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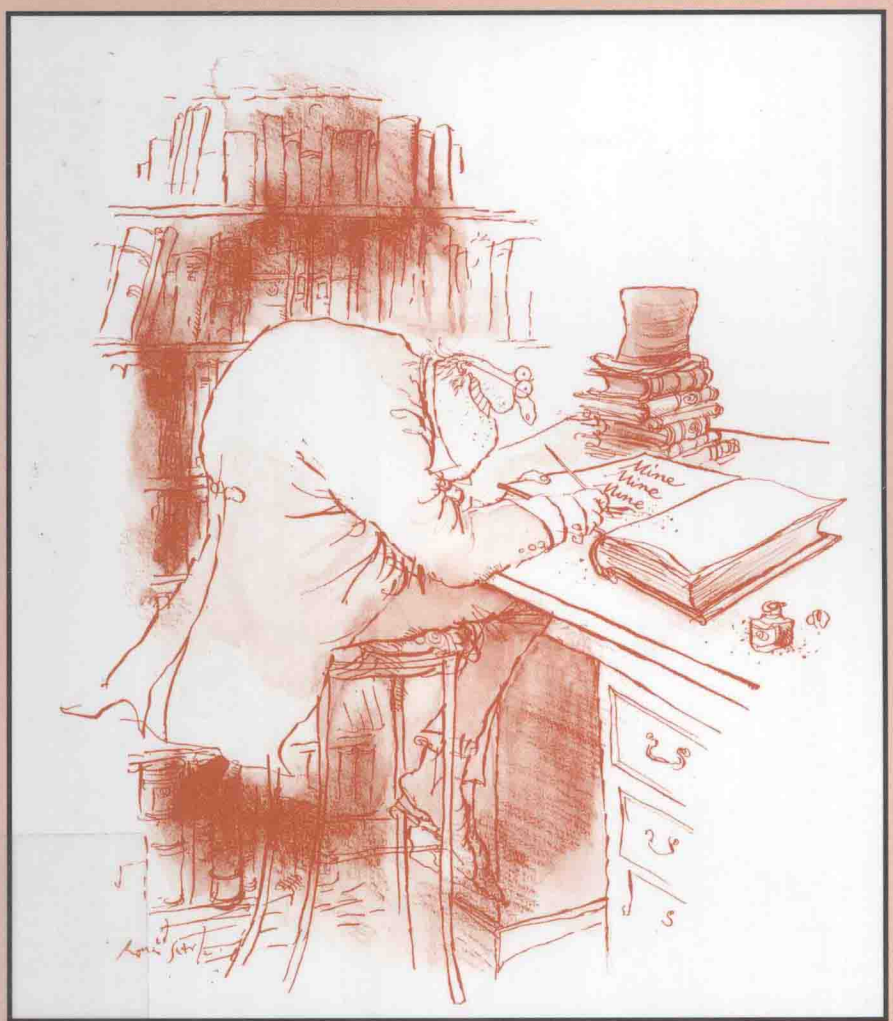
Rethinking Copyright

History, Theory, Language



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Rethinking Copyright

History, Theory, Language

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For Matt the Hat
('Hooray for granddad!')

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Introduction

Having published my first book, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain, 1695–1775* (*On the Origin of the Right to Copy*),[1] in July 2004, I did what every first author does – I waited nervously for the reviews (if any). The first, by Simon Stokes, appeared in February 2005 in the *Entertainment Law Review*. Stokes, an intellectual property practitioner and himself an author,[2] was generous indeed: 'persuasively argues'; 'shed[s] fresh light'; 'a fascinating work of legal history', and so on. He finished his review as follows:

> Whilst Deazley does not directly address the current copyright debate, the reviewer would argue that the development of copyright in the twentieth and twenty-first centuries has been a steady erosion of the public domain, often justified by the need to protect author's rights (which rights are increasingly in the hands of the large global media corporations). By piercing some cherished assumptions about copyright and authors' rights, and in particular through demolishing as a "myth" the traditional view about the development of copyright and displacing the centrality of the modern proprietary author as the *raison d'etre* of the copyright system, Deazley's book is welcome ammunition to those who would try to reassert the public domain.[3]

The review was certainly timely. When it was published I was based in Bournemouth, on a research sabbatical at the Centre for Intellectual Property Policy and Management,[4] working on the first rough drafts for this book. I had done considerable work on the second and third chapters (the 'history' bit) although more was to follow, and was beginning to consider the shape and structure of the fourth and fifth chapters (the 'theory' bit). As if in dialogue with Stokes, a dialogue about which until that time I was unaware (a very

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[1] Deazley, R. (2004), *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain, 1695–1775*, Oxford: Hart Publishing.

[2] See for example: Stokes, S. (2003), *Art & Copyright*, Oxford: Hart Publishing; Stokes, S. (2005), *Digital Copyright*, Oxford: Hart Publishing.

[3] Stokes, S. (2005), *Entertainment Law Review*, p. 41. For other reviews, good, bad and indifferent, see: Gummow, W.M.C. (2005), *Australian Law Journal*, p. 92; Adams, J.N. (2005), *Intellectual Property Quarterly*, p. 222; Alexander, I. (2005), *Cambridge Law Journal*, p. 510 and Budd, A. (2005), *Times Literary Supplement*, 15 July 2005.

[4] See www.cippm.org.uk.

post-modern affair), I had already begun work on a book which I hoped *would* engage directly with the current copyright debate, and in a way that touched upon a number of the themes articulated in the concluding paragraph of his review: the exponential growth of copyright throughout the last hundred years; the nature and significance of the relationship between copyright and the public domain; and the place of rhetoric and myth-making in framing and determining contemporary copyright policy and discourse. However, before further sketching out the substance and aims of this book, let me turn to a case which I have commented upon elsewhere and which, more than any other copyright decision of the UK courts in recent years, acted as a spur for this current enterprise: *Designers Guild* v. *Russell Williams* [2001] (*Designers Guild*).[5]

Anyone familiar with UK copyright law will be familiar with *Designers Guild*, which concerned an allegation of unlawful copying between two wallpaper manufacturers. In August 1995 the claimants launched a new range of designs under the title *Orientalis*. One design from the range, the *Ixia*, which proved to be a considerable commercial success, consisted of a striped pattern with flowers scattered over it, in what was referred to as 'a somewhat impressionistic style'. It was a design which, in the words of the claimants' designer, had been inspired by 'the handwriting and feel' of the French impressionist Henri Matisse. One year after the claimants launched their *Orientalis* range a distributor for the defendant design company displayed a wallpaper fabric, entitled *Marguerite*, at a trade fair in Utrecht. *Marguerite* also consisted of a striped design with scattered flowers overlaid in a similar style. Convinced that the copyright in their wallpaper design had been infringed, the claimants commenced proceedings in December 1996. At the trial the issue for Collins QC was whether the defendant had copied the *Ixia* design, and if so whether they had copied a substantial amount of that design. Concentrating primarily upon whether there was sufficient evidence to establish a finding of copying, Collins QC, observing that the defendant had adopted the 'essential features and substance' of the original design, held in favour of the claimant.[6] The defendant appealed not upon the finding of copying but upon the finding that they had copied a substantial amount of the work. The Court of Appeal, led by Morritt LJ, overturned the previous decision holding that while the defendant had copied the idea of the *Ixia* design, as well as adopting several of the artistic techniques employed in the execution of that design, they had not copied a substantial part of the

[5] *Designers Guild* v. *Russell Williams* [2001] 1 All ER 700; see Deazley, R. (2004), 'Copyright in the House of Lords: Recent Cases, Judicial Reasoning and Academic Writing', *Intellectual Property Quarterly*, p. 121.

[6] *Designers Guild* [1998] FSR 803.

claimant's copyright work.[7] The claimants appealed again, whereupon the House of Lords unanimously agreed to overturn the decision of the Court of Appeal upon the basis that the Court of Appeal had erred in principle in exercising its appellate jurisdiction to reconsider what was essentially a question of fact for the trial judge.[8]

The purpose for revisiting *Designers Guild* is not to embark upon an examination of the various merits and demerits of the decision itself, or the judicial reasoning therein,[9] but to draw upon one aspect of the one opinion with which all of the Lords were in agreement – Lord Bingham's statement as to the 'very clear principle' upon which copyright law rests: '[T]hat anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown'.[10] For such a short synopsis, there is much to unpack. Begin by considering the image which Lord Bingham's observation conjures up in the mind's eye: the farmer toiling in the fields, turning the sod, sowing and nurturing his crop, only to lose the product of his labour to an undeserving other. For the farmer, read the struggling author; for his crop, read the original literary, dramatic, musical or artistic work; for those who reap what they have not sown, read the copyright pirate and thief. The image has a powerful, rhetorical (and if not biblical[11] then certainly bucolic) appeal, providing a simple and seemingly self-evident premise upon which to base a copyright regime. More than this however, it invokes a theoretical and historical provenance that leads us back in time to the late seventeenth century, to the founding of the modern British state, to the political philosophy of John Locke, and in particular to his *Second Treatise on Government*:

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[7] *Designers Guild* [2000] FSR 121.

[8] As Lord Hoffman observed: '[B]ecause the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle'; *Designers Guild* [2001], p. 707. Lord Hoffman made reference to the comments of Buxton LJ in *Norowzian* v. *Arks (No. 2)* [2000] FSR 363, p. 370: '[W]here it is not suggested that the judge has made any error of principle a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this court … will be different from that of the judge'.

[9] For that, see Deazley, supra n. 5.

[10] *Designers Guild* [2001], p. 701. Interestingly, in the latest edition of *Copinger and Skone James on Copyright*, the authors rely upon this very dicta in a commentary upon the 'Nature of Copyright'; Garnett, K., Davies, G. and Harbottle, G. (eds) (2005), *Copinger and Skone James on Copyright*, 15th edn, London: Sweet & Maxwell, p. 23.

[11] Think for example of the right of Abraham to maintain his well because he had 'digged his well' (Genesis 21:30) or of the simple principle that 'thou shalt not steal' (Exodus 20:15).

> [E]very man has a property in his own person ... The labour of his body, and the work of his hands ... are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.[12]

As with Lord Bingham's toiling farmer *labour* is the key, and as is the case for the labour of the hand, then why not similarly for the labour of the head? Open any standard text (introductory or otherwise) on copyright or intellectual property and you will usually come across some reference to Locke's 'labour theory' as one of a number of plausible foundational principles upon which to build a system of copyright, albeit one which has of late fallen out of favour.[13] If you bother to look, you will generally find it rubbing up against other more contemporary and more easily digested justifications which rely upon alternative political, social and/or economic rationales.[14] And yet it is in the concept of labour, and labour theory, that Lord Bingham most readily locates the basic premise of copyright.[15]

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[12] Locke, J. (1690), *Second Treatise on Government*, s. 27, reprinted in Gough, J.W. (ed.) (1966), Oxford: Blackwell.

[13] It has not fallen out of favour with all authors however; consider for example Bainbridge who comments that: 'The basic reason for intellectual property is that a man should own what he produces, that is, what he brings into being. If what he produces can be taken from him, he is no better than a slave. Intellectual property is, therefore, the most basic form of property because a man uses nothing to produce it other than his mind'; Bainbridge, D. (2002), *Intellectual Property*, 5th edn, Harlow: Longman, p. 17. For a more sophisticated articulation of labour theory as a suitable principle upon which to base a system of copyright see, for example, almost anything written by Wendy Gordon.

[14] Typically these involve justifications based upon innovation, incentive and reward, the advancement of knowledge, the avoidance of the tragedy of the commons, or simply the moral right of the author.

[15] For one explanation as to why this might be the case see Sterk, S.E. (1995–96), 'Rhetoric and Reality in Copyright Law', *Michigan Law Review*, p. 1197, in which the author writes that '[o]ne explanation for the general failure to question [dominant] copyright rhetoric is that the participants in the lawmaking process – not only legislators and judges, but also lawyers, opinion-makers, and persons with wealth and political influence – have a self-interest in widespread acceptance of the proposition that authors deserve to benefit from their work. Rejecting the argument that authors deserve returns from their labours also would undermine the claim that prosperous members of society deserve their prosperity ... If authors do not deserve incomes commensurate with their educational backgrounds, then how can other professionals justify high compensation based on their educational attainments? ... If copyright