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Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law

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1. Introduction

This is a critical moment in our cultural life. The ownership and control of information resources is one of the most important forms of power in contemporary society.[1] Digital technologies therefore have the potential to alter and subvert power structures by changing the ways in which we access, engage with, and participate in the creation of these resources. By the same token, intellectual property laws have the capacity to shore up existing power structures and limit creative practices by enforcing and expanding traditional proprietary norms in the digital environment. Networked technologies present unprecedented opportunities for creative expression and participation in public discourse; but these technologies, and the activities they facilitate, are subject to legal regimes that allocate exclusive rights over information resources, restricting their creation, dissemination and development.

Copyright law, which creates exclusive rights over intellectual expression, is one such regime. Copyright attaches to original literary, dramatic, musical and artistic expression, granting authors and subsequent owners the power to control the production, reproduction, publication and performance of their works. Fundamentally, copyright is no more than 'the right to multiply copies of a published work, or the right to make the work public and still retain the beneficial interest therein.'[2] But through the powers of control that it grants to authors and subsequent owners, copyright regulates the production and exchange of meaning and information, and shapes social relations of communication. Writers, artists, musicians, performers, software programmers, publishers, students, researchers, librarians, teachers, readers, movie-goers, music fans – and so, one might say, all of us – exist in a web of cultural relations subject to the law of copyright.

The emergence of the digital world has rapidly generated a new public idea of communication, discourse, participation and production – one that values networking over singularity, and relationships over individuation. Most importantly, however, this new public idea favours a collaborative model of shared and cumulative cultural dialogue over a proprietary model of cultural production. Within this model, epitomised by social media, fan sites, digital sampling and file sharing, conventional ideas of

individual ownership are swept aside. This explains why the recent focus of intellectual property policy-makers around the globe has been predominantly on the threats rather than the promises of digital technology. Copyright appears to have arrived at a crossroads: it increasingly seems that a choice is being made between maximising the potential of the digital revolution and reinforcing the traditional norms of the analog world. Thankfully, this is a false dilemma: as I will argue, copyright contains *within it* the norms and aspirations that not only permit but necessitate the development of a robust cultural landscape[3] in which citizens freely participate – a social space made more open, accessible, democratic and vital by the advances of network technologies.

From a utilitarian or instrumental perspective, the exclusive rights that copyright grants are justified as a means by which to maximise cultural production and exchange by encouraging the production of intellectual works. The underlying rationale is that such works will be under-produced unless authors are given sufficient opportunity to exploit them for financial return.[4] Rationalised in these terms, the exclusive rights of authors might be said to 'encourage learning'[5] and to 'promote the progress of the useful arts'.[6] From this it should follow that the rights granted to authors under the copyright system affirm the value that we as a society place in the cultural exchange and interaction represented by the production and dissemination of intellectual works.

Many utilitarian versions of copyright theory presuppose but fail to explain this initial premise. A pure economic theory can justify copyright in terms of the economic incentive it offers for authors *qua* rational economic actors, but economics alone cannot explain the nature of the societal benefits that flow from this incentive. This requires us to understand the public interest that resides in the creation and exchange of intellectual expression. From a public interest perspective, the encouragement of cultural production should be understood as the creation of opportunities for improved communication between members of society. The copyright system should be regarded as one element of a larger cultural and social policy aimed at encouraging the process of cultural exchange that new technologies facilitate. The economic and other incentives that copyright offers to creators of original expression are meant to encourage a participatory and interactive society, and to further the social goods that flow through public dialogue. Copyright's purpose is to create opportunities for people to speak, to develop relationships of communication between author and audience, and to fashion conditions that might cultivate a higher quality of expression.

However, the role that copyright plays as a cultural and social policy tool is rarely appreciated. Rather, copyright is widely regarded as a

system whose purpose is the protection of private, proprietary rights. Notwithstanding the intangible and communicative nature of intellectual expression, its categorisation as a species of so-called 'intellectual property', compounded by a particular understanding of the nature of authorship, causes copyright to be commonly conceptualised as just another form of private property. Viewed through the proprietary lens, the intellectual expression of the author is an object that is owned like any other. In the context of a market economy, it is simply a commodity to be freely transferred and exploited in the marketplace. However, the language of 'ownership', 'property' and 'commodity' obfuscates the nature of copyright's subject matter, and cloaks the social and cultural implications of copyright protection. As history reveals, it also appears to result in the continuous strengthening and expansion of the private rights that copyright affords. As such, the way that we traditionally think about copyright – particularly in the modern digital age where works are created, shared, accessed and transformed more easily and efficiently than ever before – is inapposite to the task that we expect it to perform. Copyright is in desperate need of re-imagination.

My aim, in this book, is to provide a route towards the re-imagination of copyright law. This process of re-imagining copyright is not cast as a radical or revolutionary one: rather, it works from within the copyright system, using the concepts and components that constitute the current system, only reconceptualising them within a revised theoretical framework. Through this process, we are challenged to discard the loaded conception of the author as a bearer of rights and an owner of property, and to adopt in its place a vision of the relational author as a participant in a process of cultural dialogue and exchange. This, in turn, requires that we resist the notion of original expression as a stable, objectifiable thing, and instead embrace the idea of the work as a text, utterance or communicative act. Finally, this demands that we reject the characterisation of users of copyrighted works as actual or potential trespassers or pirates, and recognise them instead as active and equal participants in the very process of meaning-making and exchange that underpins copyright norms.

Ultimately, this route should lead us to an understanding of copyright as a system designed to further the public good by encouraging improved relations of communication between members of society, and maximising discursive engagement in a collective conversation. Viewed through this lens, author and text are no longer individualised and isolated from their social situation: it becomes possible for the contours of copyright protection to reflect the dialogic and inherently social nature of cultural expression.

As this suggests, the central concern of this book is the underlying

philosophy or theory of copyright law. I argue that our current copyright model is premised upon the political and ontological assumptions of traditional legal liberalism, and the normative assumptions of possessive individualism. These political underpinnings guide courts' interpretation and application of copyright doctrine with the result that copyright law fails to adequately reflect the realities of cultural creativity, and frequently restricts the very communicative or expressive activities that it is meant to encourage. If copyright is to be a justifiable limitation upon the expressive activities of the public, it must increase opportunities for qualitative cultural production and exchange, ultimately furthering our communication ideals. The appropriate limits of copyright's protective sphere will become clear when we acknowledge that the copyright owner's rights exist only *through* this public interest and not in spite of it. Where copyright obstructs rather than facilitates relations of communication, it goes beyond the bounds of its justification.

The crux of this re-imagined theoretical framework for copyright is developed in Part I of the book, which challenges the liberal and neo-liberal theorising implicit in modern copyright discourse. This lays the foundation for the critique that builds throughout the book: namely, that the existing theoretical framework for copyright is responsible for the (mis) construction of its core concepts. The concepts of authorship, originality and ownership are defined and shaped by the philosophical assumptions that we bring to bear on the processes of cultural creativity and the legal system that we have built in its name. These concepts, in turn, affect the operation of copyright law and the extent to which it achieves its policy goals. The current copyright model, constructed as it is around the transcendent, rights-bearing author-self, is ill suited to the task of encouraging and maximising cultural creativity and the production and dissemination of new intellectual works.

I propose a relational model as a more appropriate framework within which to understand the processes of authorship, its significance for the author and the public, and consequently, the role and purpose of the copyright system. Chapter 2 critically examines the romantic conception of authorship that pervades copyright doctrine, and the power of this conception to obscure the connection between origination and imitation while individualising the author and commodifying his work. Chapter 3 suggests an alternative version of copyright's author-figure, drawing upon feminist theory to develop a notion of the author as a situated, relational self, and authorship as a dialogic and formative process.

I proceed in the following chapters to push towards copyright's re-imagination in these terms. I explore some of the principal concepts and convictions that have caused traditional copyright theory to misrecognise the

nature of the author, the public and the copyright system, and show how a shift in thinking may alter the shape of copyright. Part II of this book challenges the pervasive view that the origin of the copyright interest (in both the moral and legal sense) can be found in the industry or labour of the author. My overarching proposition is that it is a mistake to look solely to the relation between the author and her work as the basis on which to justify the copyright system or to define the scope of the copyright interest. In so doing, we necessarily neglect the social and cultural goals of copyright, and so wrongly augment the scope of the rights conferred under copyright while failing to identify and draw the appropriate limits thereto.

Chapter 4 focuses primarily on the role of labour in defining the moral relation between the author and work by means of which the copyright interest is justified. In particular, it tackles the common conviction, grounded in Lockean theory, that the author as intellectual labourer has a natural right to own the fruits of his labour. Chapter 5 focuses on the role of labour and other elements of authorship in defining the legal relation between author and work – what the author must do to establish a legal right over her work.[7] I examine the doctrine of originality, which provides the defining characteristic of copyrightable expression, and therefore encapsulates many of the dominant misconceptions of modern copyright theory. I suggest that, by re-evaluating the originality threshold and its role in copyright disputes in light of a relational theory of authorship, the central doctrine of copyright law could be realigned with the public policy purposes of the copyright system.

The dialogic theory of authorship advanced in this book emphasises the cumulative nature of cultural creativity. This reveals the flaw inherent in the individualised account of original expression, but it also underscores the importance of downstream, meaning-generating uses of protected materials. To this end, it is essential that copyright leave space for the interactive, dialogic processes of cultural creativity if it is to enhance rather than obstruct relations of communication. As such, Part III focuses on the limits of the protection afforded to copyright owners to allow for the use, transformation and 'appropriation' of protected works as defined by user exceptions, defences and rights.

Chapter 6 takes critical aim at the restrictive fair dealing defence and other exceptions available to users, calling for a large and flexible defence to copyright infringement (even in the face of technical controls) that adequately reflects the dialogic nature of creative processes and the critical role of users in the copyright system. Chapter 7 explores the relationship between copyright protection and freedom of expression, employing relational theory to argue that both copyright and freedom of expression embody the values that we as a society attach to communication and

discursive interaction between the members of our community: copyright's legitimacy therefore depends upon its capacity to accommodate and enhance the principles of free expression.

Much of the doctrinal analysis contained in these chapters is conducted in the context of Canadian jurisprudence. Recent developments in Canada, and in particular the Canadian copyright narrative that has emerged from the Supreme Court of Canada over the past decade,[8] make the Canadian context a fertile one in which to develop a far-reaching theory of copyright. Moreover, Canada occupies a unique position in the common law copyright world: it inherited its copyright system from the United Kingdom; it developed its copyright doctrine in the context of a 'mixed' common and civil law system, drawing in part on continental influences; and, with the United States as its only neighbour and largest trading partner, it is consistently reactive to US developments and political pressures.

In the United States, the analysis of copyright theory often starts and ends with the US Constitution and the power of congress under Article 1 to 'promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'[9] In the US Supreme Court decision of *Eldred v. Ashcroft*,[10] however, the practical force of this clause proved to be far less than many had hoped. Indeed, the US copyright narrative has largely fragmented over recent years into property-based discourse and anti-instrumentalist agendas, as evidenced by the enactment of the Digital Millennium Copyright Act 1998.[11] Meanwhile, in Britain, the copyright narrative has been disrupted, and policy-making largely dominated, by developments at the European Union level. Principled theorising proves difficult in a context where copyright laws are shaped by international obligations that derive from principles foreign to the jurisdiction.[12] Because Canada has lacked a concrete statement of copyright's purpose, and because it is (at least officially) free to shape its copyright law according to its own prerogatives (within the confines of its obligations as a member of the World Trade Organization[13]), the Canadian context offers greater space within which to contemplate the purposes, principles and potential of copyright law in the digital age. For these reasons, the Canadian legal experience affords an interesting and illustrative example from which larger general – indeed universal – lessons can be learned.

The overarching theme of this book is the need to discard notions of natural right, individual entitlement and private property in copyright theory, and to re-imagine copyright in relational terms of communication, community and cultural policy. Throughout the arguments that I have sketched in this introduction lies the unifying proposition: only by

regarding copyright from a public interest perspective and recognising the social value of discursive engagement can we appreciate the system's incentivisation of cultural production as a means by which to enhance relations of communication. Furthermore, it is only by understanding the nature of the author-self as socially situated and intrinsically relational that we can appreciate the importance of communication and dialogue in the formation of human identity and community.

Individualising authorship and propertising intellectual expression causes us to miss what it is that matters about cultural creativity; and so it guarantees that we fail to recognise the real rationale behind the copyright system. The re-imagination of copyright is therefore essential if we are to fully comprehend the social goals that justify its existence – and if we are to have any hope of achieving them.

NOTES

1. James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net?' (1997) 47 Duke L.J. 87 at 87: 'Everyone says that we are moving to an information age. Everyone says that the ownership and control of information is one of the most important forms of power in contemporary society. These ideas are so well-accepted, such clichés, that I can get away with saying them in a *law review article* without footnote support.' The irony of this footnote is not lost on me.
2. *Underwriters' Survey Bureau Ltd v. Massie & Renwick Ltd* (1936) [1937] Ex. C.R. 15 at 20 (Maclean J.), varied [1937] S.C.R. 265 (S.C.C.). Cited in John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd edn (Scarborough, Ontario: Thomson Canada Ltd, 2000) at 1.
3. *Cf.* Julie E. Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain' in L. Guibault and P.B. Hugenholtz (eds), *The Future of the Public Domain* (Netherlands: Kluwer Law International, 2006) at 121–66.
4. See e.g. William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2003).
5. The first modern copyright statute, the *Statute of Anne 1709*, pronounced its purpose to be 'the *Encouragement of Learning*, by Vesting the Copies of Printed Books in the Authors or Purchasers if such Copies, during the Times therein mentioned.' For interesting discussion regarding the historical beginnings of copyright regulation see: L. Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968); Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass.: Harvard University Press, 1993).
6. Art. 1 §8, cl. 8 of the U.S. Constitution. This empowerment clause explicitly enshrines into the Constitution an instrumentalist account of copyright law.
7. The distinction between the legal and moral relation between author and work is explained by Christian G. Stallberg, 'Towards a New Paradigm in Justifying Copyright: A Universalistic-Transcendental Approach' (2008) 18 Fordham Intell. Prop. Media & Ent. L.J. 333 at 343–4.
8. See Daniel Gervais, 'A Canadian Copyright Narrative' (2008) 21 Intellectual Property Journal 269.
9. US Const., note 6 above.
10. 537 US 186 (2003).

11. Pub. L. No. 105-304, 112 Stat. 2860 (1998). See Gervais, note 8 above at 293–4.
12. A pertinent example is Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases [1996] O.J. L77/20, art 3.1 ('[D]atabases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright'). *Cf.* Sections 3 and 3A of the British Copyright, Designs and Patents Act 1988 (as amended by the Copyright and Rights in Databases Regulations 1997 SI 1997/3032). This replaced the traditional 'labour and skill' threshold with an 'intellectual creation' threshold for copyright in data compilations.
13. Canada is therefore bound by the *Agreement on Trade Related Aspects of Intellectual Property* Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).