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Review Symposium: Abraham Drassinower's *What's Wrong with Copying?*

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WHAT'S WRONG WITH COPYING? by Abraham Drassinower,
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Some years ago I published a book, AUTHORS AND OWNERS, in which I told the story of the divorce of copyright from censorship and its reconception as property. I described how in the course of an eighteenth-century legal and commercial struggle in Britain the author was established as a property owner, the originator and proprietor of an intangible object, the literary work. The author and the work – like the twin suns of a binary star locked in orbit, I suggested, these two concepts define the center of the modern copyright system. It is precisely this system that Abraham Drassinower seeks to dismantle in WHAT'S WRONG WITH COPYING?, a philosophical study in which he attempts to extract from the tensions and ambiguities in copyright doctrine a coherent conceptual structure. In place of copyright as a property right, Drassinower proposes a system based on the notion of authorship as speech. Whereas traditional copyright concerns the relationship between the author and the work, a person and a notional thing, Drassinower proposes a view centered on the relationship between multiple speakers, between members of a community engaged in conversation.

Drassinower's conceptual starting point is the doctrine of independent creation. Two works may be identical – as in Borges' wonderful story PIERRE MENARD: THE AUTHOR OF THE QUIXOTE – and yet, if independently created, each is accepted as an original work. This means that a work is an action not a thing. Other key doctrines for Drassinower are the creativity or skill and judgment requirement, the idea/expression dichotomy, fair use, and what he calls "non-use" – that is, when only a material rather than a communicative use is involved as in the classic case of Baker v. Selden[1] concerning accounting forms. From these principles and from close analyses of key cases, including Nichols v. Universal,[2] Feist Publications v. Rural Telephone,[3] and CCH Canadian Ltd. v. Law Society of Upper Canada,[4] Drassinower constructs a theory based on the concept of writing as an act of communication. The author thus becomes a speaker among other speakers rather than the originator of a commodity. The work becomes a discourse. Moreover, since expression is always social – expression towards

another – the author's discourse must also be conceived as an invitation to dialogue. An author is a speaker speaking to other potential speakers, all of whom have, in principle, equal rights. Drassinower's approach thus has affinities with Kant's conception of a book as a speech to the public, a conception shared, I might note, by Milton in the Areopagitica. But Drassinower's book is not a mere gloss on Kant so much as an exposition of the way the principles of such a dynamic and socially oriented approach are already implicit in Anglo-American copyright.

"I think these matters are not to be decided by accountants based on percentages." So said Judge Pierre N. Leval in connection with Salinger v. Random House, the classic case in which J.D. Salinger sued to prevent the use of quotations from his unpublished letters.[5] From the reduction of law to utilitarian economic analysis to the glorification of the scientific disciplines and the decline of literary and other interpretive studies in our universities, we are in a moment in which quantification increasingly dominates our culture. Indeed, even within literary and historical studies, the last few decades have seen the emergence of quantitative analyses. I am thinking, among other things, of the use of computerized stylistics to determine authorship and of computerized mapping of correspondents as, for example, between cultural centers in Enlightenment Europe. One of the great appeals of Drassinower's study is that it provides a humanistic theory of copyright, one that puts personhood and expression rather than quantification at the heart of copyright theory. It seeks to rescue copyright from the accountants.

The conventional justification of Anglo-American copyright is incentive theory. From this point of view, copyright exists to provide incentives for the "encouragement of learning," as both the Statute of Anne and the U.S. Act of 1790 put it. That is, copyright provides the author with a limited property right as a spur to cultural production. But, as Drassinower shows, the instrumentalist paradigm does not account for such fundamental copyright distinctions as that between an unprotectable telephone directory and a protectable poem. Moreover, the incentive paradigm – like the property-based discourse that underwrites it – inevitably leads to quantification. Most obviously, the notion that more is better, that *more* cultural production is in itself a good, is an invitation to calculation. More subtly, the notion that copyright doctrine seeks to find a balance between authors' and users' rights, between private property and public purposes, is also an invitation to calculation. Which weighs more, the property or the public purpose? The notion of "balance," Drassinower explains, is an inappropriate metaphor because a balance or scale cannot make distinctions between different kinds of values.

Both copyright minimalists and copyright maximalists assume the instrumentalist conception of copyright. Thus their disputes about the relative advantages of high and low copyright protection – which will produce the greater benefit? – amount, in Drassinower's trope, merely to skirmishes on a shared terrain. Divorced from

normative standards, from grounding in the concept of personhood and speech, Drassinower suggests, nothing but sterile calculations of efficiency can function as a limiting standard on the endlessly expansive claims of copyright. According to Drassinower's view, a genuine interrogation of copyright would look less like a "largely empirical debate about the requirements of progress" and more like a discussion of, among other things, the "meaning of authorship" and "the meaning of progress" (152). As it is, however, copyright discourse is, as he puts it, "drowned in oceans of social science evidence" (153).

As the humanist imperatives of his discourse suggest, Drassinower has a finely developed sense of language and metaphor. Indeed, at the heart of his study is a specifically metaphorical agenda, the attempt to transform the fundamental trope in which copyright is framed from property to speech, from commodity to communication. Speech implies response. All speakers are in principle equally empowered to participate in the conversation. This account offers *equality* in place of efficiency and *dialogue* in place of balance as, in Drassinower's phrase, "metaphors structuring copyright interpretation" (120). The conventional notion is that the utilitarian or instrumentalist account of copyright provides better for the public domain than a rights-based account. Drassinower challenges this assumption, arguing that instrumentalism can offer only an impoverished vision of the public domain as absence or loss – the name for that which, in the cause of the public interest, is decreed beyond protection. But Drassinower's rights-based account – copyright as the right of all speakers – offers an affirmative view: the public domain as a matter of intrinsic worth, a nonnegotiable, constitutive aspect of copyright law. Interestingly, the term that Drassinower actually uses here is "dignity" not "worth" – he speaks of the "inherent dignity" (157) of the public domain – perhaps precisely because of the commercial and economic overtones implicit in "worth."

WHAT'S WRONG WITH COPYING? Drassinower's title asks, and he illustrates his question with a wonderful picture of a quizzically staring parrot, head askew. The meaning of the title gradually becomes clear as the book progresses. What's wrong is the whole discourse that placing copying at the heart of the matter entails. Grounding the account of copyright in speech rather than property entails a dislocation of copying as the organizing principle of copyright doctrine. Copyright, then, "is not an exclusive right of reproduction but an exclusive right of publication" (225). This dislocation resolves some of the tensions in present doctrine. The current status of translation, for example, is incoherent. As a derivative right, a translation must be authorized, but at the same time a translation generates its own copyright. But translation, as Drassinower repositions it, is not properly authorship and thus should not attract an independent right. The "dignity of translation," he explains, "is of a different order than that of authorship" (223). Indeed, grounding the account of copyright in speech rather than property requires the elimination of the whole concept of the derivative work. "Derivative authorship" is, Drassinower remarks, an "oxymoron" (223).

I note that in denying translation the "dignity" of authorship and generalizing to reject the concept of any kind of derivative authorship Drassinower is in effect revisiting and deconstructing the historical process through which the concept of derivative works emerged, starting with the establishment of the translation right. In the United States the pivotal case was Stowe v. Thomas[6] in which Harriet Beecher Stowe failed to prevent an unauthorized German translation of UNCLE TOM'S CABIN. Justice Robert C. Grier's 1853 decision declared that Stowe's copyright was limited to the literal text of her novel in English. Invoking William Blackstone's classical description of the nature of the protected work –"the same conceptions, cloathed in the same words"[7] – Grier declared that the identity of an author's novel does not consist in the characters, ideas, or information "but only in the concrete form which he has given them, and the language in which he has clothed them."[8] Anyone then would have the right to translate Stowe's novel into whatever other language they pleased.

The hinge on which Blackstone's classic formulation turned was the common eighteenth-century metaphor of the dress of language, an ancient trope going back to the Roman rhetorician Quintilian. But metaphors are potentially fluid and unstable. In 1847, shortly before Stowe brought suit, the American treatise writer George Ticknor Curtis had proposed that "the mere act of giving to a literary composition the new dress of another language" did not create a new work.[9] The body under the dress remained the same. Thus Curtis in effect flipped Blackstone's metaphor, insisting that it was the "body" of the work rather than the "dress" that copyright protected. Stowe had invoked Curtis unsuccessfully in her pleadings, but ultimately Curtis's transformation of Blackstone's metaphor prevailed. In 1870 Congress in effect overturned Grier's decision by explicitly granting authors the right to translations of their works. And in 1879, Eaton S. Drone, the author of the principal American copyright treatise of the later nineteenth century, aggressively defended the principle that the author retains the translation right. The translator creates nothing, Drone argued. "He takes the entire creation of another, and simply clothes it in a new dress."[10] Once the protected work was no longer understood as "the same conceptions clothed in the same words" but as some kind of underlying "body" or "creation" the way was clear to establish that other kinds of derivative rights such as movies adapted from plays would also be protected.

Observing the way that Drassinower's argument leads to the elimination of the translation right and the related concept of the derivative work points, I think, to the complex and, as I will suggest, sometimes uneasy relationship between his theoretical project and the historical material on which it draws. At the same time it confirms the importance of Drassinower's alertness to language and metaphor. As the evolution and inversion of Blackstone's metaphor instances, the metaphors in which we think sometimes take on a life of their own as agents in the historical process.[11]

As I have noted, Drassinower's agenda can be understood as the attempt to transform the fundamental trope in which copyright is framed from property to speech. Key to this is the proposition that creativity – or some equivalent concept – rather than labor grounds copyright. But the explicit articulation of creativity theory in the law is relatively recent. Feist v. Rural Telephone was decided in 1991. This is not, I think, a significant difficulty. Drassinower's project – unlike my own in AUTHORS AND OWNERS – is not to provide an historical narrative of copyright's development, but rather to offer a philosophical analysis that resolves tensions and inconsistencies. Whereas I, pursuing my historical narrative, might be satisfied with – might indeed rejoice in – the identification of gaps and contradictions in the historical process, Drassinower's quite different project seeks to resolve such perplexities into a self-consistent theoretical account.

At the same time, however, Drassinower reaches back into the period of copyright's formation to find an historical anticipation of his theoretical account in the classic debate between Lord Mansfield and Sir Joseph Yates in Millar v. Taylor in 1769. Lord Mansfield was the defender of the author's common-law right whereas Yates denied that writing, being immaterial, could be a property. Although Yates accepted that the Statute of Anne could provide the author with a limited statutory protection, the only property right he acknowledged was the author's right to his physical manuscript. Lord Mansfield, as Drassinower notes, countered Yates by remarking that he was talking about the author's "copy" rather than his manuscript, specifying that he used "copy" in the technical sense in which that term had been used for ages to signify an incorporeal right to the sole printing and publishing of a discourse. What Mansfield was in truth invoking, Drassinower argues, was a right to an action not a thing. Thus Mansfield might be seen as anticipating Drassinower's own twenty-first century founding of copyright in action rather than in property, even as the eighteenth-century struggle resulted in the establishment of copyright under the rubric of property. This is not the way we usually think of Mansfield, the proponent of common-law copyright and perpetuity. The historical irony, Drassinower reports, is that "grasping Mansfield as having posited copyright as property" is grasping him from Joseph Yates' point of view not his own (178).

I don't think I have ever before understood Mansfield's position in quite this way, but I accept – at least in a general way – Drassinower's representation, as I gratefully accept his generous comments about my own work. Drassinower talks about writing as an invitation to dialogue and the relationship between his new book and my old one perfectly illustrates his point. But at the same time I note that there remains an ambiguity, a duplicity, about the old term "copy" that should not be lost. "Copy" was indeed used to refer to a right rather than a thing, but at the same time it seems to have retained – and indeed continued to retain, at least into the 20th century – a sense of the physical manuscript prepared for the press. Think of newsroom "copy paper" and of "copy boys" running "copy" from reporters to editors. Moreover, even as he remarked that he used the term "copy" in the technical sense, Mansfield insisted – as the booksellers had done – that the

copy was a form of incorporeal property. It was of course Blackstone, arguing in Tonson v. Collins in 1762[12] and later developing his argument in the second volume of his COMMENTARIES in 1766, who fully transformed discourse into property in formulating the notion of copyright protecting specific sentiments "clothed" in specific words and thereby defining "identity" of a literary composition. Was Mansfield in 1769 thinking along lines that truly anticipate Drassinower's argument or was he, already influenced by Blackstone, allowing the booksellers' notion of "copy" to acquire solidity and the aspect of a thing rather than an action? It is of course impossible to say.

My point is not that Drassinower is "wrong" in his citation of Mansfield. I don't think he is. In fact, I found his reading of Mansfield one of the most exciting and provocative moments in his book and I would not have him excise it. But nor do I think the citation of Mansfield is really essential to his argument. History and philosophy have different agendas. History – a narrative of struggles, contentions, and ambiguities – provides, I think, too slippery a foundation for the erection of an elegant intellectual edifice such as Drassinower is constructing. Drassinower's enterprise is not to tell stories but to rationalize and formalize the residue of history, to reconstruct from its contradictions a coherent and more humane account of copyright. That I believe he has done and done brilliantly.

ENDNOTES

A version of this review also appears in Jurisprudence: An International Journal of Legal and Political Thought.

[1] 101 U.S. 99 (1879).
[2] 45 F.2d 119 (2d Cir. 1930).
[3] 499 U.S. 340 (1991).
[4] 2004 SCC 13.
[5] 811 F.2d 90 (2d Cir. 1987); Transcript of Appearance, October 3, 1986, 17.
[6] 23 F.Cas. 201 (C.C.E.D. Pa. 1853).
[7] COMMENTARIES ON THE LAWS OF ENGLAND, vol 2 (Oxford: Clarendon Press, 1766), 406.
[8] 23 F. Cas. 206.
[9] A TREATISE ON THE LAW OF COPYRIGHT (Boston: Charles C. Little and James Brown, 1847), 293.
[10] A TREATISE OF THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES (Boston: Little, Brown, and Co, 1879), 451.
[11] I discuss the evolution and inversion of Blackstone's metaphor in my AUTHORS IN COURT: SCENES FROM THE THEATER OF COPYRIGHT, forthcoming from Harvard University Press, Spring 2016.
[12] 1 Black W. 321.

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WHAT'S WRONG WITH COPYING? by Abraham Drassinower,
Harvard University Press, 2015, 288 pp., Hardcover, $39.95

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There are several radical aspects of Abraham Drassinower's book WHAT'S WRONG WITH COPYING? One is that he shoves to the side the question of copyright incentives and the economic theory of intellectual property law, both long-standing starting points for copyright theory and doctrine. Drassinower makes no intellectual apologies for this sidelining and justifies it by the second radical aspect of his book: he claims to be exploring copyright law on its own terms, not on terms from outside copyright (economics or behavioral incentives) but from internal to copyright law as written and developed since the Statute of Anne.[1] This he does in impressive fashion, as I will briefly describe below. It is refreshing and a welcome intellectual and aesthetic exercise to work so closely with phrases and arguments of famous copyright cases, as if with one's hands and a pile of clay. As a reader one comes to a new understanding and appreciation for what the cases say and how they can be freshly understood as a way forward in our "copyright wars" debating an increasing copyright scope and a shrinking public domain.[2] As Drassinower says in his introduction, he sets out to "demonstrate that the assumption that copying is wrongful is a radically mistaken way to approach copyright law."[3] And he writes on the first page of the Preface that "[t]he point is to retrieve from within copyright law a neglected appreciation of the copiousness of copying, not as the agitations of wealth-maximization, but as the reverberations of thinking as a shared activity."[4] So while this book engages the on-going debate over the proper scope of copyright – a debate critical for democracy, dignity and peace (could there be any more significant triad?) – the terms of Drassinower's engagement are original and therefore deeply welcome.

There is at least a third radical aspect of Drassinower's book connected to the two already mentioned. Drassinower resets the debate about how copyright law should work and how it explains itself on its own terms by starting with basic concepts mobilized throughout copyright doctrine and recasting them anew. The book begins and ends with "copying" and "the copy," so from the start we have a sense of first principles being righted. But in addition to these cornerstone terms,

Drassinower fully debunks the empty placeholder of "value" in Chapter 1 ("The Poverty of Value") by showing how foundational concepts like "originality" and "works of authorship" as protected categories within copyright law cannot be derived from the notion of "value" or "balance," which are ubiquitous terms in the economic analysis of copyright. He pursues similar ends by revising our understanding of "originality" in Chapter 2, "work" in Chapter 3, "infringement" and "speech" in Chapter 4, the "public domain" in Chapter 5 and "rights" in Chapter 6. The book is a thorough and persistent reconceptualization of copyright on its most basic terms.

For example, in Chapter 1, Drassinower razes the fundamental theoretical concept of "value" and posits a new center to copyright law. He begins by saying: "The basic problem with the model [of construing works … as instances of economic value] is that not any and all value sounds as a matter of copyright law. … Originality guards the entrance, so to speak, into copyright territory. [And yet] [i]t grants copyright to some but not all instances of economic value."[5] After a close, patient reading of four principal cases about originality and its relationship to labor, skill and judgment in copyright law[6], Drassinower concludes the chapter this way:

> Framed as a balance, copyright law becomes nothing more than a distributive mechanism, on the one hand designed to achieve a balance between authors and users, yet on the other unable to make the qualitative distinctions necessary to get the entire balancing process going in the first place. In the absence of a principled fulcrum, copyright law is more the field of a struggle for value, and even a source of contested weapons in that struggle, than a juridical practice elucidating the conditions for the possibility of its resolution. …
>
> [The idea of balancing values] enlists for this task not only the concepts of creativity and skill and judgment, but also the entire arsenal of copyright doctrines that separates out different kinds of values and reserves protection for only some of them. Thus, for example, the idea/expression dichotomy refuses protection to ideas, regardless of their value, and regardless also of the creativity or skill and judgment, if any, that their production may have involved. Similarly, fair use or fair dealing represent a refusal to grant protection for the use of copyright subject matter in respect of certain purposes. These are decision to retain the definition of the author as a value-originator, yet to curtail in light of the public interest the value-amount to which the author is entitled. They are decisions to distribute values toward users rather than authors.
>
> The basic difficulty with this option is that it does not have at its disposal the tools necessary to make the distinctions it requires. It cannot account for the doctrinal operations it deploys precisely because, as distinction between kinds of value, those operations irretrievably presuppose concepts other than value itself.[7]

What replaces "value" as the measure by which we decide the proper distribution of use rights? He says:

> The alternative option is to accept the unambiguous affirmation of creativity and skill and judgment as an invitation to elaborate the specificity of authorship. To follow this option is to pursue relentlessly the logic implicit in the transition from sweat of the brow to creativity and skill and judgment, and thus to take on the task of setting forth copyright doctrine in general and originality in particular not as a mechanism designed to distribute the value of a work but as an elucidation of its distinctive nature. It is only in this way, I think, that we can hope to grasp copyright subject matter not as an instance of unspecified value but – to use the language of copyright law – as *the work of an author*.[8]

At the center of Drassinower's explanation of copyright law, therefore, is not value or balance but a person and her expression. More on this in a moment.

In Chapter 2, Drassinower performs a similar transmutation of underlying copyright concepts with "originality." He elucidates the term in light of critical and longstanding copyright doctrines of "independent creation" (a defense to copyright infringement in the case of substantial similarity), the idea/expression dichotomy (a limit to the subject matter of copyright), and fair use (an example of the lawfulness of unauthorized copying of an author's work). At once intuitive and hard to specify, the content of "originality" in copyright law has long been debated as a basic justifying principle as well as a limitation of scope. Drassinower clarifies this all-important concept as rooted in human social values, offering "speech, equality and dialogue in place of value, efficiency and balance as signposts to guide copyright interpretation."[9] In doing so, Drassinower reveals an underlying preference – a deontological referent as a central feature of his analysis of copyright which he mentioned in his introduction.

In the beginning of the book, Drassinower wagers there exists such an idea of "the inherent dignity of authorship" that "animates" copyright doctrine.[10] He mentions it again when he previews that "the principle of independent creation … recognizes, *as an equality matter*, acts of authorship per se" and that fair use "affirms and confirms the *equal authorship* of each and all."[11] In Chapter 2, Drassinower returns to this theme of equal dignity when explaining the doctrine of independent creation as a feature of originality, copyright's starting point. He writes that it is

> "[n]ot the content of an author's speech, but the *very speaking itself* [that] is at issue in copyright law. … If an author has a right to her original expression, then so must everyone else, including the defendant in any given copyright action. … As soon as the law of copyright grants an author rights in her expression the law of copyright also requires that the author submit to every other person's equal right in *his* original expression. ... As much as the plaintiff's originality, the defendant's defense is rooted through and through in independent creation. Each

> speaks in her own words. … At stake is not an external limitation of the plaintiff's claim but rather the principle holding plaintiff and defendant together as parties to a legal action centered on the authorship of each and both. Independent creation shows us unequivocally that copyright law engages the author not as a self-contained atom but rather as an author among authors."[12]

Drassinower builds similar arguments around the "bilateral recognition of the parties' equal claims as authors" to derive the idea/expression dichotomy and fair use.

Chapter 3 continues this theme explaining through an analysis of Baker v. Selden how the reproduction right is limited to the recommunication of a work as a work, that is, a repetition of the author's speech and not as a tool or a "nonuse" in copyright terms.[13] "Written in 1879, Baker v. Selden remains the most far-reaching reflection available on the relationship between copyright law and digital technology."[14] (Drassinower considers other cases as well, e.g., Kelly v. Arriba Soft and Canadian Ass'n of Internet Providers v. Society of Composers, Authors and Music Publishers of Canada.) Central to the distinction between mere copies and an infringement is the reproduction of a plaintiff's work as a recommunication of her speech. Recommunication – what Drassinower intriguingly calls "compelled speech" – would be an infringement whereas a reproduction that is a "reasonably necessary aspect of the defendant's own authorial engagement" or of the "work in its material form" as a "tool" or "thing" is not.[15]

We hear in this and other explanations of fundamental copyright doctrine the centrality of personhood in copyright law defined in terms of equal dignity and autonomy. It is here I want to focus the rest of my comments because Drassinower leaves this point to be assumed as an acceptable and uncontestable orientation for his philosophical and hermeneutic examination of copyright law. To be clear, I do not disagree with this as a fundamental baseline for copyright law or other legal regimes. I seek only to elaborate upon it in hopes of gesturing toward even more fruitful considerations of "equality" and "autonomy" in copyright debates yet to come. And this brings me, first, to the parrot on his book cover.

I presume Drassinower put the parrot on his book cover because parrots copy and his book embraces copying as a good and necessary act, not a wrongful one. But underlying much of this book's argument is the force of personhood, and parrots are not people nor are they people-like. From the standpoint of equality – which is a standpoint Drassinower insists upon – parrots are like foxes (or other animals). In Pierson v. Post, another case Drassinower artfully rereads and relies upon to illuminate the centrality of personhood in a discussions around property, he describes the fox as silent and necessarily so in order for the case to be about first possession of *things as between people*. Drassinower cleverly reimagines Pierson v. Post with a second fox that sneaks in at the last moment to kill the first fox and carry it away.

> "[I]t does not occur to us … to ask whether Post could sustain a cause of action against Fox 2 in respect of Fox 1. … On the contrary, if immediately after Fox 2 intrudes on the scene to bite Fox 1, Post smiles gleefully and ensnares either or both foxes, it is clear that Post has indeed constituted a property right to either or both foxes. … The silence of the fox, then, signifies its exclusion from the community of entities whose voice is recognized as a voice that counts, whose acts are worthy of respect. When the fox screams because a hunter mortally wounds it, we do not ask it to tell us its story. … But when a hunter screams because another hunter snaps up a prey about to be captured, then we find ourselves before a very difficult question about the origins of ownership and we in fact ask both hunters to tell us their stories. The point is simply that persons, not animals, have standing as owners, as entitle capable of claiming entitlements through their acts, as beings whose stories get a hearing. An entirely different set of concerns would have arisen, for example, had Pierson ensnared and killed Post rather than the fox."[16]

Drassinower's exegesis of Pierson v. Post continues in a remarkable manner, tying it to and illuminating his asserted copyright foundations.

> "If a distinction between persons and things is at the heart of the case, as indeed it is, then the case must be resolved in a manner that respects that distinction. Neither of the parties can be treated as a mere fox. Neither of the parties can be silenced – or treated as if it were nothing more than a means to the satisfaction of the other party's desire. That is what the fox is and that is why it is dead: silent or silenced. … We bother about the fox not because we care about the fox *per se*, but because the parties or persons involved have something to say about the fox. The fox has no independent status or meaning here. Only the parties do. And because each and both of them do, we cannot resolve the dispute by denying either of them that status. We must arrive at the decision of who is legitimately entitled to the fox in a manner that is respectful not only of the winner's, but also of the loser's, status as a person. That is, we must decide the conflict between persons by being respectful of the principle of personality that, according to the case's own presuppositions, each of them equally embodies."[17]

Equality is everywhere in Drassinower's book, and so I cannot resist equating the fox and the parrot. We may wonder if a distinction exists between the two animals that matters for Drassinower's explanation of copyright law to justify the parrot's prominence on the book cover. Of course, Drassinower insists that the "parroting" (my term, not his) of speech is not wrong as long as the speech is in one's own words. Is therefore the parrot on the cover speaking its own words (likely impossible)? Or, more likely, does it resemble the fox, a puppet or tool lawfully dominated by a person, which domination is a sign of privilege recognized by the law as a form of ownership? If speaking one's own words

signifies copyright authorship, which is a form of autonomy recognized as equal dignity in Drassinower's analysis, then a parrot is not an author.

On the other hand, when parrots copy human speech, they are not taking our words (they are not "speaking our words without authorization" a form of compelled speech that Drassinower defines as infringement). Parrots copy to be *in dialogue*. Copying is what parrots do as a matter of social behavior, to relate to and recognize what is going on around them, in particular who is speaking and how. So although like the fox, parrots as animals are to Drassinower's analysis irrelevant from the perspective of the juridical logic of copyright as a regulation of speech between people with equal dignity, parrots "dialogue through copying" – often verbatim copying – and this may be key to the parrot's cameo on the cover. A dog (or a fox) on the cover would make no sense. We may talk to our pet dogs all the time, but dogs do not talk back. And although most canine pet owners would confirm that our pet dogs recognize us as persons to be respected and are finely attuned to the goings on around the house and neighborhood, a dog's failure to copy our speech gives us a sense of their dumbness. We don't think of dogs as smart like parrots. A parrot's *copying* is a sign of their *intelligence*, at least that is the story we tell. And that seems another justification for the parrot on his book cover.

This is not to say that Drassinower claims one must be intelligent (as in smart or quick-witted) to be a copyright author. But he does appear to say that intelligence as in *the character of the human mind* and intelligibility as a matter of language and representation is critical to copyright authorship. Parrots don't have the human mind part, but they are intelligible in the second sense. What they lack, however, is equality, as is painfully made clear by the foxes' demise. Parrots (or foxes) are not equal to people. And equality, it seems to me from reading this book, is critical to the argument about copyright as a "bilateral recognition of the parties' equal claims as authors." So what does Drassinower mean by *human* equality after all?

In the literature on the philosophy and politics of equality, it usually takes one of three dimensions, each contestable in its own right but each nonetheless normatively and practically meaningful as applied throughout legal disputes. One concept is comparative and formal in nature, as in "likes being treated alike," or formal neutrality.[18] This is a basic non-discrimination principle. It suffers, as one can realize almost immediately when trying to apply it in practice, from an empty center.[19] What characteristics count for assessing similarity? If we're different on the basis of race but similar on the basis of test scores, does that mean we should be treated the same or that different treatment is not an equality problem for the purpose of doling out benefits on the basis of scores not race?

Alternatively, if an office provides a female employee who nurses her newborn baby keys to a private room in which to pump breast milk but does not give a similar benefit to another employee who wants privacy for making phone calls, are we treating them "unequal" or is the accommodation for a nursing mother the recognition of a different kind of equality – the equality of access and

opportunity? Failure to accommodate the nursing mother may be seen as a denigration of the choice to nurse and it may – in the aggregate and over time – subjugate her to lost opportunities and less benefits as a woman should she therefore stay home while nursing. Failure to accommodate her choice to be a nursing mother at work becomes a form of dominance, leaving her unequal and less free. Accommodation – treating people differently in order to equalize opportunity – is a different kind of equal treatment that recognizes the harm of subordination and dominance in applications of formal neutrality.[20]

Anti-subordination equality is offended when treatment or denial of access is correctly interpreted as a form of denigration. For example, one may deny nursing opportunities to mothers because of a belief they should be home with their children (we disagree with their choice to work outside the home), or because of a belief that mothers make bad workers (we think men are better employees than women). Both judgments are experienced as subjugations, constraints on free will by virtue of a judgment about the lesser quality of a person. As compared to an anti-discrimination equality principle – formal equality – this anti-dominance equality relies on identifying forms of subjugation that are usually less than mortal wounds (see the fox) and more like coercion or duress (like compelled speech). For his analysis of copyright law, Drassinower engages this kind of anti-dominance equality that rejects the presumption of hierarchies (e.g., authors over users) as well as situations that would perpetrate or perpetuate hierarchies (e.g., broad derivative work rights or narrow fair use). Properly construed, copyright doctrine based on the equal dignity of authors cannot be understood to subjugate one person to another if they are speaking their own words and are to have the right of response (what Drassinower describes in terms of fair use or fair dealing as use of another's words that is "reasonably necessary for the allowable purpose."[21]

But Drassinower also relies on what appears to be yet a related third approach to equality philosophy, and that is the assurance of independent entitlements or freedoms to "develop capabilities."[22] This kind of substantive equality rests on the notion that each person is entitled to certain basic needs to facilitate her agency as worker, parent, or intelligent agent in the world. It requires not a formal equality – everyone gets the same – but a contextual equality. We assess a claim of wrongful deprivation of this equality not in relation to the possessions or opportunities of another person (a nursing room or admission to a school) but according to a substantive standard of living as a person. This is an account of rights that people have *as people* (not parrots) and denying these rights is a denial of human dignity – or as Drassinower might say of "autonomy" – that each person may claim on the same basis as any other, that is, equally.[23]

Drassinower's "equal dignity" approach to copyright, which as I suggest includes both an anti-dominance and a capabilities understanding of equality, deserves a fuller exposition in his analysis. Although to be fair, it appears to be an assumed baseline for the book and not the subject of the book itself. He explains, for example, that equal dignity at the core of copyright requires the absence of

subordination of one copyright author to another. But, as one recognizes quickly, being enjoined from speaking another's words even if you are engaging them as an author *is* a form of control, just not an unlawful form (according to Drassinower). Why? Because he says this control is actually (or should be) manifested as self-restraint and mutual deference to authorship as such. As he says in the very beginning "your authorship is not a prerogative to control mine, as if you could treat my agency as a mere appendage subordinate to yours."[24] Whether restraint appears as noncopying or as a form of tolerance of another's speech (or both) is unclear. Why mutual restraint respecting one another's authorship is not an unlawful form of dominance or control that would otherwise be a denial of equal dignity seems circular unless it rests on an even more basic principle than equal respect of another's choice when, whether and how to speak. Drassinower writes, for example, that "[c]opyright infringement is ventriloquism practiced on an unwilling subject, … a wrong to [an]other, whose mouth is being moved … behind her back,"[25] which sounds as form of dominance and submission, whereas engagement through personal use or fair dealing is not harmful in the juridical copyright order he derives because it "fulfills the destiny of a work."[26] These are evocative images that elaborate the conversation, and yet they require more explication if the order Drassinower claims to establish is to make the best sense.

A key to Drassinower's argument is the public domain, a point that could use even more emphasis at the beginning of his book as it eventually, toward the end, refocuses the conversation from persons (individuals) to people (society). This is a tricky analytical move in any legal or political philosophy because of the discomfort with aggregating individual preferences to reach a consensus on what is good for peace and prosperity over all. But Drassinower makes it well by the end of the book when he says forcefully: "equality … anchors the public domain."[27] And so finally the important question arises as to how to conceive of equality as an individual right (of authors or otherwise) as well as a social good that structures the public or body politic. Conceiving of the public domain as essential to a capabilities approach to social welfare (which includes copyright protection) may help. Whether or not Drassinower is thinking in these terms, he devotes much of Chapter 5 to the "necessary, integral and irreducible status of the public domain" as the fountain from which copyright welfare for all authors springs.[28] And Drassinower's account of copyright "defines and confines the scope of an author's copyright in light of her place in the ongoing *conversation* of which she is but a participant,"[29] the conversation (or "dialogue") being public not private. (The title of the chapter is "Public Domain as Dialogue.") "Dialogue" undersells the point, although it ably amplifies the bilaterality and equality norms structuring the rights at issue. What Drassinower seems to mean he says later at the end of this chapter and then again at the end of the book:

> Copyright law arises not as a distributive balance of intangible commodities but as a juridical order addressing aspects of the interaction between speaking beings … The public domain thus emerges far more forcefully, not as a depository of value for which no payment is extracted,

> but as a radically nonnegotiable set of conditions for dialogue flowing from the very nature of copyright subject matter as communication."[30]
>
> …
>
> In the balance model [of copyright], a work of authorship is a fenced-in or propertized intangible. … Copyright subject matter is thus imagined as a self-contained entity, a thing, limits to which come from its outside, so to speak, as challenges to its producer's otherwise despotic dominion. … In the dialogue model, by contrast, an author's right to exclude others from his choice to speak or not speak is instead, and necessarily, a mode of inclusion. Speech contemplates audiences and interlocutors. It has with itself, by its very nature as address, the principles of its own self-limitation. To posit the inherent dignity of authorship is simultaneously to posit the public domain. In the world of copyright, an author is no sovereign despot in an inverted world of commodities. She is rather a citizen among others in the great Republic of Letters.[31]

And thus the public domain in copyright is nothing short of the sustainable conditions on which we all rely to communicate and assert ourselves in our society that promises equal dignity to all.

Drassinower suggests that instead of efficiency and value as the public goods copyright seeks to achieve, equality and autonomy (the equal dignity of authors) structure the juridical order of copyright doctrine. If, as he writes, "balance" is a form of "war,"[32] then "equal dignity" is a form of "peace." As mentioned above, equality does not mean equipoise, but a quality of person, a citizen, who may demand to be read or heard in a certain way. This equality of citizenship (which necessarily comes with positive rights) is actually quite revolutionary. (We usually demand freedom *from* interference by the state or others not the freedom *to* engage or use or possess with the help or forbearance from government or others). It is revolutionary in the context of welfare rights (food, housing, healthcare, education) and so it is with copyright. Drassinower dips into this revolution by, among other things, declaring the derivative work right inconsistent with copyright's own basic structure. He explains that "derivative authorship" imposes a hierarchy of authors, which, if authors are equal citizens, is intolerable. He also does so by immunizing the "personal use" (copying for the purpose of enjoying the work).[33] These are highly contested issues in copyright law today, especially in our digital age when both derivative works and personal uses are inevitable and everywhere, and Drassinower boldly deals with both.

Although he does not say it explicitly, Drassinower implies that we express ourselves, whether through speaking, writing or some other communicable medium, in order to be in the world and to insist on our recognition. Copyright law must be understood to equally facilitate this most basic human feature. This too is revolutionary as a matter of intellectual property law. Only relatively recently do intellectual property scholars resemble human rights advocates; the overlap remains a nascent and promising field for further study and concern.[34]

Whether or not Drassinower would accept this description of his work, WHAT'S WRONG WITH COPYING? is a book about human rights inasmuch as it is about equal dignity and self-expression.

ENDNOTES

[1] Statute of Anne (1710) is considered the first Copyright Act on which the U.S. and Canadian copyright statutes are based. WHAT'S WRONG WITH COPYING? at 146.
[2] Peter Baldin, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE (Princeton University Press, 2015).
[3] WWWC, p. 2.
[4] Id., p. ix.
[5] Id.18.
[6] Feist Publications Inc. v. Rural Telephone Services Co. Inc. and CCH Canadian Ltd. V. Law Society of Upper Canada, Walter v. Lane, University of London Press v. University Tutorial Press.
[7] WWWC, p. 51.
[8] Id., p. 53.
[9] Id., p. 75.
[10] Id., p. 7.
[11] Id., p. 12 (emphasis added)
[12] Id., p. 57-63.
[13] Id., p. 87.
[14] Id., p. 105.
[15] Id., p. 99-100.
[16] WWWC, p. 123-24 (animal rights notwithstanding).
[17] Id., p. 124.
[18] Aristotle's foundational principle of equality—that things . . . alike should be treated alike—grounds constitutional equal protection doctrine. Aristotle, THE NICOMACHEAN ETHICS bk. V, at 1129a-1131b (David Ross trans., Lesley Brown ed., 2009) (c. 384 B.C.E.). See Jessica Silbey, Reading Intellectual Property Reform through the Lens of Constitutional Equality, 50 Tulsa Law Review 549, 553 (2015) (hereinafter IP and Equality).
[19] Peter Westen, The Empty Idea of Equality, 95 Harvard L. R. 537 (1982).
[20] IP and Equality, p. 559; see also Reva Siegel, Equality Talk: Anti-subordination and Anticlassification Values in Constitutional Struggles over Brown, 117 Harv. L. Rev. 1470, 1472-73 (2004).
[21] WWWC, p. 210.
[22] The capabilities approach is largely associated with Amartya Sen and Martha Nussbaum. See, e.g., Amartya Sen, THE IDEA OF JUSTICE (2009); DEVELOPMENT AS FREEDOM (1999) and Equality of What? in McMurrin (ed.) Tanner Lecture on Human Values, Cambridge: Cambridge University Press (1980). Martha Nussbaum, Capabilities as Fundamental Entitlements: Sen and

Social Justice, Feminist Economics, 9 (2/3): 33-59; Human Functioning and Social Justice: In Defense of Aristotelian Essentialism, Political Theory 20(2): 202-246 (1992).
[23] In this way, Drassinower embraces a Kantian philosophy, although he mentions Kant only in passing and only in reference to his 1785 essay "On the Wrongfulness of Unauthorized Publication of Books." WWWC, p. 112.
[24] Id., p. 6. This is appears to be a close approximation to Kant's categorical imperative.
[25] Id., p. 113.
[26] cite. The idea that a work has a "destiny" is related (and wonderful!) and worthy of more consideration, but it is beyond the scope of this review essay.
[27] WWWC, p. 221.
[28] Id., p. 147.
[29] Id., p. 187 (emphasis added).
[30] Id., p. 182.
[31] Id., p. 226.
[32] Id., p. 54.
[33] Id., p. 183.
[34] See, e.g., Laurence Helfer, Human Rights and Intellectual Property: Conflict or Coexistence? 5 Minn. J. of L. Science & Tech. 47 (2003).

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WHAT'S WRONG WITH COPYING? by Abraham Drassinower,
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The book, WHAT'S WRONG WITH COPYING?[1], has two objectives. The first objective is to show that the dominant economic approach to delineating copyright's scope and limitations is fundamentally flawed. The second is to derive from copyright doctrine directly a more persuasive and effective alternative to understanding and ultimately defining copyright's scope and limitations. Unfortunately, the book fails to achieve either.

The book presents three principal critiques of the dominant economic approach to copyright. The book's first critique of the economic approach is that copyright does not extend or deny its protection to any given creative effort based upon the value the effort generates.[2] Rather, it focuses on the nature of the creative effort, and asks whether the creative effort at issue represents authorship. We cannot, therefore, understand copyright generally, or copyright doctrines, such as originality, specifically, as an attempt to maximize value, or so Drassinower contends. This critique is a strawman.

As Drassinower himself recognizes, in economics, we distinguish between public and private goods not based upon the value they create, but on the presence or absence of rivalrous consumption.[3] An economics or instrumental approach is not thus limited to differentiating things based upon value. In intellectual property, we distinguish between copyrightable works of authorship and patentable inventions. We distinguish them not based upon the value they create, but based upon whether the creative activity at issue results in a work of authorship or an invention. These legal categories are not, however, deontological constructs, but in my view, reflect underlying instrumental concerns. I would argue (and indeed, have argued) that we separate creative activities into patent and copyright because the cost investment and cost recovery structures associated with these two creative activities differ.[4] Because the cost structures differ, we need differing legal regimes, with differing prerequisites and differing scopes of protection to identify when a market failure is likely, and to remedy it without imposing undue social cost. For example, the requirement that an invention be nonobvious before it is

entitled to a patent makes sense given the cost investment and recovery structure for the sorts of creative activities we protect through patent. There is no need for patent to protect original and novel inventions that are also routine, trivial, or obvious. Given the intrinsic difficulties associated with copying the sorts of things that we protect as patentable inventions, the ordinary workings of the market will tend to ensure the efficient development of routine or obvious advances.[5] Extending patent protection to such obvious advances would impose social costs, without any return benefit. In contrast, the originality standard better defines when market failure becomes likely, in the absence of some special protection, for the sorts of creative efforts we protect as copyrightable works of authorship. Consider the counterfactual: If we required nonobviousness for a movie to receive protection, only a handful of movies over the last twenty years would likely qualify. More importantly, the vast majority of movies, including virtually all romantic comedies, would not satisfy the standard and would therefore be left unprotected. Without protection, it is at least plausible that many of these movies would not be forthcoming. Originality is not therefore a deontological principle in copyright, but an instrumental one. Originality best defines, for the sorts of creative efforts we protect as authorship, when market failure becomes likely.

Similarly, the differences between patent and copyright's respective scopes of protection also reflect instrumental concerns. For example, patent protects against independent creation of the same invention, but copyright does not. This difference does not reflect some deontological difference in the intrinsic nature of patent and copyright, but real-world instrumental concerns. Specifically, near-simultaneous independent creation of competing inventions is more likely than near-simultaneous independent creation of competing works of authorship. For example, assume that three companies are racing to develop cures for three diseases. They are all using similar methodologies and similar information, yet one company will win the race in each case, coming in a month or two ahead of the others. If the patent infringement standard were "copy," rather than "make, use, or sell," then the winning company would have at most a month or two to recoup its research expenses before the others entered the market and near-perfect competition began.[6] Under such an infringement standard, none of the companies would recover their research investment. Foreseeing that result, none would make the investment. A copying standard would not therefore solve the market failure problem for the sorts of creative activities we protect as patentable inventions. In contrast, the "copying" standard works reasonably well to resolve the market failure for the sorts of creative activities that we protect as works of authorship. Independent creation of identical movies, for example, seldom occurs, and even where two movies happen to explore the same topic at the same time, the movies invariably differ sufficiently that competition between them will not drive prices to marginal cost. Thus, the presence of A BUG'S LIFE or DEEP IMPACT did not reduce the ticket price for seeing ANTZ or ARMAGEDDON.

The fact that we cannot differentiate between authorship and works of authorship, on the one hand, and a variety of non-authorship creative products, including patentable inventions, on the other, based upon value is simply irrelevant. We

provide different prerequisites and scope of protection for inventions (through patent) and works of authorship (through copyright) because the cost investment and recovery structure for these two types of creative endeavors differ. Because of the differing cost structure, different prerequisites identify when a relevant market failure is likely, and different scopes of protection remedy the relevant market failure at the least social cost.

The second critique the book offers is to point out that the empirical balancing of costs and benefits an economic approach requires can be indeterminate, given the data available. In Drassinower's view, this occasional indeterminancy renders the economic approach unhelpful.[7] While true in some cases, this sort of indeterminancy is not a problem unique to the economic approach. Any approach that we might use for drawing a line between, for example, protected expression and unprotected idea will have the same problem. Whatever approach we use, there will be cases where the line can plausibly be drawn on either side. Indeterminancy is not therefore a problem unique to the economic approach. Furthermore, even if this critique somehow cut more deeply as applied to an economic approach, better data and proper application of the burden of proof would seem the proper response, rather than abandonment of the economic approach altogether. More importantly, even if there are hard cases under an economic approach, there will also be easy ones – cases, such as *Google Books*, where the expected welfare gains from finding fair use far exceed any plausible estimate of the welfare losses.[8] We should not get so caught up in the search for a perfect line-drawing tool that we miss the obvious: The economic approach does a better job than any conceivable alternative both in identifying the salient characteristics of an easy case and in identifying the right outcome.

The book's third critique of the economic approach, and perhaps the most interesting, is to suggest that by embracing the economic approach, proponents of narrower copyright (or "copyright minimalists") have allowed the proponents of broader copyright (or "copyright maximalists") to set the terms of the debate and have thereby already lost.[9] As support for this critique, Drassinower points out that over the last two hundred years the economic or instrumental approach has been the dominant paradigm in Anglo-American copyright jurisprudence and over that same time period, copyright protection, both in scope and duration, has steadily expanded.[10] The weaknesses in this argument are, however, readily apparent. As Drassinower himself admits, this historical correlation does not establish causation.[11] We have, after all, seen the same expansion in copyright protection in France and Germany, where non-instrumental, rights-based perspectives hold sway. Indeed, some of the expansion in United States copyright protection has come about due to efforts to harmonize our consequentialist copyright laws with those of deontological Europe. Nor should we discount the substantial, if sometimes hidden, role rights-based accounts play within United States copyright law itself.

In addition, for much of its history, the direct costs of copyright have been largely hidden, if not altogether lost, in the more general welfare losses associated with the

natural monopoly cost structure and the resulting oligopolistic market structure of the copyright industries. Given the technology and market structure in 1950, it did not matter whether the copyright on a book lasted five years, fifty years, or five hundred years. For virtually all books, there would be an initial print run, after which the book went out of print. Given the technology and market structure at the time, there was essentially no chance that another publisher would pick up the book and reintroduce it, whether the book was under copyright or not. The repeated extension of copyright's term through 1998 did not therefore reflect a failure of the consequentialist approach, but an accurate assessment that the costs of longer copyright, given the technology and market structure at the time, were essentially zero. True, the benefits were also essentially zero, and personally, I would have preferred Congress to strike a different balance. But at the time, given the technology and market structure, neither the costs nor the benefits of a longer copyright term were particularly compelling. That Congress chose one result, rather than the other, in these historical debates is not therefore a meaningful indictment of the consequentialist approach.

Copyright has always been driven by changes in the cost of creating and distributing works of authorship. In the analog era, just as we could offer a reasonable instrumental justification for a longer copyright term, we could also offer a reasonable instrumental justification for a broad derivative or reproduction right. With analog technology, costs and market structure often meant that only one film version of a novel would be created. Given that, there was little reason not to require that one film version to be authorized. Only one license would need to be negotiated; so transaction costs would be small. Moreover, given the distribution market for films at the time, requiring a license imposed no deadweight losses. Whether a film was an authorized or unauthorized derivative work, the admission price at the theater remained the same. At this time, a broad derivative or reproduction right made reasonable instrumental sense.

Digitization and the Internet have fundamentally changed the cost of, and the associated market for, the creation and distribution of works of authorship today. With the technology available today, works that have been out of print for years could be, but for unduly long copyright, reintroduced into the market.[12] Rather than a narrow trail of derivative works, any given novel today might spawn thousands of competing, overlapping derivative works. Requiring licenses for all these uses becomes impracticable, and the deadweight losses if we insist on licensing become substantial. Just as the introduction of the printing press changed the cost of creating and distributing works of authorship in a way that justified the initial creation of copyright, so too today, changes in the cost of creating and distributing works of authorship due to the digital revolution have changed the cost-benefit calculus of copyright. It is this changed calculus that makes today's copyright both unduly long and overly broad. Consequentialist or instrumental reasoning can justify both copyright's initial creation and today's current need to cut it back; a deontological or rights-based approach cannot.[13]

Rather than concede the field to the copyright maximalists, the consequential approach is beginning to push back and to push back strongly. True, we are just at the beginning. Progress in narrowing copyright is painfully slow. Progress is slow not because instrumentalism is the wrong tool, but because judges are people, and people fear change and cling to the familiar (and copyright owners do not want to give up what they perceive as theirs). As a result, as we move forward to a happier world of narrower copyright, there is likely to be some backsliding. Already, however, the knee-jerk tendency to expand copyright to encompass new uses, which might have been appropriate in the analog era, is starting to fade. The defeat of SOPA and PIPA in Congress, and the expanding scope of fair use in the courts over the last fifteen years perhaps best illustrate this slow progress.

As a consequentialist proponent of minimalist or narrow copyright, I am strongly encouraged by what I have seen over the last fifteen years. We are just now beginning to gather the sorts of empirical evidence that we need to understand the role copyright plays in the creative process, as well as the costs it imposes. We are just now moving beyond the casual assumptions and bedtime stories that have dominated the discussion and helped to drive copyright's expansion over the last two hundred years. We are just now beginning to win the battle for a limited copyright that actually promotes "the progress of Science." Rather than celebrate with me these initial signs of success, Drassinower asks me instead to abandon the consequentialist approach on the cusp of victory.

Now, if he could offer guaranteed victory through his alternative, I might be tempted. But he cannot. All he can offer is an unpersuasive principle derived from a flawed methodology. As his methodology, Drassinower examines some of copyright's key cases and doctrines in an attempt to discern the underlying copyright principles that animate copyright law.

As applied to case law, this methodology is intrinsically flawed. In the natural sciences, we can make observations of, for example, objects falling and derive from our observations a hypothesis, and eventually, a theory of gravitational attraction. This methodology works in the natural sciences because each observation is driven by the same underlying natural law. There is no corresponding natural law of copyright. Most obviously, copyright, unlike gravity, is historically contingent. If Drassinower applied his methodology to 16th century copyright (no protection), to 18th century copyright (short, limited protection), or to 20th century copyright (long, broad protection), he would derive very different underlying principles. Indeed, even within the 20th century, applying his methodology to United States copyright law before the Supreme Court's decision in Feist Publications (sweat-of-the-brow justifies copyright) and after the decision (sweat-of-the-brow does not justify copyright) would paint quite different pictures of copyright. *Stare decisis* or statutory language may limit the discretion of individual judges in particular cases, but at the end of the day, judicial decisions remain *ad hoc* resolutions of the particular disputes that parties, for their own idiosyncratic reasons, choose to bring, and the arguments the parties choose to make.

Holding up a mirror to judicial opinions in an attempt to see the underlying principles that bind them is futile. There is no there there. All that Drassinower can see in such a mirror is an imperfect reflection of himself. He is not discovering the hidden principles of copyright through his methodology, but only the values, preconceptions, ideologies, and biases that he brings to the search. This is most evident in his selection of a small subset of copyright cases, focusing on Feist Publications, and the corresponding copyright doctrine of originality as the basis for his methodology. Had he started with some other case, such as Campbell v. Acuff-Rose Music, or some other doctrine, such as Congress's decision to extend copyright protection to computer programs, his methodology would have led to a vastly different perspective on copyright's fundamental principles.

Even if we put to one side the deeply flawed methodology, however, the principle Drassinower derives – that copyright exists to prevent forced or compelled speech – is equally problematic. Most obviously, it is not literally accurate. I am familiar with instances of what I would consider compelled speech. It is compelled speech when a prisoner of war is tortured until he makes a video renouncing his home country. It is compelled speech when, before the Fifth Amendment prohibition on self-incrimination, a criminal defendant could be forced to either admit guilt or perjure himself. It is not compelled speech when a recording of the song "Eye of the Tiger" is played in connection with Kim Davis's release. True, that may upset the band-members of Survivor, but characterizing that use as "compelled" speech is simply inaccurate. No one is torturing or imprisoning the band to force them to play the song; they are not even physically present. While playing a recording of the song may lead some to believe (mistakenly) that Survivor supports Kim Davis or her position, the First Amendment's answer of more speech seems fully adequate to redress that concern.

More importantly, for me, however, Drassinower's principle misses entirely the point of copyright. I have been the victim of copyright infringement. When I submitted my Fair Use article to law reviews in the spring 2002 cycle, a student editor at a leading law review took the Word file that I submitted, changed the title of the article, substituted his name for mine as the author, and submitted it as his own work to various law reviews. That fall, the article published first under his name in the SEATTLE LAW REVIEW and then came out a few months later under my name in the BOSTON UNIVERSITY LAW REVIEW. When I discovered the infringement, the notion that he was forcing me to speak never crossed my mind. Nor was my concern that he copied. Rather, my concern was almost entirely the moral rights concerns of attribution and integrity.[14] Another was claiming my work as his own, and he had published the initial draft, which I had revised substantially before publication.

I recognize, of course, that copyright does not exist to serve my idiosyncratic preferences. But I do not believe my experience in this regard is unique. In all my years as a copyright attorney, no client has ever approached me and complained that another, by copying her work, is forcing her to speak. Almost always, the client's complaint is that someone has taken what belongs to them. The closest I

have seen to the forced speech concern is when private (and usually embarrassing) letters, texts, or e-mails are published, but even there, the concern is more privacy than forced speech.

I would be perfectly willing to put my personal feelings aside, however, if the principle Drassinower offered, despite its imperfect fit with my own experience, would prove more effective at reigning in copyright's excesses on the key battlefronts of today. Yet, it does not. In my experience as a copyright lawyer, originality is seldom decisive; thus, it strikes me as an odd place to center copyright law. Rather, the key battlefronts, as I see them, are the scope of fair use, whether the copyright term should be extended another twenty years, and the scope of secondary liability. The instrumental approach has helpful, and in my view, very persuasive arguments to offer on each of these issues. It has already shown success in expanding fair use and in beating back attempts to expand secondary liability. In these contexts, the instrumental approach focuses precisely on what we should care about – the great things, such as a searchable database of all books, and perhaps the Internet entirely, we risk losing if we interpret copyright over broadly.

Drassinower employs his principle of forced speech to argue for similar outcomes on each of these issues. Thus, on Google Books, he insists under his principle that Google is not speaking for itself; therefore Google's copying should not count as actionable use under copyright.[15] This interpretation is, by no means, self-evident from the principle itself. But, even if it were, it omits entirely the reasons why we should care. It substitutes an abstract principle for the real concerns at issue, and thus lacks entirely the emotional salience and resonance that is necessary to carry the day.

As a scholar, my life's work has been devoted, in large part, to correcting errors and pointing out common fallacies in the instrumental case for broader copyright, and to showing that the proper application of instrumental principles points to the need, today, for radically narrower and shorter copyright. Drassinower's book is a direct assault on my life's work. Perhaps it is not surprising then that I did not find the book particularly helpful to understanding copyright.

ENDNOTES

[1] Abraham Drassinower, WHAT'S WRONG WITH COPYING? (2015).
[2] Id at 18 (arguing that the economic approach to copyright seeks to maximize the value generated by works of authorship, conceived as information commodities, but then pointing out that copyright's principal prerequisite for protection, originality, "is not about value *per se*").
[3] Drassinower mistakenly identifies nonexcludability as a necessary precondition for the existence of a public good. He further mistakenly asserts that copyright

solves the market failure associated with public goods, at least for those public goods that also constitute works of authorship, by making works of authorship excludable.

[4] Glynn S. Lunney, Jr., Lotus v. Borland: Copyright and Computer Programs, 70 TUL. L. REV. 2397, 2427-28 (1996) ("I would suggest that the differing standards turn almost entirely on the practical differences involved in copying the creativity embodied in an invention rather than a work. Specifically, the creativity embodied in an invention is usually more difficult to copy as a practical matter, than the creativity embodied in a work of authorship.")

[5] Graham v. John Deere Co., 383 U.S. 1, 11 (1966) ("The inherent problem was to develop some means of weeding out those inventions which would not be disclosed or devised but for the inducement of a patent."); Glynn S. Lunney, Jr., E-Obviousness, 7 Mich. Tele. & Tech. L. Rev. 363, 408, 412 (2001) (attempting to develop a framework for implementing the inducement interpretation of the obviousness requirement); Michael Abramowicz & John F. Duffy, The Inducement Standard of Patentability, 120 Yale L.J. 1590 (2011) (same).

[6] To keep the example simple, I am ignoring the regulatory process required for marketing pharmaceuticals.

[7] Drassinower, supra note 1, at 25-26 (arguing that it is not clear whether granting or denying copyright to a collection of facts, such as the telephone white pages at issue in Feist Publications v. Rural Telephone, better promotes the progress of science).

[8] Drassinower admits the strong instrumental arguments for noninfringement in the Google Books case, but insists that it is an isolated exception. Drassinower, supra note 1, at 225 ("The gigantic public weight of the Google Books Project is not the kind of force we can mobilize frequently in the name of lawful copying."). I disagree that it is an isolated exception. Other examples of instrumentalism's success include: (i) the use of thumbnail images for searches on the Internet, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); (ii) the home taping of copyrighted television broadcasts for later viewing, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984); and (iii) the creation of electronic reserves for educational purposes, Cambridge University Press v. Patton, 769 F.3d 1232 (2014). These are all easy cases, from an instrumental perspective, but that is the point. These are the cases where getting the answer right makes a difference. If the costs and benefits of extending or denying copyright protection in a particular case are evenly balanced, then, while I would have a preference for denying protection, either outcome is acceptable.

[9] Id. At 147 ("Instrumentalist discourse is, in my view, part and parcel of the very expansion that minimalism seeks to counter.").

[10] Id.

[11] Id.

[12] Paul Heald, How Copyright Keeps Works Disappeared, 11 J. Empirical Legal Studies 829 (2014) (showing the disparity in availability on Amazon.com for books first published before 1922 and for those still within copyright's term).

[13] In my view, this is one of the main problems with Drassinower's approach: It does not respond to changes in the costs and economics of copying and distribution. Indeed, Drassinower critiques the economic approach for responding to changes in the economics. Drassinower, supra note 1, at 5 ("It follows, of course, that if we were to come up with an efficient way of demarcating ideas and licensing their use, we would then have to consider reevaluation – if not abandonment – of the idea/expression dichotomy as a doctrine fundamental to copyright."). But, in my opinion, that the instrumental approach responds to changes in the costs of creating and distributing works of authorship is a virtue, not a vice. As for abandoning the idea-expression dichotomy, I believe Drassinower's critique misunderstands the instrumental view of copyright. Idea and expression are not self-defining deontological principles. They are labels we attach based upon instrumental balancing. If, on balance, prohibiting the copying of Lotus's user interface is undesirable, then it's unprotected "idea." If technology changes and the underlying cost-benefit analysis shifts, we may redefine whether some particular aspect of a work, whether as user interface or a particular chord progression, constitutes idea or expression. The legal categories, idea and expression, and their legal consequences would remain.

[14] Given my circumstances, the connection to copyright's traditional incentives story is somewhat indirect. I did not receive royalties directly from publication of the article. Rather, I was paid to write as part of my position as a law professor. Nevertheless, publication and the associated reputation obviously plays some role in determining whether I can work as a law professor, and if so, how much I am likely to make.

[15] Drassinower, supra note 1, at 225.

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WHAT'S WRONG WITH COPYING? by Abraham Drassinower,
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Author's Response by Abraham Drassinower
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The purpose of WHAT'S WRONG WITH COPYING? is to set forth a rights-based account of copyright law. The book seeks to provide an alternative to the currently prevailing law and economics framework of copyright interpretation. The task is admittedly ambitious, perhaps even ill fated from the very outset. The sheer dominance of the economic framework, certainly in North America, can hardly be overestimated. It is so pervasive, so deeply constitutive of our copyright common sense, that the undertaking to raise questions about it cannot help but appear as irremediably foreign – reminiscent less of an aspiration to address others in a shared language, than of a timid archaeological impulse doomed to retrieve quaint traces of a superseded dialect. Aspiring to provoke a transition from value to right as metaphors structuring copyright interpretation is akin to whispering in an emperor's ear that the world-view her power has cemented is incoherent, if not altogether precarious. One can count oneself as fortunate if the impertinence is met with ire rather than with incredulous indifference, silent contempt, or even plain bewilderment.

Yet the burden of WHAT'S WRONG WITH COPYING? is not quite as difficult as that of addressing an audience in the cadences of a language other than its own. It is true, of course, that the book's alien or unusual intonations, at least in North America, require a level of abstraction sufficient to reformulate the very focus of theoretical attention, and thus both the way in which questions are posed and the parameters that define what an adequate answer looks like. But the exercise does not proceed in a vacuum. It is not as if the language of right approaches the language of value in the absence of at least the possibility of a common referent. On the contrary, WHAT'S WRONG WITH COPYING? operates on the uncontroversial assumption that copyright doctrine informs and structures copyright practice. Whatever else it is or needs to be, a theory of copyright practice is inevitably a theory of central copyright doctrines. To be sure, debate about what is truly fundamental to copyright practice is likely interminable. But that truism need not distract us away from the unassailable observation that, to cite the most basic of examples, any conceivable theory of copyright practice

must provide a *prima facie* persuasive account of the doctrine of originality. To be sure, we can and do debate whether a particular set of concepts can make sense of originality. But we do not debate whether the doctrine of originality is among the dimensions of copyright practice that any copyright theory must elucidate.

Glynn Lunney begins his irate review of WHAT'S WRONG WITH COPYING? by objecting to my view that the law and economics approach cannot account for originality. The economic approach construes copyright as a legal instrument designed to facilitate the production and dissemination of works of authorship conceived as instances of value. Briefly put, my argument is that the economic approach cannot get copyright off the ground because originality, the threshold condition of copyright protection, affirms and must affirm a distinction between kinds of value. Originality distinguishes copyrightable from uncopyrightable subject matter. It grants copyright to some but not all instances of economic value. It recognizes works of authorship but not facts, poems but not alphabetically arranged white-pages phone directories. Originality is thus literally constituted as a distinction between kinds of value. It therefore cannot be generated out of a theoretical focus on the production and circulation of value because its intelligibility presupposes categories other than value. In short, no matter how sophisticated, a theory of value is just not a theory of authorship.

Lunney concedes that a distinction between "authorship" and a "variety of non-authorship creative products" cannot be made on the basis of value, but he adds that this "fact" is "simply irrelevant". He informs us that the law and economics framework makes the required distinction not on the basis of value but on the basis of "cost investment and recovery structure[s]." But this move from value to markets by no means addresses the difficulty raised in WHAT'S WRONG WITH COPYING? Just as there is nothing in the concept of value *per se* that permits a distinction between works and facts, so there is nothing in the concept of markets *per se* that permits that distinction. The concept of market structure does nothing more than (re-)state the preoccupation with value: copyright law remains defined as a mode of remedying relevant market failure while minimizing cost or maximizing value. Both works and facts, however, are public goods generating market failure requiring remedy. Yet only works activate copyright. The specificity of authorship *vis-à-vis* non-authorship products thus remains unresolved. Lunney's objection in fact confirms my viewpoint.

Originality as a legal category is in fact indifferent to market structures. On the one hand, it collapses economically diverse nonrivalrous and nonexcludable commodities into a single category of authorship. That is, it does not distinguish between kinds of works on the basis of market analyses. Cooking recipes, doctoral dissertations, Broadway plays, large iron sculptures of inter-galactic aliens and atonal jazz are indiscriminately protected. On the other hand, as I just noted, originality distinguishes between works and facts at a literally foundational level, as a matter of copyright principle, and does so regardless and in the absence of market analyses. The inappropriateness of the category of value as the linchpin

of copyright interpretation could hardly be more apparent: a market-driven approach would intimate distinctions (between kinds of works) where it shouldn't, and would fail to distinguish (between facts and works) where it must. My point in WHAT'S WRONG WITH COPYING? is not that there is anything particularly wrong with the economic approach as a mode of analyzing the efficient production and distribution of nonrivalrous and nonexcludable commodities. It is rather that the focus on value (i.e. cost investment and cost recovery structures) is not a focus on copyright law. The palpable distance between the market failure inquiry and the originality inquiry makes that observation abundantly clear. The theory of market failure is just not a theory of authorship.

Just as originality is indifferent to market structure, so is the analysis of market structure indifferent to legal doctrine. Consider, for example, Lunney's casual remark that "idea" and "expression" are "labels we attach upon instrumental balancing". Legal determinations are arrived at elsewhere. Legal doctrine is not worthy of investigation in its own terms. It has no terms of its own. It is radically derivative, like an empty heteronomous shell responsive to "changes in the costs and economics of copying and distribution." The impoverished result is that market analysis has ears only for what it hears as "empirical" questions. Thus, Lunney complains that I object to "empirical balancing of costs and benefits" on the grounds that it is (or can be) "indeterminate." He suggests that "better data and proper application of the burden of proof would seem the proper response, rather than abandonment of the economic approach altogether." Of course, this is a vast misunderstanding of my position. My point is not that the economic approach does not have the answers but that, as a matter of foundations, it is asking the wrong questions. No amount of data can provide a definition of a work of authorship. No amount of data can render copyright intelligible. The meaning of originality is not an empirical problem. The economic analysis of copyright law regards itself as empirically evidenced, yet only once it has theoretically decided, as if by intuitive fiat, what counts as evidence. The methodology I adopt in WHAT'S WRONG WITH COPYING? is, by contrast, genuinely empirical: it seeks to observe, analyze and understand the fundamental co-ordinates, as expressed in copyright doctrine, informing copyright practice. The legal empiricism of WHAT'S WRONG WITH COPYING? is far more attuned with and respectful of its specifically juridical object than are the economics of public goods.

Mark Rose's classic AUTHORS AND OWNERS is among the copyright books that have most deeply influenced my thinking. I cannot think of a single work from which I have learned as much as I have from AUTHORS AND OWNERS. I find in it an indispensable, canonical account of copyright from a historical point of view – an account widely accepted, even assumed, not only among those who share Rose's deeply critical stance towards copyright law, but even among those who support it. Rose is entirely correct when he observes that the copyright system he described in AUTHORS AND OWNERS is precisely what I set out to

"dismantle" in WHAT'S WRONG WITH COPYING? There is a significant sense in which WHAT'S WRONG WITH COPYING? is a response to AUTHORS AND OWNERS – a theorist's insistence, one might say, to envision an alternative to the historian's account of things as they are.

In AUTHORS AND OWNERS, Rose renders Lord Mansfield's judgment in Millar v Taylor as a foundational, paradigmatic moment in the construal of authors as owners, works of authorship as commodities subject to ownership. WHAT'S WRONG WITH COPYING? provides an alternative exegesis. It reads Mansfield's judicial text as a pivotal moment not in the construction of authorship as proprietorship but rather in the emergence of authorship as a legal category necessarily distinct from proprietorship. In my view, Mansfield's is a specifically juridical reflection into the impossibility of grasping works as things, speech as subject to ownership. Authors are speakers, not owners.

Rose's reaction to my representation of Mansfield's judgment as antidote to the conflation of authorship and ownership is elegant. Noting that WHAT'S WRONG WITH COPYING? is aimed at a philosophical construction of copyright law as a coherent juridical order, Rose writes that "At the same time, however, Drassinower reaches back into the period of copyright's formation to find an historical anticipation of his theoretical account in the classic debate between Lord Mansfield and Sir Joseph Yates in Millar v Taylor in 1769." Rose does not disagree with my citation of Mansfield, he tells us, but he does find it unnecessary:

> My point is not that Drassinower is 'wrong' in his citation of Mansfield. I don't think he is. In fact, I found his reading of Mansfield one of the most exciting and provocative moments in his book and I would not have him excise it. But nor do I think the citation of Mansfield is really essential to his argument. History and philosophy have different agendas. History – a narrative of struggles, contentions, and ambiguities – provides, I think, too slippery a foundation for the erection of an elegant intellectual edifice such as Drassinower is constructing. Drassinower's enterprise is not to tell stories but to rationalize and formalize the residue of history, to reconstruct from its contradictions a coherent and more humane account of copyright.

Even if my citation of Mansfield were wrong, in other words, the mistake would not threaten the integrity of my enterprise. No one could mistake the generosity of Rose's remarks. Yet I hesitate. I worry that this opposition between philosophy and history, coherent vision and slippery reality, erodes the aspirations of the theoretical imagination. On the one hand, the philosophical stance Rose finds in WHAT'S WRONG WITH COPYING? inoculates its project against the ambiguities of history. Yet on the other, and at the same time, this very philosophical indifference to the rigors of historical truth appears to render its

formalizing aspirations unpersuasive. It is as if – though of course this is not the import of Rose's comment – theory were somehow to be expected to bow to the sovereignty of history.

One way to approach this fruitful dialogue between history and theory is to distinguish between the historian's history and the lawyer's precedent. Both history and precedent take place in the past, of course, but a precedent is not an historical event, a moment in a narrative of struggles, contentions and ambiguities. It is rather an aspect of a specifically juridical practice ordered as an aspiration to treat like case alike. Legally speaking, the fact that Mansfield's judgment took place in the past does not mean it is history, at least not in the sense of a fragment in an irreducibly incoherent narrative fraught with contention and contradiction. As precedent, Mansfield's judgment is, on the contrary, a foundational moment in an institutionalized practice constitutively seeking its own coherence. Legal thinking does not develop independently of its past, seeking anticipation, confirmation or falsification only subsequently, in the sovereign archives of the historical record. Rather, the history of law is always already the history of its thinking. One might say that law *is* a craving to treat like case alike under the auspices of coherence. In this vein, precedent is but a particularly dramatic illustration that, in law, the vicissitudes of history are irreducibly intertwined with the exigencies of theory. In WHAT'S WRONG WITH COPYING?, Mansfield's judgment appears, I hope, not as history but as precedent. I would thus hesitate to characterize its citation of Mansfield either as unnecessary or as reaching back into history seeking anticipation of the copyright vision it unravels.

To be sure, there can be no doubt that history and philosophy have different agendas. But it does not follow that the past provides too slippery a foundation for the elaboration of juridical insight. That, I think, would be too historical a way to portray the relation between thought and practice, history and theory. In its own terms, legal thinking is a rendering of legal practice as a positing of its own coherence. Legal thinking is what legal practice says of itself as an ongoing project to treat like cases alike – to do justice. This is not to say that legal thinking requires slavish obedience to precedent. But it is to recall that the very idea of precedent is unintelligible as anything other than a dimension of an existing practice insistent on its own coherence. A precedent is not a piece of history. It is a nodal point through which the present construes its past so as to formulate its future. Precedent is an aspiration that legal practice shall have been coherent.

I agree wholeheartedly with Rose that, certainly in the context of a discussion of Mansfield's judgment in Millar v Taylor, the term "copy" carries dual meaning. On the one hand, it denotes a right. On the other, it denotes a thing, a physical copy. I think that my construal neither denies nor underplays this duplicity. My point is rather to (re-)emphasize that it is the analysis of right that frames the specifically juridical meaning of the thing, and not the market value of the

physical copy that generates the rights attendant on it. More specifically, the distinction between law and thing catalyzes the analysis of works of authorship as acts, not things, and thus pierces through the perceived conflation of copyright and property that Rose lays bare. It goes without saying that this relation between law and thing is by no means devoid of ambiguity, tension, or deliberate and systematic contestation. Rose is no doubt correct to note that it is impossible to say whether Mansfield's 1769 judgment in Millar v Taylor truly presents a view of the "copy" as an act rather than a thing, a right rather than an instance of propertized value. Rose suggests that it was Blackstone, "arguing [before none other than Lord Mansfield] in Tonson v Collins in 1762 and later developing his argument in the second volume of his COMMENTARIES in 1766, who fully transformed discourse into property" by allowing the notion of the "copy" to "acquire solidity and the aspect of a thing rather than an action." Yet Blackstone's position in Tonson v Collins is itself rich with ambiguity, by no means a stranger to the construal of authors as speakers and of copyright as a right attendant on acts of speech. "Consider writing, 1st," Blackstone says in Tonson v Collins,

> as an assistant to the memory; 2dly, as a means of conveying sentiments to distant times and places. In neither of these lights does the writer relinquish his title of making profit by his works; except that, when he has once written and published, he gives up the exclusive privilege of reciting to the ear; since, by parting with his manuscript, he has *constituted a substitute in his stead, which speaks perpetually to the eyes of every reader*. But, though he has given out one or a hundred copies, has constituted one or a hundred *substitutes to speak for him*; yet no man has a right to multiply those copies, to make a thousand substitutes instead of one; especially if any gain is to arise from such multiplication.[1]

While there can be no doubt that proprietary language pervades many aspects of Blackstone's position in Tonson v Collins, as it also does, a few years later, Mansfield's judgment in Millar v Taylor, the substantive right described in and through that language is not the exclusive right to the use of a thing but rather the exclusive right to perform an act in respect of one's speech; in a word, the exclusive right to authorize another to speak on one's behalf. To "copy" is not to convert another's chattel but to speak for another in the absence of her authorization. Perhaps this is more implausible a reading of Blackstone's position in Tonson v Collins than of Mansfield's judgment in Millar v Taylor. But however far it may have been developed in Blackstone's COMMENTARIES, the peculiar project to transform discourse into property is not subject to completion. I believe Mansfield knew that. He knew that any compelling response to Yates' magnificent dissent in Millar v Taylor required a differentiation of authors from owners, communication from possession, and copyright from property.

Jessica Silbey's comment focuses on the role of equality in WHAT'S WRONG WITH COPYING? To begin with, she skillfully brings into relief the role of equality in the conception of the public domain I portray in WHAT'S WRONG WITH COPYING? She then notes that, while it seems clear that equality is not the subject of WHAT'S WRONG WITH COPYING? but rather its "assumed baseline," it would have been helpful, nonetheless, for me to address it more explicitly. Thus, I would like to set forth even if briefly how I conceived the role of equality in the book.

The equality of authors as authors I develop is, in my mind, less an assumed baseline than a proposition derived from the analysis of copyright doctrine. I do not go to copyright, so to speak, with equality in mind, asking copyright to live up my *a priori* assumptions. It is rather that I find equality embedded in copyright. My analysis of the fundamental principle of independent creation presides over equality-driven readings of the doctrine of originality, of the defence of independent creation, of the idea/expression dichotomy, of certain paradigmatic aspects of fair use, and of the public domain. The basic point is that, as a matter of copyright doctrine, an author's right cannot be inconsistent with any other author's entitlement to speak in her own words (even, of course, if those independently created words happen to be identical to those already uttered by another). In short, authorship cannot assert itself as a subjugation of authorship. Speech cannot be a silencing tool. Precisely as a speaker, the defendant neither is nor can be required to request the plaintiff's permission to speak. "Fair use," as I put it at one point in WHAT'S WRONG WITH COPYING?, "literally drops out of the author's mouth as she speaks."[2]

The equality embedded in the principle of independent creation thus defines and limits the author's entitlement. Authorship must be consistent with authorship. Following her very helpful précis of that argument, Silbey queries whether the concept of equal dignity is sufficient to ground the legitimacy of the defendant's fair use of the plaintiff's speech. The point is well taken and worth developing. Equality *per se* is, after all, consistent with at least three possibilities as a principle structuring the relation between plaintiff and defendant in a copyright action. That is, each of

(a) reciprocal forbearance from any unauthorized use of each other's work (no copying is permitted);
(b) reciprocal freedom to use without restriction each other's work without authorization (all copying is permitted); and
(c) reciprocal freedom to use without authorization each other's work in one's own (some copying is permitted);

is equally consistent with the idea of equality *per se*. We may say that (a) is plaintiff-centred, (b) is defendant-centred and (c) is, broadly speaking, a paradigmatic instance of what we call fair use. Silbey's point is that I need to say more than what I have said to persuade her that equality does the work I want it to do in WHAT'S WRONG WITH COPYING? Of course, she herself points to the

answer when she notes that at stake is not equality *per se* but rather the equality of authors as authors notionally engaged in dialogue. An author is someone who addresses another. To address another is to presuppose the possibility of her response. It is precisely this response by another that the idea/expression dichotomy and fair use contemplate and safeguard. In other words, while (a) and (b) are compatible with equality *per se*, only (c) is compelling as a manifestation of a principle capturing fundamental features of copyright doctrine. Whereas (a) posits a copyright devoid of limits, and (b) posits the absence of copyright, (c) captures copyright as a juridical structure ordering the relation of plaintiff and defendant as authors. Descriptively, copyright is just not about either (a) or (b). The equality of authors as authors is thus less an assumed baseline than the result of an analytical elucidation of copyright doctrine.

Still, Silbey is correct to point out that it would be both fruitful and helpful to elaborate the concept of equality further. She ends her comment with the observation that, whether I would accept the characterization or not, WHAT IS WRONG WITH COPYING? is a book about human rights because it is a book about equality and dignity. Silbey's comment taps into themes that the book evokes but does not explicitly invoke. Sufficiently explicit, I believe, are the book's insistence to see copyright law in its own terms, as well the consequent deployment of copyright as an uncompromising affirmation of the public domain, and thus as a critique of the proprietary exaggerations in the name of which it is currently deployed. Perhaps more deeply, or at least less explicitly, the book finds itself animated by a muted ambition to grasp the theory of copyright as a necessary, specifically juridical moment in a comprehensive theory of speech, and of the role speech in the constitution of the human self. Of course, WHAT'S WRONG WITH COPYING? is, first and foremost, a legal book about copyright doctrine. It starts and ends there. But I cannot help but share what I take to be Silbey's adrenaline in respect of the constellation of themes to which she alludes. I am deeply appreciative of her awareness that, precisely as a book about legal doctrine, WHAT'S WRONG WITH COPYING? is also a book about law as a depository of knowledge and insight.

It goes without saying that I am grateful to Lunney, Rose and Silbey for their attentiveness to my book, and to Bill Gallagher for making this conversation possible. I look forward to many future engagements on these shared concerns.

ENDNOTES

[1] 1 Black W 321, 324 [emphasis added]. This passage is quoted in Maurizio Borghi and Stavroula Karapapa, COPYRIGHT AND MASS DIGITIZATION (Oxford: Oxford University Press, 2013), 52.
[2] Id., p. 123.