Introduction


Whilst Deazley does not directly address the current copyright debate, the reviewer would argue that the development of copyright in the twentieth and twenty-first centuries has been a steady erosion of the public domain, often justified by the need to protect author’s rights (which rights are increasingly in the hands of the large global media corporations). By piercing some cherished assumptions about copyright and authors’ rights, and in particular through demolishing as a “myth” the traditional view about the development of copyright and displacing the centrality of the modern proprietary author as the *raison d’etre* of the copyright system, Deazley’s book is welcome ammunition to those who would try to reassert the public domain.\(^3\)

The review was certainly timely. When it was published I was based in Bournemouth, on a research sabbatical at the Centre for Intellectual Property Policy and Management,\(^4\) working on the first rough drafts for this book. I had done considerable work on the second and third chapters (the ‘history’ bit) although more was to follow, and was beginning to consider the shape and structure of the fourth and fifth chapters (the ‘theory’ bit). As if in dialogue with Stokes, a dialogue about which until that time I was unaware (a very

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\(^4\) See www.cippm.org.uk.
post-modern affair), I had already begun work on a book which I hoped would engage directly with the current copyright debate, and in a way that touched upon a number of the themes articulated in the concluding paragraph of his review: the exponential growth of copyright throughout the last hundred years; the nature and significance of the relationship between copyright and the public domain; and the place of rhetoric and myth-making in framing and determining contemporary copyright policy and discourse. However, before further sketching out the substance and aims of this book, let me turn to a case which I have commented upon elsewhere and which, more than any other copyright decision of the UK courts in recent years, acted as a spur for this current enterprise: *Designers Guild v. Russell Williams* [2001] (Designers Guild).5

Anyone familiar with UK copyright law will be familiar with *Designers Guild*, which concerned an allegation of unlawful copying between two wallpaper manufacturers. In August 1995 the claimants launched a new range of designs under the title *Orientalis*. One design from the range, the *Ixia*, which proved to be a considerable commercial success, consisted of a striped pattern with flowers scattered over it, in what was referred to as ‘a somewhat impressionistic style’. It was a design which, in the words of the claimants’ designer, had been inspired by ‘the handwriting and feel’ of the French impressionist Henri Matisse. One year after the claimants launched their *Orientalis* range a distributor for the defendant design company displayed a wallpaper fabric, entitled *Marguerite*, at a trade fair in Utrecht. *Marguerite* also consisted of a striped design with scattered flowers overlaid in a similar style. Convinced that the copyright in their wallpaper design had been infringed, the claimants commenced proceedings in December 1996. At the trial the issue for Collins QC was whether the defendant had copied the *Ixia* design, and if so whether they had copied a substantial amount of that design. Concentrating primarily upon whether there was sufficient evidence to establish a finding of copying, Collins QC, observing that the defendant had adopted the ‘essential features and substance’ of the original design, held in favour of the claimant.6 The defendant appealed not upon the finding of copying but upon the finding that they had copied a substantial amount of that design. The Court of Appeal, led by Morritt LJ, overturned the previous decision holding that while the defendant had copied the idea of the *Ixia* design, as well as adopting several of the artistic techniques employed in the execution of that design, they had not copied a substantial part of the

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claimant’s copyright work.7 The claimants appealed again, whereupon the House of Lords unanimously agreed to overturn the decision of the Court of Appeal upon the basis that the Court of Appeal had erred in principle in exercising its appellate jurisdiction to reconsider what was essentially a question of fact for the trial judge.8

The purpose for revisiting Designers Guild is not to embark upon an examination of the various merits and demerits of the decision itself, or the judicial reasoning therein,9 but to draw upon one aspect of the one opinion with which all of the Lords were in agreement – Lord Bingham’s statement as to the ‘very clear principle’ upon which copyright law rests: ‘[T]hat anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown’.10 For such a short synopsis, there is much to unpack. Begin by considering the image which Lord Bingham’s observation conjures up in the mind’s eye: the farmer toiling in the fields, turning the sod, sowing and nurturing his crop, only to lose the product of his labour to an undeserving other. For the farmer, read the struggling author; for his crop, read the original literary, dramatic, musical or artistic work; for those who reap what they have not sown, read the copyright pirate and thief. The image has a powerful, rhetorical (and if not biblical11 then certainly bucolic) appeal, providing a simple and seemingly self-evident premise upon which to base a copyright regime. More than this however, it invokes a theoretical and historical provenance that leads us back in time to the late seventeenth century, to the founding of the modern British state, to the political philosophy of John Locke, and in particular to his Second Treatise on Government:

7 Designers Guild [2000] FSR 121.
8 As Lord Hoffman observed: ‘[B]ecause the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge’s decision unless he has erred in principle’; Designers Guild [2001], p. 707. Lord Hoffman made reference to the comments of Buxton LJ in Norowzian v. Arks (No. 2) [2000] FSR 363, p. 370: ‘[W]here it is not suggested that the judge has made any error of principle a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this court … will be different from that of the judge’.
9 For that, see Deazley, supra n. 5.
11 Think for example of the right of Abraham to maintain his well because he had ‘dug his well’ (Genesis 21:30) or of the simple principle that ‘thou shalt not steal’ (Exodus 20:15).
[E]very man has a property in his own person … The labour of his body, and the work of his hands … are properly his. WHATSOEVER then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to that which is once joined to, at least where there is enough, and as good, left in common for others.12

As with Lord Bingham’s toiling farmer labour is the key, and as is the case for the labour of the hand, then why not similarly for the labour of the head? Open any standard text (introductory or otherwise) on copyright or intellectual property and you will usually come across some reference to Locke’s ‘labour theory’ as one of a number of plausible foundational principles upon which to build a system of copyright, albeit one which has of late fallen out of favour.13 If you bother to look, you will generally find it rubbing up against other more contemporary and more easily digested justifications which rely upon alternative political, social and/or economic rationales.14 And yet it is in the concept of labour, and labour theory, that Lord Bingham most readily locates the basic premise of copyright.15

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13 It has not fallen out of favour with all authors however; consider for example Bainbridge who comments that: ‘The basic reason for intellectual property is that a man should own what he produces, that is, what he brings into being. If what he produces can be taken from him, he is no better than a slave. Intellectual property is, therefore, the most basic form of property because a man uses nothing to produce it other than his mind’; Bainbridge, D. (2002), Intellectual Property, 5th edn, Harlow: Longman, p. 17. For a more sophisticated articulation of labour theory as a suitable principle upon which to base a system of copyright see, for example, almost anything written by Wendy Gordon.
14 Typically these involve justifications based upon innovation, incentive and reward, the advancement of knowledge, the avoidance of the tragedy of the commons, or simply the moral right of the author.
15 For one explanation as to why this might be the case see Sterk, S.E. (1995–96), ‘Rhetoric and Reality in Copyright Law’, Michigan Law Review, p. 1197, in which the author writes that ‘[o]ne explanation for the general failure to question [dominant] copyright rhetoric is that the participants in the lawmaking process – not only legislators and judges, but also lawyers, opinion-makers, and persons with wealth and political influence – have a self-interest in widespread acceptance of the proposition that authors deserve to benefit from their work. Rejecting the argument that authors deserve returns from their labours also would undermine the claim that prosperous members of society deserve their prosperity … If authors do not deserve incomes commensurate with their educational backgrounds, then how can other professionals justify high compensation based on their educational attainments?’
One explanation for Lord Bingham’s adherence to the labour construct no doubt lies in the fact that this particular theoretical perspective is historically contingent with the emergence of copyright legislation within the UK itself. The writings of John Locke loomed large on the political landscape at the same time as the need for a statutory system of copyright protection was being lobbied within Parliament, which efforts would eventually lead to the passing of the [An] Act for the Encouragement of Learning by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned 1709 (the Statute of Anne). This synergy between the historical and the theoretical is further augmented by the fact that the same texts (in which you will find the various justifications for copyright) in the main provide an orthodox, if brief, historical snapshot of the development of copyright prior to and throughout the eighteenth century, an account which more often than not includes the significant mid-century debates concerning the existence (or not) of copyright at common law – that is, a copyright based upon the natural right of an author to his work (for which read ‘labour theory’), and which predated statutory copyright in the guise of the Statute of Anne. This is the story of the ‘battle of the booksellers’ and of the two seminal decisions of Millar v. Taylor (1768) 4 Burr 2303 (Millar), and Donaldson v. Becket (1774) 4 Burr 2408 (Donaldson), which story is considered at length in On the Origin of the Right to Copy, and which is recounted in brief in the first chapter of this work.

Suffice to say that, for the moment, the history presented in the mainstream texts is one which acknowledges the existence of this common law copyright (as historical fact), and so by extension implicitly embraces the conceit of protection is necessary to ensure financial rewards for authors, and if authors, by virtue of their education and innate abilities, resemble other people [such as lawyers] who reap generous financial rewards, then authors must deserve copyright protection’, ibid., pp. 1247–48.

Statute of Anne 1709, 8 Anne, c. 19. Indeed one standard text makes specific reference to ‘the plea of the philosopher, John Locke’ who at the time ‘demanded a copyright for authors which he justified by the time and effort expended in the writing of the work which should be rewarded like any other work’; Garnett et al., supra n. 10, p. 34. In this the authors are certainly overstating the case. For a discussion of Locke’s involvement in the copyright question at the end of the seventeenth and start of the eighteenth centuries, see Deazley, supra n. 1, Chapter 1.

See for example Torremans who writes that ‘before publication the author could rely on certain rights of literary property at common law to obtain protection against unauthorised copying’; or Bainbridge who acknowledges that ‘the author did have common law rights that were potentially perpetual’; or Cornish & Llewelyn who note that in the eighteenth century ‘[i]t was not difficult to argue that an author ought to have some protection over his work before it was published. Since this was uncovered by the [Statute of Anne], it could only lie in a right of literary property at common law’.
copyright as a natural authorial property, albeit one that has since been statutorily dispensed with. My point in drawing attention to this mutually reinforcing historical and theoretical framework is not to begin to pick it apart (not yet anyway) but simply to illustrate that Lord Bingham need not travel far to find support for his ‘very clear principle’ – it is there to be found, in one shape or form, in almost all of the standard literature of the day. The point of this work, however, is to introduce the reader to a historical treatment of the development of copyright, as well as to some alternate theoretical approaches to copyright, that he or she may not otherwise come across within that literature.

In terms of history, this book very much picks up where On the Origin of the Right to Copy left off. As mentioned above, the first chapter of this book reprises the central thesis of that earlier work; it exposes as ‘myth’ the orthodox history of the development of copyright law in eighteenth-century Britain – what I will refer to as the myth of Donaldson and the cult of Millar. Chapters two and three take up that story in the sense that they explore the history of the history of copyright; that is, they concern the manner in which the history of the development of copyright in the eighteenth century was subsequently recorded and reported throughout the nineteenth century, into the

and that ‘to the extent that Parliament has entered the field, copyright under the Statute of Anne 1710 was not to be supplemented by more embracing common law rights’; or Garnett et al. who comment that ‘thus the effect of the Statute of Anne was to extinguish the common law copyright in published works, while leaving the common law copyright in unpublished works unaffected’. Torremans, P. (2005), Holyoak & Torremans: Intellectual Property Law, 4th edn, Oxford: Oxford University Press, p. 9; Bainbridge, supra n. 13, p. 31; Cornish, W. and Llewelyn, D. (2003), Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 5th edn, London: Sweet & Maxwell, p. 12, p. 347; Garnett et al., supra n. 10, p. 35.

19 It is difficult (impossible perhaps) to concede the existence of copyright at common law, albeit as a point of historical interest, without similarly lending credence to some form of natural rights thesis that would otherwise underpin that common law copyright. In many respects, these two historical and theoretical strands, within the context of British copyright law, are inescapably bound to one another.

20 Traditionally the Statute of Anne 1709 is considered to have abolished the common law right in published works, whereas the common law right in unpublished works was abolished by the Copyright Act 1911, 1 & 2 Geo. 5, c. 46.

21 Interestingly, Colston and Middleton, in their commentary on the development of copyright, do make reference (albeit in a footnote) to the argument that in Donaldson ‘the Court did not recognise any common law copy-right at all, even for unpublished works, and that instead the case recognises the underlying social interest in copyright works rather than the commercial interests of authors’, which argument they continue ‘does call into question the principle of protecting authors relied on by Lord Bingham in Designers Guild v. Russell Williams (Textiles) Ltd (2001)’; Colston, C. and Middleton, K. (2005), Modern Intellectual Property Law, 2nd edn, London: Cavendish Publishing, p. 250, n. 6.
early twentieth, and beyond. Through these chapters we trace the rise and fall and rise again of the conceit of common law copyright, the construct that is central to the orthodox history of the origins of copyright itself (within the UK at least). Within that trajectory we also explore the way in which one particularly significant decision of the House of Lords (perhaps the most important critique upon the concept of copyright at common law within nineteenth-century Anglo-American jurisprudence) was to become subsequently obscured, as well as the contribution which the late nineteenth-century treatise writers made to that process.

To this history of the history of copyright, chapters four and five add two theoretical approaches to copyright which (as with the non-orthodox history of copyright, as well as the history of that history) are not otherwise to be found in the mainstream contemporary texts upon copyright and intellectual property. As noted above, the theoretical framework within which these standard texts situate copyright tends to be one of a cursory romp through the various civil and common law justifications that can be called upon to underwrite the copyright regime. By contrast, chapter four introduces the reader to the institution of copyright first and foremost through the prism of the public domain. The point is to articulate some basic conceptual distinctions between the two phenomena, to explore the significance of the relationship between the two, and to draw upon the concept of the public domain to better understand the very nature of copyright, including both its limits and its limitations.

Thereafter, having approached copyright in terms of that which it is not, chapter five considers what copyright is. Here, the inquiry is not as to why we have (or tolerate) copyright, but rather to explore, albeit briefly, how best to locate copyright within the parameters of traditional property discourse, as well as reflecting upon the implications of so doing. Moreover, underpinning these various historical and theoretical strands (which, cumulatively, do aspire to unsettle Lord Bingham’s foundational premise) can be found a simple recurring theme – the almost too obvious observation that, in all of this, language matters.

That language matters naturally can be taken to mean a multitude of things.\(^{22}\) In the present context it concerns the place of both myth-making and

rhetoric in contemporary copyright discourse. It concerns the particular terminologies that writers upon copyright employ (sometimes consciously, but often not), which terminology exhorts a peculiar rhetorical force in framing the way in which we think about copyright.

One particularly evocative example is the language of copyright as *intellectual property right*, and of intellectual property right as *human right*, a powerful rhetoric, with little historical or theoretical credibility, but which nonetheless threatens to dominate copyright discourse and drive contemporary copyright policy. In this regard, if nothing else, this book encourages the reader to hold up to scrutiny the very language with which we articulate and describe copyright. As we do so, so too should we begin to more fully explore the manner in which those who write about copyright can and do engage in their own myth-making as to what copyright is and what copyright should be. Naturally, not all texts have equal influence within the field. There exist those legal treatises which lay claim to greater weight, respect and authority than others (some of which have been referred to within the footnotes of this very introduction), whether by reason of the talent and ability of their authors, their scholarly breadth and depth, their comprehensive nature, or simply their age. Indeed we can all think of one or two texts that we turn to again and again for an ‘authoritative’ or ‘objective’ commentary upon some aspect of copyright law. And yet those texts (as is the case with this text) are polemical. They do more than record, organise and comment upon the law of copyright; they seek to determine the conceptual parameters within which copyright is to be understood. This text then is about both the history and theory of copyright, but also about *rhetoric* and the *constitutive power of legal writing*.

Although I had begun to write this book by the time Stokes’ review of *On the Origin of the Right to Copy* appeared in early 2005, its origins lay in the summer of the previous year and with three discrete pieces of work with which I was then currently engaged (what have since become chapters two, three, four and five). The synergies between the various pieces were not immediately apparent to me, but rather revealed themselves as the summer progressed and as my research and thinking about each developed. As a result, however, this book bears the scars of its unplanned and uneasy birth. Much has been left unsaid; numerous threads that could otherwise have been taken up have been
left untouched. Much might have been done, for example, in more fully exploring the individual relationships, politics and philosophies of those at the bar, or sitting on the bench, who surface and resurface throughout the tale presented in the second and third chapters – legal luminaries such as Campbell, Pollock and Brougham; or in considering the relevance (or not) of the anti-monopoly movement that briefly flourished within Europe in the mid to late-nineteenth century within this history of the history of copyright; or in engaging in a more robust review and analysis of the theoretical literature on property in general, and on intellectual property in particular; and so on.

At the end of the day, the gaps and the flaws, the borrowings and the intellectual leaps of faith are there for all to see. However, they are hopefully not entirely fatal to the integrity and value of the work. Ultimately the goal is to do little more than make a claim for a greater awareness of, and greater attention to, the insights which alternate historical and theoretical treatments of the subject might bring to bear upon what we understand by copyright. In that sense this book represents no more than a springboard for my own continued research, as well as a challenge to others, whether teacher, academic, practitioner or judge.23 It seeks to provoke, to muddy the waters. If it achieves some success in that regard, albeit tentatively, then that is sufficient for now. As the *Manic Street Preachers* would have it: ‘this is my truth, show me yours’.

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‘[H]istorians must and ought to be exact, truthful, and absolutely free of passions, for neither interest, fear, rancor, nor affection should make them deviate from the path of the truth, whose mother is history, the rival of time, repository of great deeds, witness to the past, example and adviser to the present, and forewarning to the future.’

Miguel De Cervantes, *Don Quixote*

‘History is fucking.’

Alan Bennett, *The History Boys*