

The Construction of Authorship: Textual Appropriation in Law and Literature

Martha Woodmansee and Peter Jaszi, Editors
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The *Construction of Authorship* is a book consisting of 21 essays that were part of an interdisciplinary study sponsored by the Society for Critical Exchange examining the philosophy of construction of authorship. Scholars from law, humanities and social sciences examined the creative process of authorship and the validity of original thought. The book represents a collaboration between poststructural literary critics and “copyleft” legal scholars. The poststructural literary critics question the validity of our concept of authorship. As the premise of copyright is the protection of authorship, vitiating the legitimacy of authorship vitiates the legitimacy of copyright. Nevertheless, this has not prevented the collaborators in this text from attributing the individual essays to the individuals who wrote them and from claiming copyright for the book.

The essays cover a broad and loosely related range of topics such as plagiarism, the Right of Publicity, the work of Wordsworth, the rights of authors in sixteenth and seventeenth century England, international copyright, Spanish cinema, music sampling, and the teaching of writing. Martha Woodmansee begins by questioning the “myth that genuine authorship consists in genuine acts of origination”¹. Woodmansee attaches great significance to the fact that Samuel Johnson sometimes wrote anonymously and participated in collective and collaborative works and that in an electronic edition,

¹ Woodmansee and Jaszi, *The Construction of Authorship* at 21.

readers themselves shape their exposure to the work through use of hypertext options. Peter Jaszi attacks the American concept of “Romantic authorship” that underlies American copyright law. Claiming that it shortchanges collaborative production and inhibits derivative works, he suggests that authorship should have a more expansive definition that would accommodate works of multiple and collective authorship being created by introduction of new technology.

The other contributors range further afield. Jim Swan defends plagiarism, using his paradigm Helen Keller, who, because of her disability, received all of her perceptions of the outside world through other people’s writings. He argues that, because Keller had no direct sensory perception of the outside world, it was impossible for her work not to be a collection of adapted ideas collected from the study of other authors. Rosemary Coombe attacks the right of publicity, using gender issues as her critical prism. Her theory proposes that the “persona” that the right of publicity protects is as much a creation of cultural, or, more specifically, subcultural perceptions as of the actual celebrity. According to Coombe, the law should not permit celebrities to control the formation of such cultural perceptions.

Adopting an international perspective, Gerhard Joseph attempts to divine the significance of Charles Dickens not writing about the failure of nineteenth century US copyright law in his novel, *Martin Chuzzlewit*. Dickens, being aggrieved by the piracy of his works in America, permitted by the then much more provincial copyright law of this country, undertook a tour of the US in 1841, in which he attempted to secure a change in the law by appeals to the general public. These efforts were ineffectual, and upon his

return he wrote *Martin Chuzzlewit*, which contains a digression that disparages the American people, culture and landscape. Professor Joseph wonders why Dickens did not insert a direct discussion of copyright law into his novel and speculates that an incident in which a character falsely takes credit for an architectural design is a half-revelation of Dickens' feelings on the subject. Also looking across the Atlantic, N.N. Feltes traces the origins of International Copyright, focusing on the British experience. The Berne Convention internationalized the French concept of national treatment for foreign authors. Britain joined the Convention and the US did not, although the US extended protection to authors in selected other countries requiring however, that the actual books are produced in the US. Feltes attributes the English adherence to the Berne Convention to free trade driven by the "concrete, special and temporal particularities of the book trade at the turn of the century."² Nevertheless, Feltes reaches the conclusion that "International Copyright, in fact, structures a new world market for English books, requiring ideologies of value to accommodate the work of familiar local writers but also foreign writers- indeed of 'international' writers."³

Two essays cover themes only loosely related to the theme of the book. Margreta deGrazia discusses the *Masson v. New Yorker* decision⁴. With her Olympian contempt for punctuation marks, Professor deGrazia seems to miss the point that *Masson* was a defamation case and that in the context of libel, readers may attach a much different significance to statements reported as directly spoken by a person contrasted with the author's description of what the subject said, which, by the absence of quotation marks,

² Id at 279.

³ Id at 280.

⁴ *Masson v. New Yorker*, 501 U.S. 496 (1991).

disclaims verbatim accuracy. David Sanjek is the only contributor to introduce copyright in music, but approaches it from the perspective of anti-Western liberation. He defends sampling, not just as fair use, but as “a tactic... of a technological utopia of unfettered creation by disenfranchised cultures.”⁵

A number of essays explore the phenomenon of collaborative creation. Martin Streeter and Thomas D’Lugo both note the irony that in the production of modern entertainment content (television and cinema) the creative process is essentially collaborative. Entertainment, they argue, is forced in one case by legal fiction and in the other case by the culture of the *auteur* director, to conform to the copyright image of the single “author”. Jeffery Maston discovers in his discussion of Beaumont and Fletcher that when two authors collaborate their individual contributions are not clearly distinguishable. He also notes that writing for English theatre arose from a collaborative tradition. Ann Ruggles Gear postulates the literary activities of late nineteenth century women’s clubs as “alternatives” to the “interrelated concepts of intellectual property and authorship” (p. 384) based on such “economic subversion” as reading aloud from texts contributed by the members and group improvisation on those texts. The final two essays are themselves the product of collaborative authorship. Andrea Lungford and Lisa Ede note that writing is best taught collaboratively. Munroe Price and Malla Pollack discuss the *Fiest*⁶ decision. Price and Pollack note the irony that the Supreme Court has enshrined the notion of Romantic authorship in US copyright law even as the concept becomes “highly suspect among modern literary critics”⁷. They regret the fact that while

⁵ Woodmansee and Jaszi at 360.

⁶ *Feist Publ’ns Inc. v. Rural Tel. Serv., Inc.* 499 U.S. 340 (1991).

⁷ Woodmansee and Jaszi at 441.

traditionally US copyright law attempted to mediate a balance between the objective⁸, the economic⁹ and the aesthetic¹⁰ factors, “copyright law in the United States is shifting toward the European Model” which gives primacy to the aesthetic standard in which “the act of creation is central to the very notion of protection.”¹¹

The book demonstrates that US copyright law, after *Fiest*, has become centered on the concept of authorship, thereby diverging from prevailing literary theory, although it does not explain why this should be of relevance or concern to copyright lawyers. However, more disturbingly, the book also points out that, by making the focus of copyright the protection of the author, copyright is denied to a growing number of collaborative and similarly created works which do not fit neatly into the authorship model, thereby denying the economic incentives of copyright to such works. The latter should be of interest and concern to copyright lawyers, and it is not clear that such a policy “promote[s] the progress of science and the useful arts”.¹²

⁸ the person seeking protection actually produced the text.

⁹ the person wants to obtain copyright protection

¹⁰ only recognized authors and artists are entitled to copyright protection

¹¹ Woodmansee and Jaszi at 455.

¹² US Constitution, Article I, §8, Clause 8.