Copyright use and the many faces of property

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Around the time that copyright emerged as an autonomous system of rights, men of letters, philosophers and artists conceived their reciprocal relation, and their relation with readers and audience, as part of a common belonging. They were committed to building what has been lately termed the public sphere of discourse: a space of freedom and equality where they could be truly interlocutors and share the common goal of advancing knowledge, experiencing beauty and furthering goodness. Authors and the public were seen as allies and even co-workers in this task. The role of law was to secure the integrity of such a sphere. "Copyright" was the name given to this law.

One can easily label this vision as a utopia—a romantic but unrealizable vision. Yet one cannot help observing that our world has, in fact, been able to realize the complete opposite of such an ideal, in the form of a perfect counter-utopia: a condition of permanent hostility between authors and the public. Instead of a public sphere of equals, our world has apparently assembled a battleground where holders and would-be holders struggle to secure, appropriate and control the biggest possible share of "rights". From likely allies and brothers in the furtherance of truth, authors and the public have seemingly turned into competitors and even enemies in what have been aptly called the "copyright wars". The reality and necessity of an enduring rivalry between so-called "right-holders" and "users" has been by and large explained by modern economic theories, whose purpose, as far as copyright is concerned, seems to be limited to ensure that wars proceed in an effective and organized way.

Abraham Drassinower's book *What's wrong with copying?*[1] unveils a paradox in the contemporary copyright discourse. It demonstrates that the counter-utopia in which copyright is currently trapped is equally as *unreal* as any other conceivable utopia, and is certainly less appealing. It does so by letting copyright speak in its own words. No particular "theory of" or "approach to" copyright is adopted, apart from a rigorous and uncompromised intelligence of its inherent logic. To a large extent, it is difficult to speak of *What's wrong with copying?* a book "on" copyright. It is, rather, an exercise in understanding, a hearing of law's own narrative, as operating in case law and enshrined in fundamental doctrines and principles. In the course of this exercise, the book unveils a hidden, largely unheard-of dimension of copyright, which remains silent under the curtain of the dominant discourse.

As it is frequently the case with works of thought, the most precious legacy of Drassinower's book rests in its "unspoken" bit. Far from being a defect of the argument developed in the book, this

[1] ABRAHAM DRASSINOWER WHAT'S WRONG WITH COPYING? (2015).

bit coincides with the limits of copyright itself. It is unspoken for good reason. In my comment, I will try to address this bit, by focusing on what seems to me *the* crux of copyright in our times, as made flagrant precisely thanks to Drassinower's analysis.

The question revolves around the meaning of "use" in a copyright sense, as addressed in particular in Chapter 3 of the book.[2] As logic instructs, the question of what a use of a copyright work is precedes the question of whether such a use is fair or not. If there is no use in the first place, no fair use analysis needs to be undertaken. Curiously enough, the rich jurisprudence on fair use and fair dealing has left the "use"-question largely implicit. Yet the question becomes paramount in our times, as technology enables *utilizations* of copyright works that, albeit entailing copying of works on an even mass scale, do not fit squarely within our common understanding of what a *use* of a copyright work is. Recent case law on technical reproduction of copyright works in search engines and the like illustrate this point.[3]

Drassinower addresses technical reproduction under the umbrella of copying without authorship. His analysis unveils a principle of copyright infringement, in that authorial entitlements are invaded only when the original act of speech is superseded by an act of the same nature—in Drassinower's language, when the author's work is used *as a work*. This principle allows differentiating between two distinct non-infringing uses, namely: *fair* uses and *non*-uses of the work.[4] While fair use is an essential component of copyright, i.e. a constitutive element of its logic, a "non use" is purely and simply outside the copyright sphere. As illustrated in the seminal case of *Baker v Selden*[5]—as masterfully read by Drassinower—uses of a work as something else than a communicative act (for instance, as a set of instructions to perform a task) may be a matter of regulation under other laws (for instance patent law), but are irrelevant from a copyright perspective.[6] Such use is lawful not because it is fair, but because it is not a use of the work *as a work*. So, in principle, whenever the work is not used as such, i.e. as an instantiation of an act of authorship, no question of infringement can arise. Uses of works as something *else* than a work—however valuable these uses may be—are outside the scope of copyright.

In its cleanness, the "nonuse doctrine" provides a rational account of copyright operation and enables to discern a limit of copyright—and perhaps a limit of law as such in our times. The doctrine is tested in Drassinower's book by reference of some illustrative cases, where courts have expanded the fair use analysis to cover various instances of so-called "technological transformative" use. In one case, a company collected essays submitted by students for marking, and engaged in repeated acts of

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[2] DRASSINOWER, 85-110.
[33] *See* the discussion of *Arriba Soft* and its aftermaths in DRASSINOWER, 100-103.
[4] Ibid.
[5] 101 U.S. 99 (1879).
[6] DRASSINOWER, 88-100.

reproduction for purpose of detecting plagiarism.[7] Another case is that of conversion of in-copyright books in digital format in order to enable a search engine to crawl inside those books.[8] Both cases entail a prima facie infringement of the right to copy, and in both cases the defendant prevailed under a fair use analysis. Drassinower convincingly argues that situations of that kind are better addressed as *non*use instead of *fair* use: "The defendant escapes liability not because her unauthorized use is fair but because it is not a use".[9] The work is utilized in a way and for purposes that have nothing to do with what a work in the first place is, namely as the instantiation of a communicative act of authorship. It is not a use of the work *as a work*, but as a material support of data to be chewed by machines. One may say: the work is used as pure raw material for algorithms. It is *utilized*, but not *used*.

The nonuse doctrine is clearly reminiscent of trademark law.[10] However, a patent case may perhaps be more illustrative of the point I would like to address. It is the case of *Moore v Regents of the University of California*.[11] The plaintiff in this case was a patient of the Medical Center of the University of California at Los Angeles who underwent a treatment for an uncommon form of leukemia. In the course of the treatment, samples of his body fluids and other biological material where taken, which were later developed into a cell line that was patented and commercialized. In its majority opinion, the Supreme Court of California dismissed Moore's claim of ownership over the biological material and the products derived from it, on the ground that Moore's contribution to the patented invention was not the kind of "*inventive effort* that patent law rewards".[12] Although valuable and even non-substitutable, such material does not originate from an act of inventorship. Its use may be questionable on other grounds,[13] but it is outside the scope of patent law.

Yet, use of matter emanating from the personal sphere has become common in many areas of technology. Personal data is in fact the currency of today's digital economy, which is largely based upon extracting value from information emanating from the private sphere of individuals. Here, too, the use of personal data falls outside the scope of the laws on privacy and data protection as soon as the link between data and individual is broken. Use of personal information in anonymized and aggregate forms does not, in principle, constitute an infringement of privacy and data protection laws, insofar as no harm is caused to individual's privacy and dignity.

A common thread seems to run through these examples—plagiarism detection, mass digitization, use of genetic material and of personal information. What all these situations have in common, is not

[7] AV et al v iParadigms, LLC, 562 Federal Reporter, 3rd Series (2009).
[8] Authors Guild, Inc. v. Google, Inc. 954 F. Supp. 2d 282 (S.D.N.Y. 2013).
[9] DRASSINOWER, 102.
[10] *See* DRASSINOWER, 109-110 (comparing copyright and trademark).
[11] 51 Cal. 3d 120 (1990).
[12] Ibid. , 141 (italics in the original).
[13] The Court admitted an action under breach of fiduciary duty (Ibid., 130).

just the fact that they do not constitute a "use" in any legally meaningful sense, be it copyright or patent or privacy law. They also have in common the fact that the defendant or the user becomes, by either operation or non-operation of law, the *exclusive user*—or, otherwise put, the *owner*—of an instance that she has not originated in the first place. From this perspective, the problem is not the use as such, which can certainly be more coherently described as a nonuse instead of a fair use. The problem is the proprietary entitlement that the user can claim around her—legitimate—free use.[14]

The issue of propertization is not new to copyright. Drassinower discusses with marvelous acumen the founding instances of modern copyright law, and in particular the deep implications of the famous "reversal" of *Millar v Taylor*[15] in *Donaldson v Beckett*.[16] A careful reading of those landmark opinions shows that *Donaldson*'s "reversal" is in fact an affirmation of the very principle stated by Lord Mansfield's judgement in *Millar*, namely that the entitlements of an author to his work are those of a "proprietor" to an object of property. In a way, the "reversal" is the foundational moment of the long-lasting misconception of copyright as a property right over intangibles or, as Mark Rose put it, the symbolic instant in which "possessive individualism" implants into copyright law.[17] A misconception in respect to which, as Drassinower warns, any "balancing" operation is deemed to be hopeless: "it does not follow that the antidote to this reversal is an assertion of the public interest over and against the interests of authorship. […] What is required, instead, is a redefinition of authorship, neither its denial nor its limitation in the name of public interest. […] The antidote to the *author as proprietor* is the retrieval of the author as speaker".[18]

Copyright history has seemingly repeated itself two and a half centuries after that foundational instant. In a moment where "public interest" seems finally to prevail over copyright maximalism, and fair use effectively mitigates the appetites of the "right-holders", propertization—unexpectedly—rematerializes by the back door. The much-celebrated fair use victory in *AG v Google* may in fact be the foundational moment of a new "possessive" history: that of propertization of fair use. Finding the antidote to the *fair user as proprietor* is the challenge that *What's Wrong with Copying?* leaves as a legacy for the copyright scholars our age.

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[14] For a critical discussion on proprietary entitlements made possible by fair use *see* MAURIZIO BORGHI & STAVROULA KARAPAPA, COPYRIGHT AND MASS DIGITIZATION, 97-110 (2013).
[15] 98 Eng. Rep. 201 (1769)
[16] 1 Eng. Rep. 837 (1774).
[17] *See* MARK ROSE, AUTHORS AND OWNERS. THE INVENTION OF COPYRIGHT (1993).
[18] DRASSINOWER, 162-163. Emphasis added.