birth of the crime novel is also sort of connected to the cultivation of an audience or a readership, especially in the case of case of Arthur Conan Doyle , who sort of, as you feel convincingly, really sort of realized that building an audience, is the sort of the foundations for actually you benefiting from your work. There is a quote here that caught my eye about the detective story, right? :"That the detective story is a form of cultural production that can be licensed to exceed the confines of an original publication in order to animate a following, to produce a future audience, the most valuable form of literary production that can be constructed in modernity". So it's, it's sort of cuts to the heart of the production of the audience as an actor. And so it's very sort of interestingly how Doyle is quite liberal with this characters to sort of build, let other others, other actors, and playwrights use his characters in sort of cultivating that audience and that following. And that also sets them apart a bit from Conway and Hume who managed to cultivate that following in a different way. And I think it's interesting also to see how this coincides with a formation or the cultivation of popular culture, printed public culture into a new stage.

The second case, the Melba case, it's also, I think really exciting for many reasons. I mean, first of all, it says super interesting, exciting story in itself, but it's also really exciting, interesting to see how she works with the concept of reputation. You write a very interesting observation, about how Melba negotiated a kind of a moral rights clause in her contract with a record company where she had sort of, she could stop, or had the right to stop recordings that would be sort of violate her, her reputation, damage reputation as kind of a kind of a moral rights clause before moral rights is even a concept that Anglo-Saxon law incorporates. And this also later, you also talk about write about how she cultivates, well, while on one hand cultivating an image or entering embodying the image of an international diva, an opera diva. She also cultivates the image of a, sort of a homegrown Australian girl or an Australian housewife, to cultivate a sort of build and maintain a credibility within that fan base. And I think it's interesting to see how, how that fan base then becomes kind of her capital in art, in negotiating with the record company, because that's sort of where she can lend that fan base, lend that credibility, to the record company. Oh, well, a gramophone company, sorry, as a way to legitimize that gramophone immediately. And I think these are really interesting examples of how cultivating the audience also becomes a part of cultivating the authorship and just to end.

I would like to close with a brief update on the Taylor Swift conflict. Now you mentioned very briefly Taylor Swift back in the Melba chapter, as one example of a long line of conflicts regarding sort of recording artists being ripped off by the recording company. So the background of the Taylor Swift tour, and this is actually a news article about that Taylor Swift just caught my eye as I was reading this book and that's what I want to pick up on it as well. So the background is this. As many other young artists, she signed where the recording company, Big Machine, and she got a flat fee for, or a flat rate for, or her flat compensation for her for six records. Copyright was entirely owned by Big Machine. She tried to buy it back several times, but they refused. Instead, they sell the copyright to an investment company. As she still hasn't been able to buy them back, so instead she takes a different route. She re-records. These are not reissues, but she makes entirely new recordings of the six albums getting the copyright herself of course. And then she turns to the fans telling them to listen to the new versions instead of the old ones. And I read the brief interview with one of the fans sort of explaining how they would sort of, of course, sort of back her up on this. So this shows also shows how she mobilized the fans.

In relation to her relationship to the record company, that also shows how it kind of still draws on that old narrative about the author playing the victim, but still also points to a kind of an agency of the audience where the audience is actually making a copyright informed decision to listen to the new recordings of those records instead of the old recordings, because they wanted the money to go to Taylor Swift.

So I think that's just sort of, and that's, to me that's kind of a if not the endpoint that then at least the milestone in the sort of the cultivation of the audience, that's also a hidden and implicit story in this story that you tell that I think is really, really exciting. So thank you.

**Eva Hemmungs Wirtén:** [00:23:39] Kathy. Do you want to, do you want to respond now, or should we let Brad first?

**Kathy Bowrey:** [00:23:47] Let Brad go.

**Eva Hemmungs Wirtén:** [00:23:49] Okay, Brad?

**Brad Sherman:** [00:23:53] Okay. Thanks everyone. Thanks Eva. And thanks for inviting me to speak and it's a great pleasure to do so. I don't know what sort of subset I fall into by I'm one of the lucky people who read both the 200,000 words and the scaled down version. I've been thinking about the difference, retaining them, I think. This is for another time to talk about in preparing for today's talk, I was thinking about how to situate the book for people who haven't read it yet. And you know, where does it relate to? And Chris Kelty's "Two Bits" is something that struck me to start with -- just it's tone and things. with the book that really resonates in some ways. I think that Kathy's book follows in some way in the footsteps of Mark Rose's book "Authors and Owners". It's elegant, its historically grounded, theoretically informed, beautifully written, a little bit angry and it's groundbreaking. Kathy's work also engages a bit similar questions to Rose about the role of the author, their relationship to literary property or copyright, and then how that interrelates with publishing practices albeit at different times. It's at this point, however the similarities between the two works differ.

And I think this is one of the most interesting things about Kathy's book as she takes those ideas and pushes it in really new and exciting directions. While many others have taken Rose's arguments or Rose-like arguments, and many other followed in his footsteps about the role of literary property in the emergence of the author and assume that it's a timeless concept that applies to all copyright related subject matter, Kathy takes a different route. Instead she shows how the concept of the author has changed over time. More importantly, by focusing on the practices ,the business practices, in the book, music and film industries, she presents us with new ways of thinking about copyright in it. And in her words how we can bring about better outcomes for creators.

There are a number of notable things about the book, and I just want to focus on three for now, and Martin's already gone through some things so I can scale back and leaves things open. I will talk about the content, the methodology, and then some of the lessons. Martin's already mentioned some of the things.

One of the most striking things about the book, I think is the content which is one of the most immediately striking things. It focuses on a neglected period of IP history from late Victorian era to mid 20th century. It spans a huge array of different types of creators and bands, from Banksy, Radiohead to Nellie Melba. Kathy engages with, at least from a corporate perspective, some refreshingly new subject matter. I was also particularly attracted by the Australian content, which doesn't really get much mileage in this space. I think you do a justice to that. The chapter on the role of celebrity women and recording, the feminist reading of corporate history and recording is a timely and compelling account. And there are more Taylor Swift stories that I'm sure people talk about at the end, hopefully.

The second noteable thing about the book, I think is its methodology. And there are a couple of things here that are particularly unique I want to focus on two of them. One of the things that unites much copyright scholarship, and this is particularly the case with self-styled real world practical or policy work is just how far removed it is from the commodity form of copyright and with the business practices of authors in the worlds that they inhabit. One of the things about Kathy's book is how she builds on what she calls a materialist methodology that takes these things very seriously. In this sense it is very much a socio- legal project. And in this sense, I think the book is unparalleled.

I mean, I've been thinking about it and I don't want to offend anybody, but I can't think of a book that comes close to it in intellectual property law in the depths of its socio-legal analysis. It reminds me a lot of what I've been reading recently, some Deleuzean ideas of becoming, how things never are. They always become and how they move on. And she traces and it unfolds through different chapters, and it shows the fluidity of concepts of authorship, copyright and how those things are employed for different purposes over time. I think that's really a compelling part of the book. A second, and for me more interesting, just for my personal interests, is the book builds on incredibly rich historical archival research and in itself, that is an amazing achievement.

What distinguishes Kathy's scholarship from a lot of the growing body of historical accounts of IP generally is that it doesn't stop once it's mastered the historical narrative. Many people, once they manage to work out how the dots fit together and get out of the archive, stop there. And they're happy with telling a story. And sometimes it's very, very compelling. For Kathy, however, this is more a starting point for developing a rich and compelling argument or set of arguments. And Martin just went through an outline most of them in detail and like much of the best scholarship, not just in intellectual property law, but generally, many Kathy's conclusions are counter-intuitive. They go against the grain of what you might ordinarily think and that makes the book worth reading, if not anything. In doing so and unfolding this rich historical narrative Kathy not only charts how the ideas of authorship have changed over time, she also shifts our attention away from the legal subject to the author and their relationship with the legal object, the work, to look about the emergence of what we call a modern abstract author and all that went with it.

The third thing that struck me about the book was what lessons can we take away with it? And that's the thing that I think that at the end of the day was the thing that is the legacy of the book going forward. One of the state of the aims of the book is to address 21st century grievances about copyright. And I think the book does this admirably, but I must admit that these are not the things that attracted me when I read it, probably because I don't really care. I won't have much time for the grievances, I think as you do, but you provide a really important, compelling account that sort of sidelines those things.

I think what I was attracted to was much more, it was implicit in the arguments of the book. And in particular, I was particularly interested in the way in which leads us to question how we think about copyright law, its place in the world. The role, it's importance or otherwise in how it operates and how we rethink through.

So I think in a sense it has, it's not just a negative argument against a set of grievances about copyright law, but there's a range of positive stories that it can tell. I've given it to read to a couple of PhD students. I photocopy chapters for them to read in thinking about artificial intelligence and computer generator works. I've given it to read someone to read doing stuff on genomics, because I think there's many lessons here to think about the sort of the socio-legal historical narratives going forward. It is a pleasure to read, the arguments timely and it's based upon incredibly rich scholarship. I think you should be very proud and I think it's a fantastic book. So let's leave it to that. Thank you.

**Eva Hemmungs Wirtén:** [00:31:16] Thank you, Brad. Thank you Martin. So Kathy- picking up on Martin's questions perhaps to begin with and then, you know, going into Brad's comments as well.

**Kathy Bowrey:** [00:31:25] Actually I'm going to run them together because I think that maybe that's what I'd like to do.

Thank you both of you for your very generous reading of the book. What I think I was trying to do which is why it took so long to write was that in legal scholarship there's a lot of lack of sophistication in thinking about-- What is your legal object? How do we describe the legal subject and how does it relate to the narrative?

And I think we all just jump in often because that's what we're taught in law school. Humanities scholars ask different questions. But then there's often a disconnect with how humanities scholars then address law, because they are a bit scared of it often, that they are often also dressed down if they get it wrong, which just means that they're asking questions that lawyers feel uncomfortable about, or don't like at least in my experience in ISHTIP and other places. And in terms of connecting with Martin's points about the authors, audiences as actor and reputation and celebrity -- that was really important to me and something I didn't know about going into it. It was coming from a reading of what these people were actually doing, because if you put aside looking for what the contracts say and try to think about what is it that they're, that we're trying to do here, and what were the problems that people were trying to resolve, then different legal subjects and objects appear. So the audience actually appears as somebody trying to turn them into an object and, and particularly, an object of trade. Similarly, reputation is something that, and all of us I think understand this, that there are ways in which our reputations have a value, you know, a professional value. And in terms of trying to sell books, reputation can potentially have a commodity value, perhaps not in academic circles, but in terms of the people that I've spoken about, these are people writing popular genres where they were success stories. And that's the other thing that was an interesting as subjects because we tend to kind of think of the successful artists and authors as the exception, which clearly in terms of their bank accounts, in some ways they are probably the exception, but actually when you start looking at the problems that they have and how they actually approach the industry and, and how the opportunities open up for them , you know, there's nothing exceptional about them. It's just that we don't talk about these processes. And also I think we duplicate the disadvantages by not actually doing that. So what I was trying to actually do with the archival record was actually reconsider what we think we know.

And in particular, one of the things that I've found in doing copyright history in particular, is that every time you actually look at how the law is supposed to operate, it's just not true. It's just not there. I mean, so much of what we spend time on, and I also do this in class teaching about the importance of the legal technicalities and the legal taxonomies, but when it actually goes to what actually matters and what rights you actually need, it's got nothing to do with that subject matter. That idea of law is a fig leaf to much, much more I guess, complicated conversations. And I think by fixating on the role of those technicalities, we can often actually do a disservice by suggesting that if we get changes to the technicalities or stronger rights that somehow that changes the power relations. It doesn't. Obviously understanding the technicalities is potentially a very important lever in those negotiations. But it's not really what it's about. And so in terms of going to Brad's point about socio-legal research and methodologies, it's very much something that I think that requires us all to kind of experiment a lot more in reconsidering these kinds of connections. And perhaps working with others in other disciplines as well, around different ways of actually understanding and approaching these interactions rather than seeing differences in approaches to the subject matter as a problem or something that has to be reconciled, actually just recognizing that it's a, you know, it's, it's a very complex type of thing, but in terms of commodification there's dominant forms, but even those dominant forms are not particularly stable.

And as I said earlier on, particularly at this point in time, so that's what I was trying to do. Thanks.

**Eva Hemmungs Wirtén:** [00:35:52] Martin, Brad, do you want to quickly reply or respond to something? Martin? No, I think we should, should open up then. I'll open up the floor or whatever the expression would be for, for questions and comments from the audience. And maybe if we use the chat function, I think that would be the easiest way for me to keep track of, of people. So we have one hand instead, Luke, go ahead.

**Luke McDonagh:** [00:36:36] Thank you. And thanks Kathy, for writing this book, because it has been really useful to me in my own research and I really enjoyed reading it. And I, you know, I want to also commend you as the other discussants have for as you say, bringing together a scholarship that is often dotted around the place in the humanities, in economic history and in legal history, but it's unfortunately so rarely connected in any thorough away and in the chapter where you talk about the coming of film and the way that that disrupts the rights of the Dramatists, I suppose. The way you put it is really a fascinating one and a personal favor of mine and the book.

And I wanted to ask you, you know, whether you, well, I wanted to ask you, first of all, what was the biggest challenge about writing this from someone who, you know, ISHTIP is also about helping each other out and trying to figure out the best ways to approach these kinds of big projects. So when you were looking at some of the, the non-legal sources, when you were reading the economic history, when you were reading the cultural histories and as you said, they often touch upon the law, but they don't really engage with it because that's not their field. They're fascinated by the kind of cultural happenings and the commodification that's happening. What were the challenges that you found in writing it? And then I suppose, you know, the second question is this. Is one of the messages of the book that the history of culture is really the history of disruption in industrial capital and industry?

And you know, whether you go back to the Elizabethan theatre being disrupted by literacy and the novel in the 1700s, whether for example, as you say of the Victorian crime novel, whether it's the example of Hollywood, whether it's the example of streaming today, where, you know, perhaps the app is now the important commodity and the artists have slipped very far behind in terms of their importance and their reward. So yeah, a couple of unwieldy questions for you. Apologies for that, but I really did find the book fascinating and it it's caused so many thoughts that I just wanted to put a couple of them out there.

**Kathy Bowrey:** [00:38:53] Thanks. In terms of the biggest challenges - well the main one was actually settling on the structure for the book. Two aspects there. One is how to actually explain the legal technicality because to understand certain dynamics and dilemmas you really do need an understanding of the actual stakes in the technicality of the law. So contrary to what I was saying before about it, perhaps suggesting it doesn't matter, it does very much matter at particular points in time. And one thing we do know about copyright law is it doesn't do any favors in terms of trying to actually make it clear how it actually operates historically.

So trying to work out how to include that content so that people could follow it was really tricky and in particular, so that people who were not IP lawyers would not be completely lost and I able to actually follow the conversation, and not turn off. And in fact, that was why I wrote so much as the original version of the book, as I did it in six volumes where the first was, the first part was basically explaining what the law was. And then the second part of was actually explaining, the actual, I guess the sociological kind of narrative and the, and the political stakes. So that was a real challenge.

The second thing that was really difficult was the fact that I think that it's important to write from your own place and culture. And you can't pretend that you don't. And so I actually really wanted Australian material to be in there, but that caused a huge problem, obviously, in terms of readership. But at the same time, the reason that I think you know obviously Brad's Australian too and Brad thinking it works too is perhaps great but I guess it's how other people outside of our culture, would take it. But the Australian cultural content being in there is important because it's an international industry. And so in a sense, what happens outside of those markets is actually a result of the consequences within the metropolitan centers in the examples that I actually talk about. So in that sense Australian content is not incidental but is in fact showing how the power dynamics actually work internationally. And I think that's something that's lost in the literature, which is very much focused on the UK or the US. I can't speak knowledgeably about European academic content at all. I'm sadly monolingual, but that international dynamic, I think that that's actually a bit of a problem. So for example, with this stuff around piracy, you know, if you look at all the history, there's so many books written about copyright and piracy and they relate, you know, to the relationship between the US and the UK. And it's like, well, that's not even the big problem for the rest of the world. I mean, you know, it's empire and the fact that empire never ends that is the problem. But somehow we kind of like erase that whole conversation as, and sort of like neatly quarantine it.

In terms of your, your second point, I've kind of lost myself in my own conversation now.

But in terms of the Dramatists part, I guess I do recall that. I mean, one of the things is the way that we even understand that a dramatist is a playwright, has a market, which is for live theatre-- but that wasn't necessarily what it was all going to be about at the end of the 19th century. You know, for example, the playwright and this is an example of law not mattering, for the first 30 years, Australia continued to pay playwrights for the right to adapt their plays for film when that wasn't what the law was. And you know, I mean, it took until 1932 when it becomes apparent that that's been going on. So the stakes and the dismal earnings of playwrights today is to some extent, a consequence of them being cut out of what was the growing market that was going to replace live theatre, which was film. They could have had a stake in that, but they were deliberately cut out because the Society of Authors, which was dominated by basically a very small handful, subset of authors who cut them out and did deals with Hollywood behind their backs. And in the chapter, I sort of talk around that. I also talk about the way in which even playwrights who weren't entitled to particular royalties -- they just paid them off on the side because they just wanted to look forward to the future and realized that the future was film. And if they had to actually pay particular royalties payments which they weren't obliged to, they should continue to do that because they had the bigger game in mind.

It was pretty shocking to me going through all this history how so many important things which had major ramifications were really decided by very small numbers of individuals who all were this particular social set, who all knew each other and simply operated the world like it was their own private play thing. I mean, I wasn't expecting it to be so bold in terms of the law, you know? So, so for example, there are documents where they actually say things like, we think you should keep the changes in the language in your contracts, because it looks less like we're talking to each other and this is, this is actually written down.

Yeah. Similarly with Melba, the fact that a backhander is paid to Melba's lover to get her to agree to sign her recording contract and release the track – the letter actually says, you know, make sure she doesn't find about it and make sure all the copies of this document are actually destroyed. And the only reason I found that was because this was an age where secretaries typed the letters and the carbon copy was filed. So yes, the originals were destroyed as instructed, but understanding business processes of the time is actually really important for doing this kind of work, because a lot of the work, there was a lot of detective work in doing this and seeing something which is curious and then following it and following it up and just not giving up, which also meant being a real nuisance at archives and just continuing to push and ask and not go away. The amount of times that I was told you don't have a right to that, or you can't make a copy of that because you don't have permission to do that to, you know, this is confidential information. You can't write about that. No, thankfully I do know the law in these areas and know what I can and can't do. And you know, I don't like being told that I can't do things. So, it took a lot of perseverance though to actually do the work and a lot of time.

**Eva Hemmungs Wirtén:** [00:45:13] Luke, do you want to say something, add something or comment on the comment?

**Luke McDonagh:** [00:45:23] No, I mean, I think, you know. You've just raised a couple of really fascinating details that are there in the book, you know, and I think that that's the strength of it is that you did, you know, you went down the rabbit hole, I suppose. And you found all these fascinating archival details that revealed a lot of, a lot of what was happening behind the scenes. And, you know, it's interesting for us as lawyers to think about whether the technicalities of the law and legislation-- you know, how impactful are they, if at the end of the day, you're dealing with a kind of a cartel issue where that the economic dominance is already there, whether it's visible behind the scenes, whether it's visible in terms of, of the way let's say the Imperial copyright act was passed and so on. I mean, there's really so much to it. So I'm just very glad the book exists and I'm very grateful for it.

**Eva Hemmungs Wirtén:** [00:46:18] Thank you, so Fiona. Oh, sorry. Kathy, do you want to...

**Kathy Bowrey:** [00:46:21] I was just going to add on to that. I mean, one of the dilemmas of course, today is that it's harder and harder to do this. I don't understand how this work will be possible in the future where there's only electronic copies, which are so much more fragile. I'm sure the same conversations and same deals are being made.

**Eva Hemmungs Wirtén:** [00:46:37] Okay. Fiona.

**Fiona Macmillan:** [00:46:43] Thank you. Thank you. Thank you so much, Kathy is a fabulous book from which I learned so much and which of course really made me rethink a lot of, a lot of things. And I'm not going to, there's not a time to go through this now, but write about this another time, but I, I just wanted to pick up one kind of particular, particular thing quickly, which is -- You know, for a long time, I've suspected that law's not really anything like as important as a legal academics and lawyers think it is. And I know that's not a very original thought, but one of the things that reading this book makes me think about this, maybe it is that the parts of law that we think are important are not as important as we think they are. And one of the, this isn't really a question, but I wonder whether one of the things that we could think is coming out of this is that contract is more important than property, which is the reverse of what we usually think.

In other words, what you've written about is a network of contractual relationships where the property, right, the intellectual property, right, is kind of, is sublimated in that network. I mean, one of the things I've always been interested about is the way in which, for example, the European media companies, franchises, like the Big Brother franchise, is licensing a copyright interest that didn't exist at all. So, so in other words, copyright's sort of leverage there, the property right, is a leveraging of a set of contractual relationships. And what I really wanted to ask you is, I mean, whether you think that's correct, but also whether you think that in some ways, the image of copyright is a property right has been leveraged by the big major and entertainment corporations as a place of conflict as a place where everyone goes on, we talk about the copyright wars. They say, it's our property, right. And you know, can't be taken away and blah, blah, blah, knowing all the time that it's not the real theatre of creativity, knowing all the time that this, this image of copyright that they're putting out and they're fighting about is not, it's not really the real thing. It's just the distraction from the real business of getting on with extracting value from these authors on the international stage. That's enough.

**Kathy Bowrey:** [00:49:01] I guess I don't think it's so much property versus contract because I think that contract only really makes sense if you understand it in the context of manufacturing policy, tariff policy, tax policy, how to raise finance on a global scale. In quite a few of the chapters these were things, areas of law, I didn't think I'd have to get my head around, but I did to some extent because it was part of actually understanding what the stakes were. And the contracts obviously sit in an international trade context within the intersection of all those other dynamics and relations as well. So yeah, I think that the property argument is rampant and the contracts in a sense, get the upper hand because of the absence of competition policy being applied, even when it did apply. And partly that's to do with the unaccountability of the discourse and the discussion. Partly it's because they designed it that way, you know, they were aware of the fact that competition law could clamp down on some of these contractual dealings and in those contexts with their film industry, definitely the property arguments around copyright and film served as a mask for distracting attention.

In Australia, for example, there was several Royal Commissions into the film industry in the 1920s and it never twigged that these contractual dealings for importing films didn't actually have copyright. Most of the content that was bundled would not have been copyright content. And yes, there's logistics with the trade in celluloid where the physical copy can be restricted and you have to pick it up and you have to drop it off and all that type of stuff. But I think that the intellectual inquiry into the dynamics of the industry was completely distracted by thinking, because it was about property rights and copyright that they couldn't actually consider those types of issues. And so yeah, I think it has a lot of spin, and symbolic importance at particular points, but I'd stress that one of the things that I think we need to think about as IP lawyers is, is connections with those other areas of law and how they intersect.

**Eva Hemmungs Wirtén:** [00:51:13] Fiona, do you want to comment ?

**Fiona Macmillan:** [00:51:15] Not, no, not really. Thank you very much, Kathy. I think it's really a really important question to think about whether copyrights really, anything like as important as we think it is, basically. Thanks. Thank you.

**Eva Hemmungs Wirtén:** [00:51:29] So I've sent out in the chat, if anyone has it's still time for one more question or comment or reaction or whatever. I haven't seen anything. So if there's not, I just want to say thank you all for participating. Thank you to Kathy, obviously for her great book, which caused or which made us have a great discussion. Thanks to Martin. And of course thank you to Brad as well. And everybody else. I see that Kathy has posted in the chat information about the upcoming two other conversations that we'll be hosting with your with Fiona. I invite you to join us then as well, obviously, and keep taking an interest of course, ISHTIP and hopefully, maybe also in PASSIM.

And I hope to see you all again Well, May 4th. Thank you so much. Thank you Kathy. And everybody else.

Bye.