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Title

Commentary: Property and Propriety: A Response to "Copyright as a Property Right?"

Permalink

<https://escholarship.org/uc/item/86m2z9mq>

Journal

UC Irvine Law Review , 9(2)

ISSN

2327-4514

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Publication Date

2019

Property and Propriety: A Response to “Copyright as a Property Right?”

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The question mark in Simon Stern’s title is the key to his argument. As we know, a property-based view has long governed thinking about copyright on both sides of the Atlantic. In the late nineteenth century the prominent treatise writer Eaton S. Drone presented the property-based view with particular rhetorical force when he denounced the “arbitrary terminus”—forty-two years at the time—that the copyright law decrees, declaring that if the same limit were put on material property it would certainly lead to revolution.¹ Today the argument would be couched in utilitarian and pragmatic terms, but the notion of copyright as fundamentally an economic right, a right of property, remains dominant. Indeed, as Stern remarks, the notion of copyright as a form of property is so well-accepted that it seems hard even to think in alternative terms. But was it always so?

Stern’s project is to excavate some of the tensions and disparate interests characteristic of copyright’s formative period in eighteenth-century England. A property-oriented copyright holder, he suggests, is one attentive to threats of market rivalry and therefore quick to object to derivatives and other potentially competitive productions. A person concerned more with propriety might be flattered rather than threatened by imitations. In the early modern period, of course, the term “propriety” hovered between “appropriateness” or “conformity to accepted standards” and more specifically economic concepts of “ownership” and “possession.” Stern’s task is in part to discriminate between these two senses—the property-based concept and the dignitary concept—in particular cases. As we know, the property-based view of copyright has dominated since the end of the eighteenth century. But this was a view, Stern argues, promulgated more by booksellers than by authors. Authors tended to be more concerned with dignitary issues.

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1. EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 51 (Boston, Little, Brown, & Co. 1879).

Stern notes that the language of property asserted by the booksellers was largely excised in the legislative process that led to the Statute of Anne in 1710.² This is evidence of parliamentary resistance to the full force of the booksellers' arguments. The one piece of property language that remains appears in reference to the proposed registration scheme, a minor and incidental invocation that may well be a drafting oversight. The booksellers used this reference in pressing their proprietary claims but very few writers took similar positions and those that did, such as Samuel Richardson, a printer as well as an author, or William Warburton, the administrator of Alexander Pope's literary estate, were unusually situated.

In developing his discussion Stern dwells on the key figure of Pope, providing among other things a close analysis of the 1732 letter to John Gay in which Pope discusses Jonathan Swift's dealings with the bookseller Benjamin Motte. Stern shows that Pope's primary concerns are with propriety rather than specifically economic issues. Pope fears that Motte, a mere bookseller, will not present their friend Swift's writings in a sufficiently dignified way. Significantly, Pope's 1732 letter to Gay is one of the earliest appearances of the term "copyright" on record,³ and yet Pope's concerns do not have to do with money and compensation.

Pope was essentially a professional writer. He made a fortune from his publications, especially his translations of Homer, and he was the first author to make regular and repeated use of the Statute of Anne to protect his interests. His attorney in these matters was William Murray, the brilliant young lawyer who was later, as Lord Mansfield, to have an enormous influence on the early development of copyright law. Nonetheless, Pope always presented himself as an amateur rather than as a professional. "Why did I write?" he asks in the *Epistle to Doctor Arbuthnot* (1735), answering that he produced verse not as a task or calling but merely as a genteel pastime to amuse himself and his friends.⁴

Pope was the most litigious author of his day. Yet as his protestations of gentility remind us, copyright was legislated before authorship was fully established as a reputable profession. Printing and bookselling, however, were enormously important and heavily capitalized enterprises in this period. Authors' concerns were indeed somewhat different from those of the booksellers. Even Samuel Johnson, perhaps the first writer of great prestige to acknowledge his status as a professional, resisted, as Stern demonstrates, the full claims of a proprietary view of authorship. By the early nineteenth century, however, social conventions and authorial attitudes had changed significantly. By 1819 Robert Southey and William Wordsworth were both insisting that copyrights were properties like any other and should be perpetual.⁵ And several decades later, in 1842, Charles Dickens made his famous first trip to the United States, protesting, among other things, the uncompensated

2. See Statute of Anne 1710, 8 Ann., c. 19 (Gr. Brit.).

3. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 58 n.4 (1993).

4. See Alexander Pope, *An Epistle to Dr. Arbuthnot*, in THE POEMS OF ALEXANDER POPE 597-612 (John Butt ed., 1963).

5. ROSE, *supra* note 3, at 110.

reprinting of his novels in America.⁶ Two years later, Dickens filed suit in Chancery against a piracy masquerading as an abridgement of his enormously successful *Christmas Carol*.⁷ Thus, as social norms changed and professional authorship became reputable, the proprietary views first promulgated by the booksellers became the norm for authors as well.

Stern's historical argument—his breaking apart of the interests and understandings of eighteenth-century authors and booksellers—opens up alternative ways of thinking to today's dominant economic and utilitarian conception of copyright. In this piece Stern is, as he notes, extending the discussion of an earlier essay, *From Author's Right to Property Right*, in which he discusses, among other things, the legislature's introduction to the Statute of Anne of the reversionary scheme.⁸ According to this provision, after the expiration of the first fourteen-year term of protection, the sole right of printing would revert to the author for a second fourteen-year term. This arrangement, he notes, significantly qualified the copyright's status as property. It also provided the author with an instrument for asserting dignitary—as distinct from strictly proprietary—concerns when the question of renewal arose. For example, an author might stipulate matters related to the form in which a work would be presented in a new edition. The statute did not explicitly set out a dignitary right as distinct from a property right, but in the reversionary system it did open a space for the author's dignitary issues to be developed.

Building on this point, Stern considers a series of cases litigated under the statute, starting with *Burnett v. Chetwood*.⁹ *Burnett*, which concerned an English translation of a book originally published in Latin, is usually dismissed as an “erratic” decision insofar as the lord chancellor chose to assert his responsibility to superintend the moral content of a publication. But Stern observes that Lord Chancellor Macclesfield's opinion implies consideration of authors' dignitary concerns. Macclesfield ruled that the author who was deceased might very well have objected to the notions expressed in his book being published in the vernacular and therefore generally available.¹⁰

Stern then turns to *Pope v. Curl*, the important case in which Alexander Pope sued the bookseller Edmund Curl for publishing private letters without authority.¹¹ Pope proceeded on a property-based claim but he could have pleaded harm to his name and reputation. If he had couched his case in dignitary terms, Stern speculates, copyright might well have developed differently. Moreover, if Pope had had occasion to sue one of his booksellers for failing to observe the author's

6. See AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA 58–63 (1960).

7. E.T. JAKES, CHARLES DICKENS IN CHANCERY 13–15 (1914).

8. See Simon Stern, *From Author's Right to Property Right*, 62 U. TORONTO L.J. 29 (2012).

9. *Burnett v. Chetwood* (1720) 35 Eng. Rep. 1008; 2 Mer. 441.

10. *Id.* at 1009.

11. *Pope v. Curl* (1741) 26 Eng. Rep. 608; 2 Atk. 342.

reversionary rights, the consequence might have been an early rejection of the booksellers' common-law claim, their assertion that copyright was an absolute property equivalent to real estate. Perhaps the landmark cases of *Millar v. Taylor*¹² and *Donaldson v. Beckett*¹³ would never have arisen. Furthermore, discussing *Millar*, in which the common-law claim was upheld by a divided court presided over by Lord Mansfield, Stern observes that Mansfield's decision mingled economic and dignitary concerns, using the author's non-economic interests as justifications for an assignable property right. Analyzed in this way, it becomes apparent that the potential for an understanding of copyright that would go beyond the purely economic was latent in Lord Mansfield's jurisprudence. Thus, Stern implicitly invokes the possibility of an alternate history for copyright, something like a legal *Man in the High Castle* story.

Copyright today flies under the flag of property and this encourages a flattened and constrained view based on economic analysis. But Stern's discussions, both his careful exegesis of the differences between authors' and booksellers' attitudes toward literary property in the eighteenth century, and his reconsideration of the early copyright litigation suggest that the potential for a regime based on personal or dignitary rights as well as property rights was present in the early period. In an interesting way, Stern's project complements that of his Toronto colleague, Abraham Drassinower. Drassinower recently published a study, *What's Wrong with Copying?*¹⁴ In place of copyright as a property right, Drassinower proposes a view centered on the notion of authorship as speech.¹⁵ From this perspective the author becomes a speaker among other speakers rather than the originator of a commodity and the work becomes a discourse rather than a notional object. Speech implies response. All speakers are in principle equally empowered to participate in the conversation. Such an approach directly challenges the dominant instrumentalist conception of copyright, the notion that copyright provides the author with a property right as a spur to cultural production. It does so precisely by insisting on authors' dignitary concerns, their equal rights to enter into the discourse that constitutes society.

Drassinower at times reaches back into history but the main line of his approach is theoretical and philosophical. He exposes some of the conceptual ambiguities and tensions that underlie the dominant utilitarian approach to copyright. Stern's approach, both in his current contribution and his earlier essay, *From Author's Right to Property Right*, is historical. He uses historical analyses to break open the constraints of the predominant economic view, exposing the alternative possibilities that were latent in the early period of copyright's formation. He thus "denaturalizes" the property-based view that has long dominated thinking about copyright. Implicit in his project, as I understand it, is the hope that if our present

12. *Millar v. Taylor* (1769) 98 Eng. Rep. 201; 4 Burr. 2303.

13. *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837; 4 Burr. 2408.

14. ABRAHAM DRASSINOWER, *WHAT'S WRONG WITH COPYING?* (2015).

15. *See id. passim*.

understanding of copyright can be shown to be historically contingent, then perhaps we will be free to imagine inflections or alternatives for the future.

