

# What's News?

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## Abstract

This review of Will Slauter's *Who Owns the News?* (2019) highlights three ways in which its history of copyright in news tracks and illustrates key themes in the history of cultural policy. One is how copyright law and journalistic style co-evolved, confirming the attributes of modern journalism itself and deploying style as a device for defining the scope of news producers' legitimate copyright claims. In the news, as elsewhere in copyright, exclusivity and genre largely co-created each other. Two is how the labor and skill of individual human producers of knowledge are often hidden amid prominent debates about relationships between the circulation of knowledge and financial investments in systems of knowledge production. Reporters and photographers, as modern human creators of the news, are often missing from this history. Three is how the history of copyright in news is told largely with reference to organization of producers, distributors, readers, and users in collective settings. Copyright and cultural policy often develop and are best understood in terms of the roles of formal and informal groups.

## I. Introduction

A history of how copyright got to be property risks being a just-so story, per Kipling: a careful arrangement of moments suggesting that the result could not be other than it is. *Who Owns the News?* (2019), Will Slauter's excellent account of copyright conflicts through history over property, propriety, and priority in the news business, nicely avoids that trap. The law of the news is a messy affair, like the news itself, and Slauter navigates its history elegantly. This review can highlight only a few key themes.

*Who Owns the News?* offers a history of how modern cultural categories came to be: exclusivity in creativity and "expression," on the one hand, and openness in knowledge, truth, "idea" and "fact," on the other hand. It helps to settle the claim that copyright law makes cultural policy.<sup>1</sup> *Who Owns the News?* is not only a history of the idea of property in words. It is also a history of the production and re-production of culture.

As a copyright scholar I focus almost entirely on relationships between legal rules and institutional, industrial, and social settings rather than on the evolution of law itself. In this instance, my interest in context is also personal. I grew up in a family of professional journalists. My grandfather and mother each had decades-long careers in daily newspapering in the U.S., as reporters and editors. I was trained by them from an early age in the cultures and techniques of twentieth-century journalism. I am delighted to admit to reading

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<sup>1</sup> Scholarship making this point includes Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (2009) and Siva Vaidhyanathan, *The Rise of Intellectual Property and How It Threatens Creativity* (2001).

*Who Owns the News?* while metaphorically wearing both my latent beat writer's identity and my legal scholar's identity. In that combination I embody the argument below. The news is a product and an attribute of specific places, times, and practices. Below, the review focuses on three of those: news as genre, news as sweat, and news as shared knowledge.

## II. News as Genre

As a history of property concepts, *Who Owns the News?* focuses understandably on the character of the property-esque "thing." It starts as one would expect, by exploring, tentatively, what one means by the word "news" (11-13). Does the word refer to events in the world? To accounts of events in the world? To certain sorts of events, or accounts—ones that bring novel or unknown information to light? The idea of news becomes nearly material, as "news" is expressed in units. Early in news history, there were letters, "reports," and, above all, "paragraphs" (65-76). Well into the nineteenth century, in both the U.K. and the U.S., the news was embodied in units that were copied and shared in networks of editorial custom that administered collective sensibilities about propriety and priority. Telegraph dispatches were "intelligence" as well as "news" (155-58); as the telephone displaced the telegraph, "wire" services, now bearing a metaphoric moniker, competed to supply "the news" (229). Newspapers themselves became bundles of news, customers of wire services, as well as purveyors of information.

If news is as much semantic thing as material object or unit, then what sort of thing is it? Different sorts at different times, to be sure. The character of news as thing at any given moment is part and parcel of a larger, moment-specific question of print culture and the character of relevant social worlds. Like any media or communications practice, news creates and responds to communities and practices of writing, speaking, reading, and listening. There are rhetorical styles of composition and interpretation, meaning that news is genre.<sup>2</sup> Genre is embedded in a set of rhetorical actions that concern both how the material is produced and how it is used, and because all of these are collective, social activities, genre is not static. Genre evolves. That evolution is critical, because the social, political, and legal implications of the medium—"the paragraph," or "the news story," and so on—are inseparable from its setting. *Who Owns the News?* is, in the first place, a history of law and genre. How does this matter here? Neither modern newswriting style nor the journalistic content that it produced are center stage in *Who Owns the News?* It would be a mistake to read the history of copyright in news as an extended review of claims to exclusivity in beat writing

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<sup>2</sup> The historian of journalism James Carey observed similarly that journalism should be understood as much in terms of its cultures, including its ritual practices, as in terms of its communications practices. James W. Carey, *The Problem of Journalism History*, in James Carey: *A Critical Reader* 86 (Eve Stryker Munson & Catherine A. Warren eds., 1997). Intellectual property practices are assimilated to genre studies in Dan L. Burk & Jessica Reyman, *Patents as Genre: A Prospectus*, 26 *Law & Lit.* 163 (2014).

or investigative reporting. Those were both mid- and late-nineteenth century American inventions, along with ideals of journalistic objectivity.<sup>3</sup>

Rather, what grounds the history of copyright in *Who Owns the News?* is intense, regular focus by publishers and by legal actors on the qualitative and economic virtues of information at speed. In both business and law, “the news” usually means “what’s new” in an almost literal sense—material that is valuable socially and economically precisely because and only so long as that material is not available elsewhere (e.g., 148, 209). In the late nineteenth century, that focus on speed and its cousin, publishing priority, were transmuted by norms of professional journalism in the U.S. into the idea of the “scoop,” a metaphor for claiming valuable news from the pool of mere information.<sup>4</sup> Speed and priority became proper newsgathering and newswriting itself, with their emphases on facts, brevity, and a certain breathlessness on the page.

Speed and priority are not absolutes. They are situated in geography (what is news in London or New York may be news again in Manchester or Chicago) and in reader communities, as well as in professional norms. The exigencies of time (which is limited) and space (which is also limited) mean that reporters have long suffered or enjoyed the flaws of saying things concisely and without nuance. Through time and practice, those limitations became virtues, embodied in a profession, journalism. That profession, with its norms, became the thing, along with news itself. The absence of expressive style meant that as to news, journalism respected and enforced genre expectations rather than formal property rules.<sup>5</sup> Proper journalism became unpropertied journalism. But other modes of exclusivity might attach to journalistic priority, that is, to economy, and in particular to speed.

Copyright contests that eventually rejected most property in news thus helped to make and then to validate the genres and practices of modern journalism. Likewise, copyright law learned to look to news organizations’ adherence to genre expectations to check overly broad claims to exclusivity in news as such. *Who Owns the News?* highlights a vivid example in the case of *International News Service v. Associated Press*,<sup>6</sup> which recognized a limited form of non-copyright legal exclusivity in the context of rivalry between two wire services, so-called “quasi-property,” based entirely on speed and priority (235-69). An equally vivid but more recent example comes from *Harper & Row, Publishers v. Nation Enterprises*, the well-known 1985 U.S. Supreme Court case holding that the defendant, a news magazine, was not excused from a copyright infringement claim for publishing excerpts of a former U.S. President’s unpublished autobiography. This was despite the magazine’s reliance on its

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<sup>3</sup> See Michael Schudson, *The Objectivity Norm in American Journalism*, 2 *Journalism* 149 (2001); see also David T.Z. Mindich, *Just the Facts: How “Objectivity” Came to Define American Journalism* (1998).

<sup>4</sup> Scoop, n.2, *Oxford English Dictionary* (3d ed. 2019).

<sup>5</sup> The absence of expressive style is a style in itself, an obvious literary point that is lost, like many aesthetic arguments, amid the Supreme Court’s insistence that copyright should be indifferent to artistic merit. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>6</sup> 248 U.S. 215 (1918).

alleged “news reporting,” a recognized category of fair use in U.S. copyright law.<sup>7</sup> Rhetorically, the Court majority rejected the defendant’s claim of “legitimate journalism” on the ground that the newsgathering in question was too fast; the defendant had taken a short cut.<sup>8</sup> The news magazine was a pirate after all.

### III. News as Sweat

News, like all cultural forms, comes from people. Yet *Who Owns the News?* is not their story. Absent from its pages are the reporters and photographers, not to mention correspondents, stringers, legmen, freelancers, editors, typesetters, Linotype operators, newsboys, newsstand operators, truck drivers, or any of the many other human beings who collected, reported, shared, printed, and distributed the news over the centuries. Actual human beings contributing creative energy, expertise of other sorts, or, simply and literally, sweat equity are in short supply. In *Who Owns the News?*, the central players are the men and smaller number of women with the money: publishers.

Editors appear in Slauter’s narrative from time to time, primarily to express and enforce customs regarding sharing the news (163), rather than to lay claims to exclusivity. Those customs materialize most vividly in the image and practice of “scissors editors” (95-96, 101-06), a phrase that captures editors’ early- and mid-nineteenth-century practices of cutting reports out of other newspapers in order to reprint them in their own. At times even the editors’ contributions were diminished. The selectivity and judgment associated with choosing what to cut was heavily criticized by many contemporaries (114).

Writers and photographers appear in historical debates mostly as rhetorical foils for publishers laying claim to exclusivity in news (63, 176), when they turn up at all. If the popular imagination associated the romance of daily journalism with writers and reporters in older films such as *His Girl Friday*,<sup>9</sup> *All the President’s Men*,<sup>10</sup> and even recent films such as *Spotlight*,<sup>11</sup> then more popular attention should have been paid to the business end of things, in *Citizen Kane*<sup>12</sup> and in Gay Talese’s detailed book-length account of the workings of *The New York Times*, aptly titled *The Kingdom and the Power*.<sup>13</sup>

To economists, news is a public good, a non-rival intangible, and *Who Owns the News?* invokes that proposition as the standard way of explaining the social problem for which legal exclusivity is often a solution (6). But to practitioners, and to many readers, the news is visceral. “News” is a machine (sometimes referred to as “the press”)

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<sup>7</sup> 17 U.S.C. § 107 (2016).

<sup>8</sup> Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525, 1605-11 (2004).

<sup>9</sup> *His Girl Friday* (Columbia Pictures, 1940).

<sup>10</sup> *All the President’s Men* (Warner Bros., 1976).

<sup>11</sup> *Spotlight* (Participant Media, 2015).

<sup>12</sup> *Citizen Kane* (RKO Radio Pictures, 1941).

<sup>13</sup> See Gay Talese, *The Kingdom and the Power* (1969).

anthropomorphized into people, who share stress, risk-taking (including physical danger), camaraderie, late nights and lonely mornings, council meetings, and the endless tracking of sources.

How does this matter here? In *Who Owns the News?*, the history of news as sweat appears in occasional references to the fact that a news organization's ability to assert claims to exclusivity in "its" news depended on showing that it had acquired copyright interests properly from individual contributors (169). In other words, reporters and correspondents could indeed be authors for copyright purposes (183-85). Yet references to customary practices around compensation, credit, and attribution show that those norms often favored the identity of the publication or the wire service as source (100-09). Editors, rather than reporters, were bound together in "webs" of trust (107). Bylines and photo credits for individual contributors were modern inventions (109). (Even today, they are usually matters of passionate interest primarily and only to the individuals involved.) In legal terms, sweat-related interests were erased in 1991, the same year when the United States Supreme Court ruled "sweat of the brow" arguments were out of bounds in copyright advocacy in federal courts in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>14</sup> If there were any chance that "sweat"-based or Lockean labor-based arguments might advance in U.S. copyright cases after *International News Service*, *Feist* ended that possibility.

Elsewhere in copyright, scholars including Jessica Silbey have begun to remedy historical exclusion of creator perspectives from public policy conversations.<sup>15</sup> Good empirical understanding can teach us what creators really want and need from the law, which we can blend with economic models and the romanticized rhetoric of authorship.<sup>16</sup> But news writers and news photographers are not romanticized as creative geniuses, even if they often work as much for love as for money. They are better romanticized as the indefatigable civic observers of public and cultural affairs at both global and neighborhood scales, the Fourth Estate, and ink-stained wretches, metaphorically speaking, in everyday practice.

*Who Owns the News?* does not address struggles in the news business between management and labor, including the history of the Newspaper Guild, but it may be read as a history of precisely those conflicts. Jessica Litman has argued that if property rights are alienable—and copyrights almost always are—then they often yield to bargaining inequalities.<sup>17</sup> *Who Owns the News?* confirms her point.

#### IV. News as Shared Knowledge

One may be struck by the absence of human creators in *Who Owns the News?*, but one is equally struck by the presence and power of community in many forms and at many scales.

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<sup>14</sup> 499 U.S. 340 (1991).

<sup>15</sup> See Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (2015).

<sup>16</sup> See *The Construction of Authorship: Textual Appropriation in Law and Literature* (Martha Woodmansee & Peter Jaszi eds., 1994).

<sup>17</sup> See Jessica Litman, *What We Don't See When We See Copyright as Property*, 77 *Cambridge L.J.* 536 (2018).

Carol Rose has written that property is fundamentally a set of stories about how communities constitute themselves,<sup>18</sup> and *Who Owns the News?* suggests that few forms of property fit that bill better than the news.

Early newspaper editors constructed systems of customary practices among themselves and across different publications for information acquisition and sharing (81-82), building on social networks anchored in London's coffeehouse culture. Enforcing registered copyrights was disfavored, and editors evolved thick customs, a "culture of copying," for sharing news reports based on publication timing and attribution (51-66). Collective practices evolved with technology and economic development. Industrialization, railroads, and the telegraph prompted newspapers outside of London to collaborate in order to compete with their rivals in the capital for access to news from abroad, forming an early version of what grew into the Reuters news service (165-67). British telegraph companies developed newsrooms outside the center as places where people could gather in shared social spaces to read and discuss the news, a practice that the companies copied from London papers (155-58). Eventually the papers and the telegraph companies ended their conflicts and went into business together, and later the telegraph itself was nationalized.

Collectivized practices for accessing the news evolved in the U.S. from tavern culture, the early American version of London's coffeehouse culture,<sup>19</sup> into street-side public "bulletin" boards (233-34). The private status of the telegraph in the U.S. gave rise to different forms of news sharing via newspaper "combinations" (152-53) and private cooperatives and collectives known as wire services (192). The major U.S.-based wire service is still known today as the Associated Press.

When one starts to look for the evolution of property in news and the evolution of copyright as property, whether property claims were asserted formally or via custom and practice, in almost all cases they were asserted in the context of proper behavior in some collective context, giving us the related concepts of property, propriety, and priority.

Seen in that light, *Who Owns the News?* joins Shyam Baganesh in seeing *International News Service v. Associated Press* as a case about the competitive integrity of a modern newsgathering collective—the AP, as a wire service, reporting the news—rather than about exclusivity in news as such.<sup>20</sup> An economically sustainable newsgathering collective requires an administrable ruleset that addresses membership and manages resource access and resource consumption. In each of these respects, the question of property is less a question

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<sup>18</sup> See Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 Yale J. L. & Hum. 37 (1990).

<sup>19</sup> See Peter Thompson, Rum Punch and Revolution: Taverngoing and Public Life in Eighteenth-Century Philadelphia (1998).

<sup>20</sup> Shyamkrishna Baganesh, "Hot News": The Enduring Myth of Property in News, 111 Colum. L. Rev. 419 (2011).

of property rights and more a question of property institutions, systems for cooperating regarding a resource.<sup>21</sup>

*Who Owns the News?* highlights the many ways in which copyright and property focus on the evolution of groups and collective interests, alongside individual interests in market settings. We call these groups “communities,” “collectives,” “cooperatives,” “conspiracies” or “cartels.” Groups may be terrific, or they may impose harm. The point is simply that groups matter to property as well as to other parts of law. Treating *International News Service* as a case about resource governance is not a way of endorsing the outcome. The Supreme Court was asked to clarify the rules of proper behavior both in and adjacent to the group. The Supreme Court might have determined, as the dissent urged, that the risks of monopoly imposed by the collective outweighed its benefits.<sup>22</sup>

How does this matter here? Recall the introductory point that copyright law is, in effect, a form of cultural policy. Consider three related cultural policy implications of groups in the news and groups in copyright, each of which is a variation on a theme. When and why do we like groups and what they do, and when and why do we not like them?

One implication involves how group-based thinking clarifies relationships among news, copyright, and the state. The press has long been referred to as the Fourth Estate (the phrase dates to the late eighteenth and early nineteenth centuries in the U.K. and France), implying that it serves as a recognized supplement to the three organic “estates” of the realm and as a check on state power. A free and independent press, in other words, is a critical part of democratic governance. *Who Owns the News?* calls attention to the idea only briefly (276), but courts have resisted recognizing formal property in news partly because of the role of open access to information in politics and governance. *International News Service v. Associated Press* assumed that no copyright exists in news; the dissent would have gone farther and rejected any sort of exclusivity. In excluding “sweat of the brow” arguments from copyright, the Court in *Feist Publications, Inc. v. Rural Telephone Service Co.* confirmed that copyright excludes facts and ideas in part because of their critical contributions to the broader public interest.<sup>23</sup>

The history of copyright also suggests a different construction of the relationship between property and state power. Neil Netanel showed how copyright in cultural expression supported the development of an independent, market-based cultural sphere, which is not controlled or funded by the state.<sup>24</sup> This sphere produces diverse knowledge and learning, enabling citizens to participate effectively in democratic governance, civic life, and community formation. Although one might expect to find news assimilated to the market model and covered by copyright along with literature and music, it is not.

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<sup>21</sup> See Michael J. Madison, *Governing the World’s Most Valuable Resource (Everything You Know About Data Is Right)* (working paper) (2019) (on file with author).

<sup>22</sup> *Int’l News Service v. Associated Press*, 248 U.S. at 248 (Brandeis, J., dissenting).

<sup>23</sup> *Feist Publ’ns, Inc., v. Rural Telephone Svc. Co.*, 499 U.S. 340, 349-50 (1991).

<sup>24</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *Yale L.J.* 283 (1996).

Looking at relationships among news, copyright, and the state as questions of group or collective practice helps us make sense of this apparent paradox. As institutions both embodying and transmitting political debates, early American newspapers helped an informed citizenry participate in shaping their collective identity as a new nation.<sup>25</sup> As the 1800s advanced, there was a collective turn in the news, politically and economically, from the state to broader community and society. What had been mostly separate fields of politically-themed newspapers and “commercial advertisers” (75-95) began to merge. Following the Civil War, newspapers became more recognizably modern bundles of political, cultural, and commercial information. By the end of the century, reporting and interviewing developed as practices and sources of content. The early-nineteenth-century textual “report” produced the late-nineteenth-century human “reporter,” suggesting authorial voice and control as well as material prepared for a public “readership.”<sup>26</sup> Collective social identities shaped by and in light of newspapers’ new communal role also showed up in the added advertising that paid for larger and more complex publishing and distribution operations. The purposes and the benefits of the news have always been the ways in which it helps us see ourselves in relation to one another regardless of setting.<sup>27</sup> Habermas’s “public sphere,” whether local, regional, national, or global, was and is composed of circulating information.<sup>28</sup> Newspapers and the news became social glue in a new age of production and consumption.<sup>29</sup>

Legally, these patterns settled along now familiar lines. As to its informational content, news is largely contained within a non-market sphere of cultural production but is subject to genre-specific customary practices and norms. Copyright-based distinctions between “expression” and “idea” and “fact” embody that identity for news, along with application of the doctrines of fair use (in the U.S.) and fair dealing (in the U.K.) to news reporting. In certain other respects, where interests in speed and priority give the news a commodity-like character, news may be part of the market. In the rare case, improper competition as to priority undermines collective newsgathering interests. Most of the time, genre-based market competition simply runs its course.

A second implication involves how group-based thinking clarifies economically-motivated understandings of the news. News may be a public good, in economic terms. Publishers’ and editors’ longstanding focus on speed and priority confirms that private producers cannot recoup their production costs simply by selling news as a private good. Other

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<sup>25</sup> See Jeffrey L. Pasley, “The Tyranny of Printers”: Newspaper Politics in the Early American Republic (2001).

<sup>26</sup> See Michael Schudson, *Preparing the Minds of the People: Three Hundred Years of the American Newspaper*, 100 *Proc. Am. Antiquarian Soc’y* 421 (1990). The writers were often rewrite men rather than reporters. In journalism as elsewhere, authorship was a social construct.

<sup>27</sup> See Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (1990).

<sup>28</sup> See Trish Loughran, *The Republic in Print: Print Culture in the Age of U.S. Nation Building, 1770-1870* (2007).

<sup>29</sup> See Gerald J. Baldasty, *The Commercialization of News in the Nineteenth Century* (1992).



strategies must be found: privatizing the news in tangible newspapers; bundling the news with advertisements; creating exclusivities via law; and/or obtaining some sort of public subsidy. Each of these strategies has virtues and drawbacks.

Groups help here. The characterization of news as an ordinary public good may overlook a fundamental value of the news as cultural infrastructure, meaning both its social value and its commercial value. The news is not only a good to be consumed by buyers; the news also supplies a flow of circulating information, a resource that members of society build on in constructing individual and collective identity. Exactly how the news is used, by whom, and when, cannot be predicted in advance. The news is valuable not only because it is produced and read. It is valuable because of what happens after it is read. The news is generative of social value in many forms, in Jonathan Zittrain's sense.<sup>30</sup> It generates positive spillovers, in the sense of Brett Frischmann and Mark Lemley.<sup>31</sup> Because the value of those spillovers is diverse and distributed, aggregating demand and pricing it via a market is particularly difficult. The problem is not undersupply of a consumable good; the problem is undersupply of news as infrastructure.

From a cultural policy perspective, the solution is to approach the problem not only as a question of supplying a public good, but also as a problem of governing the news as a shared resource, supplied and managed collectively.<sup>32</sup> Specific governance strategies may vary, but prioritizing exclusivity as such obscures more than it clarifies.

That perspective helps to explain the presence and functions of groups in the history of the news. On the newsgathering side, editors' sharing customs and collectives such as the Associated Press, including relevant formal and customary exclusivities that the AP enforced among its members, helped distribute the initial investment risk associated with producing the news. On the reader side, shared social spaces, such as coffeehouses and newsrooms, and modern collective reading practices institutionalized in newspaper subscriptions helped to aggregate demand for the news and provide critical economic support for newspapers. Postwar advertising, much of it keyed to aggregations of retail businesses in cities and in malls, indirectly aggregated diffuse demand in much the same way.

A third implication involves how a group-based perspective suggests an explanation for the different cultural and copyright trajectories of two fields with shared ancestry and distinctive modern identities: news and science. Newspapers and scientific journals both originated in mid-seventeenth-century correspondence networks for information and knowledge circulating in England and continental Europe.<sup>33</sup> Early newspapers evolved concurrently with an informal trans-national community of scientific researchers, literary critics,

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<sup>30</sup> See Jonathan Zittrain, *The Future of the Internet and How to Stop It* (2008).

<sup>31</sup> See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 *Colum. L. Rev.* 257 (2007).

<sup>32</sup> This refers to the concept of knowledge commons, described in *Governing Knowledge Commons* (Brett M. Frischmann, Michael J. Madison, & Katherine J. Strandburg eds., 2014).

<sup>33</sup> See Adrian Johns, *Miscellaneous Methods: Authors, Societies and Journals in Early Modern England*, 33 *Brit. J. Hist. Sci.* 159 (2000).

and philosophers known as the Republic of Letters.<sup>34</sup> That community coalesced into early scientific societies and journals. The Royal Society was established in London in 1660. The scientific journal now known as *Philosophical Transactions* was first published by the Royal Society's inaugural Secretary, Henry Oldenburg, in 1665. The journal became an official Society publication in 1752, giving it stable sponsorship, functional exemption from market revenue considerations, and prestige via the imprimatur of a royal charter.<sup>35</sup>

The Society and the journal jointly served as a community-based registration mechanism for evaluating and verifying quality, settling claims of priority, and coordinating scientific peers around norms of civility, objectivity, and the distribution of knowledge.<sup>36</sup> Parallel developments took place in France, elsewhere in Europe, and eventually in the U.S. Habermas's concept of the public sphere, referred to earlier in considering the role of news in constructing collective identity, originated in his interpretation of the Republic of Letters.<sup>37</sup> The Royal Society was a key institution of that community.

Well into the twentieth century, copyright claims and copyright-based disputes involving scientific journals were all but unknown. Journal sponsorships and university budgets typically covered the modest publishing costs, and the risks and harms associated with commercial piracy were typically low. The scientific community also adhered closely to values and norms of access to knowledge via reprinting, largely regulated by communities of experts themselves. Both for journals and for individual researchers, attribution, acknowledgement, and credit were critical and sufficient forms of communal currency.<sup>38</sup>

*Who Owns the News?* shows that news trod a related path, distinct in many ways but overlapping in others, suggesting that no single institutional arrangement suits social interests in producing and distributing knowledge. *Philosophical Transactions* in its earliest forms was sufficiently like a newspaper of the late 1600s that an early historian of printing in America, Isaiah Thomas, wrote in 1810 that it should be considered part of the history of newspapers.<sup>39</sup> Neither the Statute of Anne nor the U.S. Constitution, the foundational texts of copyright policy, draw distinctions among types of knowledge. The former states that copyright is meant for “the Encouragement of Learning.” The latter puts copyright in the context of the “Progress of . . . Science.”

But the idea of knowledge in news had only a certain influence before, for all practical purposes, expiring. In the U.K., duties on paper referred to by anti-monopolist politicians and publishers as “taxes on knowledge” (166) were repealed in the mid-1850s, a

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<sup>34</sup> See Anthony Grafton, *Worlds Made by Words: Scholarship and Community in the Modern West* (2009).

<sup>35</sup> See N. Moxham, *Fit for Print: Developing an Institutional Model of Scientific Periodical Publishing in England, 1665-ca.1714*, 69 *Notes & Rec.* 241 (2015).

<sup>36</sup> See Marie Boas Hall, *Oldenburg and the Art of Scientific Communication*, 2 *Brit. J. Hist. Sci.* 277 (1965).

<sup>37</sup> See Margaret C. Jacob, *Scientific Culture and the Making of the Industrial West* (1997).

<sup>38</sup> See Aileen Fyfe et al., *Credit, Copyright, and the Circulation of Scientific Knowledge: The Royal Society in the Long Nineteenth Century*, 51 *Victorian Periodicals Rev.* 597 (2018).

<sup>39</sup> See Isaiah Thomas, *The History of Printing in America; with a Biography of Printers & an Account of Newspapers* (Marcus A. McCorison ed., 1970) (1810).

development that gave a boost to cheap “penny papers” (selling for a penny) and to market competition across the country as the new entrants “pilfered” content from London papers (163-66). In the U.S., in *Clayton v. Stone*,<sup>40</sup> a federal district court rejected the idea of copyright in news precisely because news was too ephemeral, in the opinion of the court, to constitute knowledge or learning (135). That case was decided in 1829, and its influence was widely felt (136-41). As copyrightable subject matter, the news never recovered. The literal text of news stories aside, news consists of unoriginal facts and information. Knowledge is the province of scientists. News is the province of journalists (for its information) and publishers (for the money).

Bringing the narrative up to the present day, the interweaving of cultural interests and economic imperatives threatens scientific knowledge no less than it threatens the news. Late nineteenth-century research science committed to publishing as the route to career advancement and prestige for researchers and academics. Commercial publishers evolved to meet scientific publishing expectations, marrying market capitalism to large-scale public science and peer review, particularly after World War II. The Royal Society first took note of copyright legislation (and photocopying technology) in the late 1940s, taking steps with other journal publishers to formalize a code of “fair copying” to ensure that copyright did not interfere with the circulation of knowledge for research purposes.<sup>41</sup> Commercial scientific publishing has expanded massively since then, and the economic stakes have only grown. Elsevier, a modest Dutch publisher before World War II, is now a global behemoth in scientific publishing known as RELX (after an early 1990s merger with Reed, originally an English newsprint producer and newspaper publisher), and it is enmeshed in controversial claims of ownership regarding science and scientific knowledge.

The point is that differences between treatments of claims of exclusivity in news and in its scientific cousin can be explained with reference to the different organizational ecologies of science and journalism. Science has long been communal and self-governed with respect to both its production and its application; scientific knowledge is expert knowledge; its groups exist largely to shield science from the market.<sup>42</sup> News is customary in its production and collective in its interpretation and application. But its groups exist to produce information for the market and to enable readers to construct their identities in state and society.

## V. Conclusion: Past as Prologue

The concepts and practices highlighted in this review are stylized. Things get messy in practice when those concepts come into conflict with the people, groups and things that embody them. In journalism, evolving technology and demographics periodically unsettle

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<sup>40</sup> *Clayton v. Stone*, 5 F. Cas. 999 (S.D.N.Y. 1829).

<sup>41</sup> See Aileen Fyfe et al., *Untangling Academic Publishing: A History of the Relationship Between Commercial Interests, Academic Prestige and the Circulation of Research* (2017).

<sup>42</sup> See Robert K. Merton, *Science and Technology in a Democratic Order*, 1 *J. Legal & Pol. Soc.* 115 (1942); Michael Polanyi, *The Republic of Science: Its Political and Economic Theory*, 1 *Minerva* 54 (1962).

distinctions between the communal informational attributes of news and its market-related attributes. In science, changing professional expectations and funding structures unsettle distinctions between self-governing scientific communities and market actors.

The law has long reflected and mediated that unsettling, giving us evidence of cultural policies in negotiation. *Who Owns the News?* documents that history at length. The point is not limited to questions of exclusivity in copyright. Other legal regimes similarly address culture simultaneously as “news” or journalism and as market commodity. The Associated Press came under antitrust scrutiny in the mid-twentieth century (265). In 1970, the U.S. Congress passed the Newspaper Preservation Act.<sup>43</sup> The statute offered a subsidy to local newspaper cartels, an exclusivity expressed via antitrust law rather than copyright. The purpose was to forestall the failure of daily newspapers in competitive markets and to assure access to diverse editorial voices. It treated monopoly as a solution, in short, rather than as a problem. The statute did not work either as business or as culture. Yet even today, collusion is sometimes promoted as a solution to the problem of failing newspapers.<sup>44</sup> Better and more imaginative strategies are needed. The point is that these patterns repeat across different cultural domains. Contemporary debates about scientific publishing and Open Science reflect comparable tensions between community-based cultural interests and the mechanics of market capitalism.<sup>45</sup>

*Who Owns the News?* reminds us that contemporary arguments about the purposes of copyright and the purposes of property have ancient roots in science, art and even the news. It reminds us that there are no perfect ends to those arguments, only more or less stable institutional and cultural arrangements in which people believe they are getting something for their money. Maybe that something is useful to them. Maybe that something is useful to society. Whose news? It's our news.

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<sup>43</sup> Newspaper Preservation Act of 1970, Pub. L. No. 91–353, 84 Stat. 466, § 2, 15 U.S.C. §§ 1801 et seq. (2016).

<sup>44</sup> See Brad A. Greenberg, The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It, 59 UCLA L. Rev. 414 (2011).

<sup>45</sup> See Jerome H. Reichman & Ruth L. Okediji, When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale, 96 Minn. L. Rev. 1362 (2012).