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A Legal Philosophy for Technological Informatics?

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ABSTRACT: This Paper fuses literary theory, copyright law and information technology in a call for the legal establishment to evaluate current attitudes towards copyright and technology through an historical and conceptual analysis. The crux of this analysis is to detail the paradigmatic shift in the 1700's when copyright was formally established, and investigate the legal promulgation of the misleading concept of Romantic authorship. It culminates in a hope that timely legal dialogue will ensure the demise of this concept as we shift from the Industrial Age to the Information Age.

KEYWORDS: Copyright, Authorship norms, Originality, Internet.

'***Originality is a thing we constantly clamour for, and constantly quarrel with.***'
Thomas Carlyle (1795-1881) Scottish essayist, historian

Introduction[1]

Recent years have seen increasing conflicts in trying to accommodate technological advances within the `traditional' structures of copyright law. There have been various initiatives, with different degrees of success, at both national and international levels. This discussion concerning the interface between copyright laws and technology has filtered through into active changes to substantive law. Such changes have, however, been characterised by investigations which have led to primarily piecemeal additions to the law. There has been little attention paid within the legal establishment to the underlying conceptual shifts which such changes are evidencing. Instead such discussion as there has been has concentrated on the more technical and practical matters of fine tuning the present laws for future developments.I propose to discuss the nature of these conceptual shifts, especially within an historical context, as I view them. In so doing, I will analyse how we can utilise the knowledge of such shifts to aid our discussions, especially in the ways they impact on the ideas of `originality' and authorship norms within literary works covered by copyright law. I will begin by analysing the formation of copyright law and the factors which led to its expansion. I will then look at the way this shaped our current understanding of the `originality' threshold for obtaining copyright and the legal *statusquoante*. I will use this as evidence, by way of illustration, for my argument that the law is not well placed to deal with the paradigm shift we are facing; the transition from an era of the printed word to that of the electronic word. We need explicit recognition of the deeper changes we are undergoing and a legal response which is commensurate with such evolution.

Of Printing Presses and Literary Property in the Age of Romance

It is my assertion that when discussing copyright today we must keep in perspective the travails of its past. Of course this could be said for many legal doctrines. However, in this context it is less an argument for viewing law in terms of its historical development and more a matter of realising the distinct nature of copyright law. Copyright law shapes the essence of our society, culture, even definitions of our personhood and creative instincts: `Copyright is necessarily a subject which gives rise to a very wide field of discussion. In some of its aspects it goes down deep into human affairs and raises questions of a character about which mankind will ever dispute' (Birrell; 1911). Furthermore copyright has a strangely acute multi-disciplinary nature; cutting, as it does, across the boundaries of law, literature, art, philosophy and politics, to name but a few. This close relationship between copyright and the general fabric of society compels an understanding of the subject which is deeper than, and not restricted to, the superficial present.

My principal reason for emphasising the history of copyright law is because I wish to draw parallels between the development of the concept in its first statutory form, in the Statute of Anne 1709, and its present day convoluted machinations. It is my fundamental thesis that the early 1700's constituted the first paradigm shift in the way in which we view copyright law. Due to various misunderstandings that shift has skewed our vision of copyright. We are presently undergoing another paradigm shift and it is my belief that we need to facilitate discussion of this, as well as recognition of where we went wrong earlier, to construct a better future for copyright law.

There can be identified in history a particular period of time when the concept of copyright came into formal fruition. This period is characterised by a fusion of disparate elements that blended together and lent their individual flavours to the making of the construct. I believe that these elements can be roughly identified as the printing press, the debate over literary property and the Romantic Era of literary thought.

The printing press facilitated the whole issue of copyright as it provided the cause, the fundamental justification, for such a concept to come into being. Introduced in England in 1476 by William Caxton, it transformed the way the written word was disseminated. By the early 1700's it was posing enough of an issue that printers had long since, from 1557 at least, organised themselves into a guild and had gained recognition regarding the rights they exerted over the printed matter. The role of the printing press as it has affected society and cultural discourse has been studied in great detail (Eisenstein; 1979). My principal purpose in raising it is as a stark reminder of the extent to which the development of technology and the fate of copyright laws proceed hand in hand. There is a symbiosis between the control of intellectual creation and advancing technology which cannot be unduly emphasised. It was because of the printing press, and its proliferation, that copyright came into being. There would have been little need for copyright had it not been for the fact that the press provided for works to be circulated with such speed and in such bulk. Similarly, as I will show below, there would be little need for a re-evaluation of copyright had not computers, and especially the Internet, taken us beyond the `traditional' confines of the concept.

This period also saw the prominence of the issue of literary property which revolved around three principal questions (Bently and Sherman; 1999). First, there was the issue of whether a property right over mental products could actually be claimed. Protagonists of literary property resisted framing the debate in terms of traditional modes of acquiring property. Thus, they tried to move away from the argument that since mental labour could not be occupied it was not a form of property. Instead of occupation, they invoked the argument that a property right could be claimed on the basis that labour had been expended on the intellectual product. To this end they invoked, for example, the Lockean theory of possessive individualism. Briefly, this posits that since one owns

one's own person, one also comes to own that on which one has expended labour. The second issue concerned the question of whether the subject matter of literary property was actually capable of being ascertained. The response was that the expression of literary works through print would delineate the parameters of the subject matter over which rights would prevail. This was linked to the third broad issue in which there was controversy: namely the ramifications of the recognition of property rights in mental products, e.g. the way this would effect the `common pool of knowledge' etc. This was countered by invoking the now familiar idea/ expression dichotomy; that rights in literary property would extend only to the expression and not the idea of the intellectual creation.

Around the same time the Romantic School of literary thought rose in prominence. Joseph Addison's `Spectator Papers' (1711-1714) marked a milestone in the then prevailing struggle against neo-classicism. It was Young's seminal `Conjectures' (1759), however, which openly denounced neo-classicism and it is probably fair to classify him as one of the forefathers, if not *the* founding father, of Romantic thought, which was to be so influential over the following centuries. The basic and most fundamental assertions of the Romantic School were to emphasise that the source of creativity, originality, could be found within individuals. This distinguished it from earlier literary thought which had located creativity in either reviving prior work through a process of imitation or as being the result of Divine inspiration. Thus Romanticism located the spring of creative power within humans and propagated the belief that originality could issue from single individuals. The idea of the Romantic author, the original genius, grew steadily throughout the Eighteenth and Nineteenth Centuries. Premier in aiding its progress were Wordsworth, especially in his `Essay, Supplementary to the Preface' (Owen; 1974) and Coleridge who defined imagination as `a repetition in the finite mind of the eternal act of creation in the infinite I am' (1817). Thus the Romantics defined an author as a solitary person working on his creation.

My aim in raising this fusion of factors is to show that copyright was created through a mixture of the advanced technology of the printing press, the prevailing philosophies of possessive individualism and the influential Romantic literary thought of the period. In short there was a shift in the early Eighteenth Century which fed the whole foundation of copyright. I believe that the principal flaw within this shift was the concept of the Romantic author. This concept is fallacious for two main reasons: first it has been responsible for perpetuating a misleading image of the `original' author within literary theory and, second, it has been given an overly exaggerated role in the history of shaping copyright law (by, for example, Woodmansee; 1994a, p. 28). I will deal each of these in turn.

Woodmansee has pointed out that our notion of authorship is a recent one, deriving, in fact, from the Romantic Era and since the Eighteenth Century onwards. She has argued that prior to, during, and since then authorship has actually been `collaborative' and that the Romantic notions of authorship we have been labouring under are not representative of actual authorship (Woodmansee; 1994a). `Collaborative' authorship has been defined as `any writing done in collaboration with one or more person's'(Lunsford and Ede; 1990 p. 15). The study by Lunsford and Ede, as Woodmansee notes, is revealing: `Indeed, one comes away from their investigation of how people actually write in business, government, industry, the sciences and social sciences with the impression that there is but one last bastion of solitary origination: the arts and humanities' (Woodmansee; 1994a, p. 25). If we assume that the Lunsford and Ede study, amongst others of a similar nature, viably establishes that most creation is collaborative then we can label the Romantic author as misleading. Commentators (Woodmansee and Jaszi; 1994b, pp. 1-10) have pointed to the fact that this has been recognised in literary circles, that it has been appreciated that the ideal of the `original' author is inaccurate and, therefore, urged the need for recognising the actual forms of creation. There has, however, been a failure to explicitly address these issues in legal academia and it is that shortcoming which this Paper hopes to redress.

Thus, as I have noted, the Romantic Era fed into the notion of copyright although it did not do so as an entirely accurate representation of authorial creativity. That does not alter the basic point: that it

nevertheless had a role to play. It is my assertion that the role it played in shaping copyright law was less as an independent and discrete factor and more as a tributary into the debate over literary property itself. The idea of the individual `original' author was circulating around the same time that the idea of whether there could be rights over literary works was being contested. It was the latter debate which informed the creation of copyright laws rather than the idea of the Romantic author. My reason for asserting that Romantic authorship norms did not per se affect the development of the laws of copyright can be substantiated by looking at the law itself. Had the Romantic author been a pivotal force in shaping copyright laws it would be a logical inference to see this reflected in the emergent laws. Instead, there is no reference to the `original' nature of authorship until 1911. The Copyright Act 1911 consolidated copyright law. Prior to this it has existed in various statutes: the Literary Copyright Act 1842, the Engravings Copyright Acts of 1734 and 1766, the Prints Copyright Act 1777, the Dramatic Copyright Act 1833, the Lectures Copyright Act 1835, the Sculpture Copyright Act 1814, and the Fine Arts Copyright Act 1862. Only in the latter *two* was the word `original' used and even then it was in relation, respectively, to `sculptures' and `paintings' rather than literary works. (Copinger and Skone James on Copyright; 1999, p.106). It was the Copyright Act 1911, therefore, that first utilised `original' in its statutory form and applied it to copyright generally. It is interesting, in this regard, to note the discussion in the House of Commons preceding the enactment of the 1911 Act and, in particular, the way they interpreted `originality'. The following guide to the meaning of `original' was presented:

`Originality in the language of the law of copyright is not the same thing as novelty...But under the head of originality it is required before a man can claim protection of the law of copyright that that which he claims to protect as his should really be his in the sense that his is the brain that has first of all applied itself to the subject matter and produced the composition or, at any rate, that his is the brain which, though it has not produced the composition has expressed it in a new form..' (Solicitor General, 1911).

This is important as it shows that the law has not adopted a consistently Romantic view of authorship since the Eighteenth Century. It indicates, as I stated earlier, that Romanticism has been given an inflated role in the history of copyright. My findings are in contrast, therefore, to those of Woodmansee who claims:

`Our laws of intellectual property are rooted in the century-long reconceptualisation of the creative process which culminated in high Romantic pronouncements like Wordsworth's to the effect that this process *ought* to be solitary, or individual and introduce `a new element into the intellectual universe'. Both Anglo-American `copyright' and Continental `authors' rights' achieved their modern form in this critical ferment...' (Woodmansee; 1994a, p. 27).

No doubt the notion of Romantic authorship had a hand in developing copyright but this was more as it affected, and raised the profile of, the issue of rights in literary property *per se*. It can be seen, therefore, that there was a paradigm shift in the early Eighteenth Century and that this shift was characterised by certain elements. Furthermore I have demonstrated how a misleading part of the shift, the Romantic notion of authorship, had ramifications for future generations and coloured legal discourse. The law cannot, in this regard, be praised for the way it has dealt with the originality requirement. It might not have taken the Romantics literally in insisting on genius type creation before extending copyright protection, but neither has it arrived at a laudable alternative. Consequently, it is necessary to inquire into the current state of the law in this area, before embarking on a discussion of the present paradigm shift.

Original Creativity: The Ambiguity of the Legal Oxymoron

Recent discussions of copyright law have paid increasing attention to the idea of authorship. The current authorship debate can, essentially, (as explained by Jaszi; 1994b, p.29-30) be traced to the writings of Foucault and his essay `What is an Author' (Harari; 1979, p.141). Foucault encouraged

literary critics and historians to enquire into the idea of `authorship' and to recast its future by comprehending its past. The authorship debate also draws on the input of Benjamin Kaplan (1977) who questioned the obsolete nature of the legal rules that define copyright, and pointed to the tumultuous history of this field. It was Martha Woodmansee, however, a Professor of English, who began to connect these disparate spheres of scholarship and conjoined the discussion of literary issues with that of legal policy making (Woodmansee; 1984).

Woodmansee asserts (1994a, p. 28) that the modern authorship construct is partly and powerfully shaped by the laws which regulate our modern writing practices but that these laws have yet to be affected by the `critique of authorship'. I take issue with this as I believe that the law has been engaging, albeit subversively, in the authorship debate. Although we seem, through the law, to be nominally adhering to Romantic notions of authorship, the actuality is in fact more complicated as there is an implicit recognition of the `reality' of creation. Thus I am opposed to Woodmansee's argument that `as creative production becomes more corporate, collective and collaborative, the law invokes the Romantic author all the more insistently' (1994a, p. 28). My argument is based on the following assertions: that if we analyse copyright law and the role of originality within it, then we will see (as shown above) that originality was only relatively recently formally introduced into English law. Furthermore, the law has been interpreted by the courts in such a way that the threshold for originality is of a low standard. This fact shows that even within legal establishments there is a more acute perception of the truth of modern authorship than is presumed. This is also shown by the extension of copyright to works of a collaborative nature, for example computer programmes. I am not claiming that this kind of furtive recognition of the actual state of authorship is admirable; I am merely indicating that it exists. I am also seeking to argue, through my use of the Eighteenth Century framework and the improper promulgation of the Romantic author, for explicit legal recognition in favour of `collaborative' authorship. I believe that this is the crucial time to be putting forward this argument as our transition to the Electronic Era, and the increasing use of the Internet, will make the adherence to even nominal forms of `originality' even harder and more artificial.

As I have indicated above, the current British copyright laws posit a low requirement of originality. Neither the Copyright Act 1911 nor the subsequent UK legislation adopting the use of `original', the Copyright Act 1956 (ss. 2 (1), (2), and ss. 3 (2), (3)) and the Copyright, Designs and Patents Act 1988 (henceforth CDPA) (s. 1 (1)) has included a definition of the word. Given the paucity of the statutory definitions of `originality' (and, indeed, the relatively recent emergence of the notion itself) we must turn to the courts to provide further elucidation of the role the concept has in defining copyright law. The House of Lords judgement in *Walter v. Lane* (1900) provides immediate evidence of the low originality requirement. This case upheld a reporter's entitlement to copyright protection, under the auspices of the Literary Copyright Act 1842, over an article he had written, and which the defendant had copied, for a newspaper. This was despite the fact that the reporter's article was a word for word rendition of a third party's speech. Although this is an early example of the flexible nature of originality, perhaps the most important distinction when discussing originality is the fact that copyright protects only expression and not ideas behind the expression.

This is commonly referred to as the ideas/expression dichotomy. The emphasis on protecting expression can be seen from the statutory requirement that copyright may only exist where the work is recorded `in writing or otherwise' (CDPA s. 3(2)). If an idea has been expressed in particular detail and in a certain manner it will be infringed if another uses the same expression. Even then, however, it is the expression and not the idea which is protected by copyright law (*Ibcos Computers Ltd. v. Barclays Mercantile Highland Finance Ltd* (1994). The fact that copyright protection extends only to the *expression* of ideas and not the *ideas* indicates that the law emphasises mutations and transformations rather than creation *abinitio*. Due to the existence of the idea/expression dichotomy, copyright law does not necessarily require originality of thought, merely of expression (*University of London Press Ltd v. University Tutorial Press* (1916) *per* Petersen J; cited with approval in *Macmillan & Co. Ltd v. Cooper (K. & J.)* (1923)). This also permits an author to utilise the common pool of human resources. Again, this demonstrates a significant flexibility on part of the law as it

indicates the legal recognition that creation includes drawing on earlier innovations. This does not mean that the law equates originality with imitation. Therefore, use of prior creations will subject the author to a higher test regarding the issue of whether he has expended the adequate skill and judgement, than if he had produced without drawing on the common pool.

Existing subject matter is often used to create new works in different ways. Thus, for example, a new work can be protected by copyright even where it consists of compilations of formerly produced works, provided skill and labour have been used in the selection and arrangement (*Macmillan Publishers Ltd v. Thomas Reed Publications Ltd* (1992). CDPA 1988 includes compilations within literary works in s. 3(1). It is noteworthy to compare the different categories of compilations which have been protected under copyright law: the spectrum extends from those of literature (*Macmillan & Co. v. Suresh Chunder Deb* (1890)) to those of football pools coupons (*Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (1964)). It is, however, necessary for more than trivial labour to have been involved (*G. A. Cramp & Sons Ltd v. Frank Smythson Ltd* (1944); *Total Information Processing Systems Ltd v. Daman Ltd* (1992) (linking three computer programs did not create a copyrightable compilation) but cf. *Ibcos Computers Ltd v. Barclays Mercantile Highland Finance Ltd* (1994) (compilation of computer programs subject to copyright protection)). Again, therefore, there is an evident tension in the law between, on one hand, paring down the need for originality to an almost non-existent level and then, on the other hand, rescuing it from total extinction by requiring the use of a certain level of skill.

That imitative creation *per se* is not sanctioned is certain, given that copying an already existing (usually an artistic) work does not confer copyright protection on the copier (*Walter v. Lane* (1900), p.554 *per* Lord James). This is even though the copier may have used labour and judgement in executing the copy (*Interlego A.G. v. Tyco Industries Inc.* (1989)). This raises the issue of exactly how much skill and labour a creator must expend in order for copyright to arise. The cases in this area have indicated that there are no particular parameters defining how much labour is `enough' (*Cambridge University Press v. University Tutorial Press Ltd* (1928)) apart from a requirement for a basic level of minimum effort (*Autospin (Oil Skins) v. Beehive Spinning* (1995)). So far, therefore, we can note that although the law does insist that originality subsist in a work, this level of originality is highly minimalistic. More than anything it appears to be fulfilling a gatekeeping role. It prevents those works which are purely imitative or plagiarised from attracting protection. There can be little doubt that courts have recognised that the majority of creative output is in the form of small, constant additions to the existing sum of public knowledge rather than in the form of dramatic works of `genius'. This can also be seen with regard to the extension of copyright protection to works of an inherently collaborative nature. For example, although copyright protection was initially restricted to a conventionally defined category of `literary works' this has been extended to include computer programs and databases (s. 3 (1) CDPA 1988).

I have sought to show, therefore, that contrary to what is, perhaps, a widely held belief; our current laws do not favour the ideal of Romantic authorship as much as may appear from a superficial reading of the statutes. Indeed there appears to be an understanding of the real, primarily collaborative nature of authorship which is facilitated through, for example, the low originality threshold. I believe that the time is ripe for this to be openly acknowledged as the application of copyright laws to the Internet, in particular, will stretch our laws beyond their present artificiality to snapping point. In this way it is my belief that we can learn from the shift in the early 1700's, and the creation of the misleading Romantic author, by resisting the promulgation of a false stereotype.

Charting the progress: from paradigm to paradigm

I believe that we are currently on the cusp of another paradigm shift. This notion of impending

change has been disseminated in `The Magna Carta for the Knowledge Age' (<http://www.feedmag.com/95.05magna1.html>). In it, we are said to be in the final throes of the Industrial Age (the `Second Wave') and on the verge of the Knowledge Age (the `Third Wave'). It is because we are in this mongrel transitory period that we should be discussing conceptual issues in order to address and identify our ultimate goals. `Much of our personal confusion and social disorientation is traceable to conflict within us and within our political institutions--between the dying Second Wave civilisation and the emergent Third Wave civilisation thundering in to take its place.' (Magna Carta). The technology overwhelming us is obvious: soaring advancements in communication and creativity have been made. The speed and ease with which we are now able to engage in social and intellectual discourse through the Internet is unrivalled in human history. There is also an increasing awareness of our modes of creation and the fact that much of what we produce is collaborative and derivative (Lunsford and Ede; 1990). In the face of this activity the law seems to have responded unsatisfactorily, caught as it is between two conflicting ideologies; one the false vision of a solitary Romantic author, the other an instinctively familiar but unnamed collaborator.

My fundamental point is that although we may have been getting by with this tenuous legal framework in the age of the printed word, it will be increasingly difficult to maintain any degree of cohesion with these standards in relation to the electronic word. We need to openly acknowledge that creation is primarily collaborative and accept as defunct the copyright notion of `originality'. That this will be harder than might seem is clear from the recent movement within the EC to extend copyright only to works of the `authors own personal creation'(Cornish; 1996, p.336). This movement has ramifications within Britain. For example, there has been one particular pronouncement in relation to databases, amending the CDPA 1988, regarding the meaning of `originality'. The provision states: `For the purposes of this Part a literary work consisting of a database is original if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation.' (CDPA 1988 s. 3A(2); as altered by the Copyright and Rights in Databases Regulations 1997 (S.I. 1997 No. 3032), effective from January 1, 1998). This wording relating originality to the `author's own intellectual creation' can be traced to the Berne Convention (e.g. Art. 2(5)) and symbolises the threat implicit in the undertaking to vanquish `original authorship'. The difficulties imminent in such an undertaking should not detract from its necessity. The very features of the Internet that we covet-- the speed, the ease of access to unlimited resources, the malleability of the medium-- all these will change the way we create and can but render our creativity more collaborative than it is now. It will be easier and faster to access information, for example through hyper links (Bolter; 1991) and, consequently, to `borrow' and be inspired by such information. Similarly there will be an unparalleled ability to create and disseminate conveniently and rapidly.

Conclusion

We need to recognise these conceptual changes we are undergoing in order to discuss the more specific issues. Thus, moving away from `originality' will entail finding new ways of tackling the ultimate conundrum in copyright: how to create a bright line test which will allow us to protect the rights of creators whilst ensuring public access to, and use of, prior works? Furthermore we will need to re-evaluate the place of technologies; of databases and computer programmes, rather than lumping them alongside other copyright categories. Fundamentally I have to agree with John Perry Barlow, in his seminal `The Economy of Ideas' (<http://www.eff.org/~barlow/EconomyOfIdeas.html>) that we cannot face the new technologies, and especially digitised intellectual property on the Internet, with the hackneyed tools of traditional intellectual property laws. Moreover it would be a fatal flaw in our progress to attempt to do so via a construct as misleading as Romantic authorship.

There is a need for explicit recognition of the situation, acceptance of this and then a need to move from there by facilitating discussion and proposing comprehensive, as opposed to piecemeal, reform. The need for this reform is acute given the technological advancements over the past decade. The role of the Internet has been burgeoning and has to be investigated for the ramifications it poses for

authorship. Traditional copyright as it stands is artificial in the extreme when applied to the Net. The constructs which ring hollow when applied to the written word, in this Enlightened period of non-original, collaborative authorship, are downright farcical when applied to electronic creation.

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