The Idea of Authorship in Copyright

Lior Zemer

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Preface

In a world of intellectual achievers whose creations are safeguarded by robust regimes of rights of exclusion, the public is collectively isolated from and deprived of recognition of its social and cultural contribution to the process of creating intellectual properties. In this book I argue that copyrighted entities represent the authorial collectivity. I advocate the authorial role of the public in the process of copyright creation. This role has been largely ignored and taken for granted. I take the temerity to introduce and develop a socio-legal argument suggesting a property right for the public in *every* copyrighted enterprise.

This book is about copyright theory. It presents a model of public authorship. The upshot consists of a mix of morally viable copyright-specific justice reasons. The discussion is founded upon the argument that a copyright work is a joint enterprise of the public and the author. Every copyright work depends on and is reflective of the decisive authorial contribution the public makes to the formation of authorial and artistic materials. The author's exposure to and consumption of cultural and social elements is what makes the copyright creation successful. These elements are nurtured and stimulated by the public and constitute an integral part of the public's collective identity. Copyright works should therefore, not be regarded as exclusive private property. Since copyright works profit from significant public contribution, both public and authors should own them under a joint title.

As a way to approach the above issues, Chapter 1 introduces my general argument, maps the theories dominating our copyright culture and positions my argument amongst them. Chapter 2 discusses the conceptual aura surrounding copyright discourse, and considers what benefits we can extract from answering the question whether copyright is an essentially contested concept. In Chapter 3 I define the scope of copyright entitlement. I consider to what extent the entitlement paradigm within copyright law mimics the patterns of the common law allocation of entitlement within the institution of traditional property. I argue that copyright confers a bundle of rights on rightholders, and emphasise that this bundle imposes correlative duties on the public.

In order to account for the public authorial role, we have to eliminate well-established misconceptions dominating our copyright realm. Chapter 4 inquires into the role of the public in copyright creation. It examines the social nature of copyright and argues that authorial and artistic works require contribution from two sources: public and authors. I argue that every copyrighted work is limited *ab initio* due to its dependence on the public authorial contribution. Chapter 5 takes the arguments of the preceding chapter a step forward and presents a social constructionist theory and bases on it limits to copyright. In Chapter 6 I attempt to rein in the tendency to assume that Locke's property theory provides a coherent justification for copyright.

I challenge the many modern copyright-Lockeans who claim that Locke did not account for copyright.

Chapter 7 takes joint authorship as its organising principle. Here I provide a comparative analysis of the requirements for joint authorship and show how the public/author relationship satisfies them all. I then present several alternatives to the present ownership pattern in copyright, reflecting the actual collaborations and the proprietary aspirations of the two parties that deserve property right in copyrighted works – public and authors. Chapter 8 concludes the present study. In this chapter I provide a summary of the main arguments I present and the significance of the public authorship model to contemporary copyright law and policy. I also outline further broader conclusions highlighting the misconceptions we cherish in our vision of copyright.

It should be stated that in this book I do not intend to undermine traditional property. In essence, I reject the allocation of exclusive property rights in copyrighted materials. I also do not intend to announce the 'death of the author' or the end of copyright. I agree that copyright protection is a necessary economic desideratum and should be encouraged by the incentives and rewards that the system provides. I agree on the assumption that cultural and social properties ought to be brought within the domain of some kind of property institution. This, however, does not mean allocation of rights operating on the axis of ultimate private exclusivity.

Although much of the discussion transcends the law of any particular jurisdiction, the statutory and doctrinal examples are drawn principally from particularities of English copyright law. Where applicable, examples from other jurisdictions are given.

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This book is about the concept of authorship and the acute contemporary need to redefine its scope and boundaries. It is a product of a journey. In this journey, which began almost a decade ago, I did not travel without company. There were many passengers, institutions, events, and conversations taking part in the process of building and defending arguments and their eventual expression in this book. I have been fortunate to invite new passengers in almost every corner of the journey and I accumulated debts of gratitude to many people. I owe most, of course, to the supervisor of my doctorate, Leslie Green, for his encouragement, invaluable suggestions and constructive criticism, and for making my research an exciting academic experience. Leslie, I have learned much from you and from our many discussions, and I am confident that it will take many more years for me to fully realise their true impact on my current and future research.

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Lior Zemer
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Chapter 1

Introduction

Against Sole Authorship

Every copyrighted entity represents the creative collectivity. It is a joint enterprise of both the individual author and the public. Contemporary conceptions of copyright reject the collective nature of authorial and artistic creations and invoke copyright to signify entitlement of a certain kind, to mark an individual territory and disregard its social nature. The framework within which the regulation of copyright is examined is embedded with misconceptions and contradictions. At the heart of this definitional complexity is copyright laws' perennial struggle to define the boundaries of when the right to own begins, and when the social realm takes priority. The avenues to resolving this struggle are affected by various implications arising from this complexity. Reaching an effectual balance depends on the success of any definition of copyright in taking into account and rewarding the contribution of key participants in the process of authorial creation.

The law's inability to strike a proper balance between private and public interests in copyright is controlled by the fact that classical notions of property are embedded in policies on cultural and social appropriation. Copyright focuses on authors as a privileged category. It confers a fenced private dominion on rightholders and posits the singular author at the very centre of the copyright creation process. It rejects the very nature of copyright creation as a collectively imagined and produced activity. Hence, the reason for the slogan coined by Boyle: 'Authors tend to win.'[1]

As a legal and social institution, copyright is governed by diametrically opposing conceptions of rights. It is a technical name that does not reveal the concept's intrinsic difficulties. It declares ownership over authorial and artistic resources and confers exclusive entitlement and control to a definitive category of creators, engaged in genuine activity vested in original works. It is a system that sanctifies and preserves the right to ownership. It is a system that allows traditional conceptions of property and ownership to control its social commitments.[2]

Copyright denies the contribution of the public to the copyright creation process and imposes and maintains an imbalance between private and public interests. The

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1 J Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Cambridge Mass.: Harvard University Press, 1996) 116.

2 The key questions to ask are: 'Should we have a system of property rights in the products of intellectual labour? If so, what sorts of things should it cover? And what bundles of rights and other incidents of ownership should be included?' LC Becker, 'Deserving to Own Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 609, 609-610.

role the public plays in the copyright creation process has been explored from various standpoints, but no concept has been sufficiently developed to be incorporated into a paradigm of copyright ownership. We are bound to rethink the way in which our copyright system allocates exclusive private rights in cultural and social items. As Coombe argues: 'If, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols, then it is important that legal theorists consider the nature of the cultural symbols "we" "share" in consumer societies and the recognition the law affords them.'[3] In this book I argue that copyright creation is a collective enterprise. I approach copyright from a social perspective and claim a right for the public in every copyrighted entity, not merely for the sake of philosophical or academic debate, but for matters of proprietary entitlement and control.

Every copyrighted entity is a social construction. It depends on the consumption of cultural and social properties that make an author capable of interpreting and absorbing the significance of these properties, then translating his creative ability into the language of copyright creation.[4] The set of rights copyright confers on authors does not reflect the inevitable causal relationship between authors and public. Moreover, as Scafidi asserts, '[t]his exclusive celebration of one individual not only obscures the role of the community and society at large in the development of intellectual property, but it also shifts attention away from the need for a robust public domain...'[5] Preservation of the collective, and conservation of a rich and diverse array of cultural and social properties rarely conjure a romantic view similar to that of the lone author.

Many plausible arguments justify exclusive property rights over tangibles such as land and chattels. Intellectual property in general, and authorial and artistic works in particular, differ from tangible assets. The distinctions between intellectual and traditional property are three.[6] First, since a copyrighted work is a form of expression, there is a clear and decisive public role – more than in any other form of property – in shaping methods of expression such as languages, and musical and artistic styles.

Second, copyrighted works such as literature, music and films, are the defining components of our culture and social reality. Treating them as assets that can be subject to exclusive ownership essentially means that our culture and social reality can be owned with the perquisites of buying, selling, transferring and excluding. Not only do the expressions of our culture and social environment define our society as a whole, they are also part of what defines our individual personalities and aspirations.

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3 RJ Coombe, 'Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue' (1991) 69 *Texas Law Review* 1853, 1864.

4 See for example P Jaszi, 'Towards a Theory of Copyright: The Metamorphoses of "Authorship"' (1991) *Duke Law Journal* 455.

5 S Scafidi, 'Intellectual Property and Cultural Goods' (2001) 81 *Boston University Law Review* 793, 804.

6 I shall use the term 'property' interchangeably with 'traditional', 'tangible' or 'corporeal' property and the term 'intellectual property' interchangeably with 'intangible', 'incorporeal' or 'abstract' property.

Subjecting these elements to exclusive private property has a direct detrimental impact on the development of our society and its individual members.[7]

Third, the law has recognised that copyright and property, while fulfilling similar ambitions, are different doctrinal areas. The law has designed a different set of rules specifically applicable to copyrights to accommodate their social implications. In that special set of rules, the duration of the right is perhaps of the greatest difference. While perpetuity is not an alien concept in traditional property, in copyright it is.[8] As Hughes observes: 'Perhaps the greatest difference between the bundles of intellectual property rights and the bundles of rights over other types of property is that intellectual property always has a self-defined expiration, a built-in sunset.'[9] Despite the limited duration of the right, it is frequently argued that it creates the danger of conferring on authors a quasi-perpetual right. In fact, as Lessig remarks, this danger is already with us: copyrights have come to be thought of 'not as rights that get defined or balanced against other state interests, but as rights that are, like natural property rights, permanent and absolute.'[10]

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7 As Vaidhyanathan writes: '...there must be a formula that would acknowledge that all creativity relies on previous work, builds "on the shoulders of giants", yet would encourage – maximize – creative expression in multiple media and forms. But because twentieth-century copyright law has been a battle of strong interested parties seeking to control a market, not a concerted effort to maximize creativity and content for the benefit of the public, we have lost sight of such a formula along the way.' S Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York and London: New York University Press, 2001) 116.

8 An author enjoys copyright in his works for 70 years 'from the end of the calendar year in which the author dies.' Copyright, Designs and Patents Act 1988 (1988, c.48) s 12(2) (hereinafter – 'CDPA 1988').

9 J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 296. However, there exists one exception to this rule. The CDPA 1988 provides a unique exception to the standard usage of copyright term, designed especially for Sir James Matthew Barrie's play *Peter Pan*. The exception provides the trustees of The Hospital for Sick Children, Great Ormond Street, London, a perpetual 'right to a royalty in respect of the public performance, commercial exploitation, broadcasting or inclusion in cable programme service of the play "Peter Pan" by Sir James Matthew Barrie, or of any adaptation of that work, notwithstanding that copyright in the work expired on 31 December 1987.' CDPA s 301. The right will terminate if the Hospital ceases to have a separate identity or no longer has as its purpose the care of sick children.

Seville remarks in that respect that '[t]he policy questions are vexing...since authorship draw from the literary commons, it is arguably inappropriate to attribute "ownership" of a character to a single author, at least if it is to extend beyond the boundaries of the character's expression in the author's copyright works' and 'quite apart of the dangers of unwittingly restricting other's use of character types, room must be left for humour, parody, comment, and reference.' C Seville, 'Peter Pan's Rights: "To Die Will Be an Awfully Big Adventure"' (2003) 51(1) *Journal of the Copyright Society of the USA* 1, 7.

10 L Lessig, 'Copyright's First Amendment' (2001) 48 *UCLA Law Review* 1057, 1068.

Although it is not entirely wrong to argue that '[o]ur lives are in every respect dominated by an intuitive sense of property and belonging',[11] when intellectual properties are at stake, ownership and control should not be defined under exclusive terms. I shall argue that copyrighted entities are manifestations of the collective creativity; they are socially and culturally constructed. So we may ask, if works of art and authorship are collectively produced, ought they to be collectively owned? Admittedly, as Underkuffler remarks: property is a legal conclusion but '[t]he idea that property rights...are presumptively free from collective claims has been decisively abandoned, if ever it was true.'[12] I largely base my arguments on the claim that every copyrighted entity is socially constructed and historically contingent.[13] This claim raises serious doubts regarding declarations such as 'I own the copyright' or 'this is my copyright.'

A starting point for the understanding of copyright from a constructionist perspective is the role of collaboration in copyright creation and its place as a key characteristic of the creative society. In fact, collaborative authorship is not an invention of modern times. Masten tells us that collaboration 'was a prevalent mode of textual production in the sixteenth and seventeenth centuries, only eventually displaced by the mode of singular authorship with which we are more familiar.'[14] Vickers asserts that collaborative authorship was a 'standard practice in Elizabethan, Jacobean, and Caroline drama.'[15] Jaszi tells us that in recent times works of art and

11 K Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157, 158.

12 LS Underkuffler, *The Idea of Property: Its Making and Power* (Oxford: Oxford University Press, 2003) 2. See also by the same author, 'On Property: An Essay' (1990) 100 *Yale Law Journal* 127.

This can be supported by Gordon's remark that 'what strikes the backward-looking observer as curious is simply this: that in the midst of such a lush flowering of absolute dominion talk in theoretical and political discourse, English legal doctrines should contain so very few plausible instances of absolute dominion rights. Moreover, it is curious that English and colonial social practices contained so many property relations that actually seemed to traduce the ideal of absolute individual rights. The real building-blocks of basic eighteenth-century social and economic institutions were not absolute dominion rights but, instead property rights fragmented and split among many holders; property rights held and managed collectively...; property relations of dependence and subordination; property subject to arbitrary and discretionary direction or destruction...; property surrounded by restriction on use and alienation; property qualified and regulated for communal or state purposes...' RW Gordon, 'Paradoxical Property', in J Brewer and S Staves (eds.), *Early Modern Conceptions of Property* (London: Routledge, 1996) 96.

13 As Hacking, writing on social constructionism, tells us: 'none of the examples is my own. I deliberately take historical case studies made by other people', and that '[c]ollectively my audiences were participating in the making of this book.' I Hacking, *The Social Construction of What?* (Cambridge Mass.: Harvard University Press, 1999) ix, 172.

14 J Masten, *Textual Intercourse: Collaboration, Authorship, and Sexualities in Renaissance Drama* (Cambridge: Cambridge University Press, 1997) 4.

15 B Vickers, *Shakespeare, Co-Author: A Historical Study of Five Collaborative Plays* (Oxford: Oxford University Press, 2002) 137.