James Boyle, from Shamans, Software, & Spleens. Harvard UP, 1996.

CHAPTER 6

Copyright and the Invention of Authorship

So far I have argued that, because of the contradictions and tensions described here, there are certain structural pressures on the way that a liberal society deals with information. When we turn to the area of law conventionally recognized as dealing with information—intellectual property law, and in this case copyright law—I claim that we will find a pattern, a conceptual strategy which attempts to resolve the tensions and contradictions in the liberal view of information. On one level, understanding this pattern will help us to make sense (if not coherence) of the otherwise apparently chaotic world of copyright. On another level, I claim that the conceptual strategy developed in copyright is important to understand, because parts of it can also be found in most, if not all, of the areas where we deal with information—even if those areas are conventionally understood to have nothing to do with copyright.

From what I have argued previously, it should be apparent that although intellectual property has long been said to present insuperable conceptual difficulties, it actually presents exactly the same problems as the liberal concept of property generally. It merely does so in a more obvious way and in a way which is given a particular spin by our fascination with information. All systems of property are both rights-oriented and utilitarian, rely on antinomian conceptions of public and private, present insuperable conceptual difficulties when

reduced to mere physicalist relations but when conceived of in a more abstract and technically sophisticated way, immediately begin to dissolve back into the conflicting policies to which they give a temporary and unstable form. In personal or real property, however, one can at least point to a pair of sneakers or a house, say "I own that," and have some sense of confidence that the statement means something. As *LeRoy Fibre* case shows, of course, it is not at all clear that such confidence is justified, but at least property presents itself as an *apparently* coherent feature of social reality, and this is a fact of considerable ideological and political significance. In intellectual property, the response to the claim "I own that" might be "what do you mean?"

As Martha Woodmansee discovered, this point was made with startling clarity in the debates over copyright in Germany in the eighteenth century. Encouraged by an enormous reading public, several apocryphal tales of writers who were household names, yet still living in poverty, and a new, more romantic vision of authorship, writers began to demand greater economic returns from their labors. One obvious strategy was to lobby for some kind of legal right in the text—the right that we would call copyright. To many participants in the debate, the idea was ludicrous. Christian Sigmund Krause, writing in 1783, expressed the point pungently.

> "But the ideas, the content! that which actually constitutes a book! which only the author can sell or communicate!"—Once expressed, it is impossible for it to remain the author's property . . . It is precisely for the purpose of using the ideas that most people buy books—pepper dealers, fishwives, and the like and literary pirates excepted . . . Over and over again it comes back to the same question: I can read the contents of a book, learn, abridge, expand, teach, and translate it, write about it, laugh over it, find fault with it, deride it, use it poorly or well—in short, do with it whatever I will. But the one thing I should be prohibited from doing is copying or reprinting it? . . . A published book is a secret divulged. With what justification would a preacher forbid the printing of his homilies, since he cannot prevent any of his listeners from transcribing his sermons? Would it not be just as ludicrous for a professor to demand that his students refrain from using some new proposition he had taught them as for him to demand the same of book dealers with regard to a new book? *No, no it is too obvious that the concept of intellectual property is useless. My property must be exclusively mine; I must be able to dispose of it and retrieve it unconditionally.* Let someone explain to me how that is possible in the present case. Just let someone try taking back the ideas he has originated once they have been communicated so that they are, as before, nowhere to be found. All the money in the world could not make that possible.[1]

Along with this problem go two other, more fundamental ones. The first is the recurrent question of how we can give property rights in intellectual products and yet still have the inventiveness and free flow of information which liberal social theory demands. I shall return to this question in a moment. The second problem is the more fundamental one. On what grounds should we give the author this kind of unprecedented property right at all, even if the conceptual problems could be overcome? We do not think it is necessary to give car workers residual property rights in the cars that they produce—wage labor is thought to work perfectly well. Surely, an author is merely taking public goods—language, ideas, culture, humor, genre—and converting them to his or her own use? Where is the moral or utilitarian justification for the existence of this property right in the first place? The most obvious answer is that authors are special, but why? And since when?

Even the most cursory historical study reveals that our notion of "authorship" is a concept of relatively recent provenance. Medieval church writers actively disapproved of the elements of originality and creativeness which we think of as an essential component of authorship: "They valued extant old books more highly than any recent elucubrations *and they put the work of the scribe and the copyist above that of the authors.* The real task of the scholar was not the vain excogitation of novelties but a discovery of great old books, their multiplication and the placing of copies where they would be accessible to future generations of readers."[2]

Martha Woodmansee quotes a wonderful definition of "Book" from a mid-eighteenth-century dictionary that merely lists the writer as one mouth among many—"the scholar, . . . the paper-maker, the type-founder and setter, the proof-reader, the publisher and bookbinder, sometimes even the gilder and brass worker"—all of whom are "fed by this branch of manufacture."[3] Other studies show that authors seen as craftsmen—an appellation which Shakespeare might not have rejected—or at their most exalted, as the crossroads where learned tradition met external divine inspiration.[4] But since the tradition was mere craft and the glory of the divine inspiration should

be offered to God rather than to the vessel he had chosen,[5] where was the justification for preferential treatment in the creation of property rights? As authors ceased to think of themselves as either craftsmen, gentlemen,[6] or amanuenses for the Divine spirit, a recognizably different, more romantic vision of authorship began to emerge. At first, it was found mainly in self-serving tracts, but little by little it spread through the culture so that by the middle of the eighteenth century it had come to be seen as a "universal truth about art."[7]

Woodmansee explains how the decline of the craft-inspiration model of writing and the elevation of the romantic author both presented and seemed to solve the question of property rights in intellectual products: "Eighteenth-century theorists departed from this compound model of writing in two significant ways. They minimized the element of craftsmanship (in some instances they simply discarded it) in favor of the element of inspiration, and they internalized the source of that inspiration. That is, inspiration came to be regarded as emanating not from outside or above, but from within the writer himself. 'Inspiration' came to be explicated in terms of *original genius* with the consequence that the inspired work was made peculiarly and distinctively the product—and the property—of the writer."[8]

In this vision, the author was not the journeyman who learned a craft and then hoped to be well paid for it. The romantic author was defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry and the warrant for property rights. To see how complete a revision this is, one need only examine Shakespeare's wholesale lifting of plot, scene, and language from other writers, both ancient and contemporary. To an Elizabethan playwright, the phrase "imitation is the sincerest form of flattery" might have seemed entirely without irony. "Not only were Englishmen from 1500 to 1625 without any feeling analogous to the modern attitude toward plagiarism; they even lacked the word until the very end of that period."[9] To the theorists and polemicists of romantic authorship, however, the reproduction of orthodoxy would have been proof they were not the unique and transcendent spirits they imagined themselves to be.

It is the *originality* of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which "justifies" the property right and at the same time offers a strategy for resolving the basic conceptual problem pointed out by Krause—what concept of property would allow the author to retain some property rights in the work but not others? In the German debates, the best answer was provided by the great idealist Fichte. In a manner that is now familiar to lawyers trained in legal realism and Hohfeldian analysis, but that must have seemed remarkable at the time, Fichte disaggregated the concept of property in books. The buyer gets the physical thing and the ideas contained in it. *Precisely because the originality of his spirit was converted into an originality of form,* the author retains the right to the form in which those ideas were expressed: "Each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can *appropriate* his thoughts without thereby *altering their form.* This latter thus remains forever his exclusive property."[10]

A similar theme is struck in American copyright law. In the famous case of Bleistein v. Donaldson Lithographing Company,[11] concerning the copyrightability of a circus poster, Oliver Wendell Holmes was still determined to claim that the work could become the subject of an intellectual property right because it was the original creation of a unique individual spirit. Holmes's opinion shows us both the advantages and the disadvantages of a rhetoric which bases property rights on "originality." As a hook on which to hang a property right, "originality" seems to have at least a promise of formal realizability. It connects nicely to the romantic vision of authorship which I described earlier and to which I will return. It also seems to limit a potentially expansive principle, the principle that those who create may be entitled to retain some legally protected interest in the objects they make—even after those objects have been conveyed through the marketplace. But while the idea that an original spirit conveys its uniqueness to worked matter seems intuitively plausible when applied to Shakespeare[12] or Dante, it has less obvious relevance to a more humdrum act of creation by a less credibly romantic creator—a commercial artist in a shopping mall, say. The tension between the rhetoric of Wordsworth and the reality of suburban corporate capitalism is one that continues to bedevil intellectual property discourse today. In *Bleistein,* this particular original spirit had only managed to rough out a picture of energetic-looking individuals performing unlikely acts on bicycles, but to Holmes the principle was the same.

"The copy is the personal reaction of an individual upon nature. *Personality always contains something unique.* It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright."[13]

This quality of "uniqueness," recognized first in great spirits, then in creative spirits, and finally in advertising executives, expresses itself in originality of form, of expression.[14] Earlier I quoted a passage from Jessica Litman which bears repeating here: "Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain. Others have implied that 'mere ideas' may not be worthy of the status of private property. Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment. The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive."[15]

I would say that we find the answer to this question in the romantic vision of authorship, of the genius whose style forever expresses a single unique persona. The rise of this powerful (and historically contingent) stereotype provided the necessary raw material to fashion some convincing mediation of the tension between the imagery of "public" and "private" in information production.

To sum up, then, if our starting place is the romantic idea of authorship, then the idea/expression division which has so fascinated and puzzled copyright scholars apparently manages, at a stroke, to do four things:

First, it provides a *conceptual basis* for partial, limited property rights, without completely collapsing the notion of property into the idea of a temporary, limited, utilitarian state grant, revocable at will. The property right still seems to be based on something real—on a distinction which sounds formally realizable, even if, on closer analysis, it turns out to be impossible to maintain.

Second, this division provides a *moral and philosophical justification* for fencing in the commons, giving the author property in something built from the resources of the public domain—language, culture, genre, scientific community, or what have you. If one makes originality of spirit the assumed feature of authorship and the touchstone for property rights, one can see the author as creating something entirely *new*—not recombining the resources of the commons.[16] Thus we reassure ourselves both that the grant to the author is justifiable *and* that it will not have the effect of diminishing the commons for *future* creators. After all, if a work of authorship is original—by definition—we believe that it only adds to our cultural supply. With originality first defended and then routinely assumed, intellectual property no longer looks like a zero sum game. There is always "enough and as good" left over—by definition. The distinguished intellectual property scholar Paul Goldstein captures both the power and the inevitable limitations of this view very well. "Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft *out of thin air* an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*."[17] But of course, even these—remarkable and "original"—works are *not* crafted out of thin air. As Northrop Frye put it in 1957, when Michel Foucault's work on authorship was only a gleam in the eye of the episteme, "Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise."[18]

Third, the idea/expression division circumscribes the ambit of a labor theory of property. At times, it seems that the argument is almost like Locke's labor theory; one gains property by mixing one's labor with an object. But where Locke's theory, if applied to a modern economy, might have a disturbingly socialist ring to it, Fichte's theory bases the property right on the originality of every spirit as expressed through words. Every author gets the right—the writer of the roman à clef as well as Goethe—but because of the concentration on originality of expression, the residual property right is only for the workers of the word and the image, not the workers of the world. Even after that right is extended by analogy to sculpture and painting, software and music, it will still have an attractively circumscribed domain.

Fourth, the idea/expression division resolves (or at least conceals) the *tension between public and private.* In the double life which Marx described, information is both the life blood of the noble disinterested citizens of the public world and a commodity in the private sphere to which we must attach property rights if we wish our self-interested producers to continue to produce. By disaggregating the book into

"idea" and "expression," we can give the idea (and the facts on which it is based) to the public world and the expression to the writer, thus apparently mediating the contradiction between public good and private need (or greed).

Thus the combination of the romantic vision of authorship and the distinction between idea and expression appeared to provide a conceptual basis and a moral justification for intellectual property, to do so in a way which did not threaten to spread dangerous notions of entitlement to other kinds of workers, and to mediate the tension between the schizophrenic halves of the liberal world view. Small wonder that it was a success. Small wonder that, as I hope to show in this book, the language of romantic, original authorship tends to reappear in discussion of subjects far removed from the ones Fichte had in mind. Like insider trading. Or spleens.

A final question remains before I can proceed. Has the structure I have just described been rendered superfluous by economic analysis and public goods theory? An economist might say that the difference between the author and the laborer is that the author is producing a public good and the laborer is (generally) producing a good that can be satisfactorily commodified and alienated using only the traditional lexicon of property. The distinctions drawn from the idea of romantic authorship might appear to be surplus—unnecessary remnants of a conceptualist age.

It is certainly true that there are articles that decry the language of "idea" and "expression" and that offer the prediction that those terms will be used as mere summations of the underlying economic analysis[19]—in the same way that "proximate cause" is used as a way of expressing a conclusion about the desirable reach of liability. But this kind of response mistakes both the popular and the esoteric power of the language of romantic authorship. As the rest of this book will show, the romantic vision of authorship continues to influence public debate on issues of information—far beyond the traditional ambit of intellectual property. I tried to show earlier that the language of economic analysis provides no neat solutions to the problems of information regulation—precisely because economic analysis is marked by the same aporias as the rest of public discourse. In this situation of indeterminacy and contradiction, it is the romantic vision of authorship that frequently structures technical or scholarly economic analysis—providing the vital initial choices that give the analysis its subsequent appearance of determinacy and "commonsense" plausibility. Scholars may criticize the distinctions that flow from the romantic vision, but they should not imagine themselves to be free from its influence. This point will be particularly obvious when we get to the unlikely—and distinctly unromantic—subject of insider trading.

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Before I go on, I would like to separate my project here from other critiques of the idea of authorship. Poststructuralist philosophy has produced a fair amount of author bashing. Literary criticism has been particularly hard on the idea of authorial intent. (Cynics would say that this is because the author's intentions are the last threat to the author-ity of the critic as the imperial interpreter of the text. Actually the truth is a little more complex.) Strange as it may seem, I would like to differentiate my project from full-court author bashing. I have no particular stake in the question of whether literary authors are being presented as coherent, omniscient individual subjects; if they are, I wish them well. It's nice work if you can get it. I do not believe that authorship is a patriarchal, phallocentric plot; indeed, I am willing to agree that, as an abstract idea, it has great liberating potential. How could someone of even mildly pinko sensibilities fail to be attracted by a system in which workers get property rights in the objects they create, or by a property system built on originality, where iconoclasm is actually the warrant for ownership? The irony about many of the critics of the author is that they fix on qualities to revile—defiant individuality, transformation, noncommodifiable moral rights—which under a slightly different set of historical and social circumstances they would have been the first to celebrate.

The historical work on the actual development of authorship as both an interpretive construct and a repository for property rights has been much more important to me—indeed, I have tried in a small way to add to it. But nothing in my argument turns on whether authorship is something that law has unwisely borrowed from literature, something that literature has unwisely borrowed from law, or something in between, as seems most likely.

Finally, this book is not written out of hostility or condescension toward the authorial ideal or its adherents. Attachment to the idea of the individual transformative authorship is not a silly "mistake."

First, it has a clear element of existential truth—our experience of authors, inventors, and artists who *do* transform their fields and our world, together with the belief (one I hold deeply myself) that the ability to remake the conditions of individual life and collective existence is to be cherished and rewarded. Second, as a basis for an intellectual property system, it seems to *work*, precisely because it makes a series of wrenching and difficult conflicts disappear—largely by defining them out of existence rather than solving them, however. It is possible to portray the fixation on originality and the neglect of sources and audience as a technical error made by the rational guardians of the legal system or as a deep plot by the multinationals. Instead, my argument has been that we need to see the romantic vision of authorship as the solution to a series of ideological problems. For those who do not like the word "ideology," at least as applied to any group of which *they* might be a part, we could call these problems deep-seated conceptual conflicts in our ideas of property and polity. The romantic idea of authorship is no more a "mistake" than classical economics was a mistake. It is both something more and something less than that. If one is critical of a system built on its presuppositions, one must begin by understanding both its authentic appeal and the deep conceptual itches it manages to scratch. Only then can one begin the critique.

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In the next chapter I turn to the question of blackmail. My aim in this book was to pick examples each of which illustrated a different aspect of the structure of information regulation I describe. Copyright offers the idea of romantic authorship as a way of reconciling the demands of private property and the public realm. By contrast, I argue, blackmail presents a situation in which the state *forbids* the commodification of information, precisely because it concerns the private sphere of home, hearth, and personal self-definition.

6. Copyright and the Invention of Authorship

1. Christian S. Krause, "Uber den Buchernachdruck," 1 *Deutsches Museum* 415–417 (1783), quoted in and translated by Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,' " 17 *Eighteenth-Century Studies* 425, 443–444 (1984) (emphasis added).
2. Ernst P. Goldschmidt, *Medieval Texts and Their First Appearance in Print*, 112 (1943) (emphasis added).
3. Georg H. Zinck, *Allgemeines Oeconomisches Lexicon* col. 442 (3d ed. n.p. 1753), quoted in Woodmansee, "The Genius and the Copyright," 425.
4. See James Boyle, "The Search for an Author: Shakespeare and the Framers," 37 *American University Law Review* 625, 628–633 (1988).
5. A view which persisted for some time: "Nevertheless, I had to be told about authors. My grandfather told me, tactfully, calmly. He taught the names of those illustrious men. I would recite the list to myself, from Hesiod to Hugo, without a mistake. They were the Saints and Prophets. Charles Schweitzer said he worshipped them. Yet they bothered him. Their obtrusive presence prevented him from attributing the works of Man directly to the Holy Ghost. He therefore felt a secret preference for the anonymous, for the builders who had had the modesty to keep in the background of their cathedrals, for the countless authors of popular songs. He did not mind Shakespeare, whose identity was not established. Nor Homer, for the same reason. Nor a few others, about whom there was no certainty they had existed. As for those who had not wished or who had been unable to efface the traces of their life, he found excuses, provided they were dead." Jean-Paul Sartre, *The Words*, 61–62 (1964).
6. I use the male form deliberately. It is true, that, despite the obstacles placed in their way, a number of women authors established themselves on the literary scene. To say, however, that they participated in the "invention" of romantic authorship, or to claim that such a notion accurately reflected the parts of their own creative practices which they thought most valuable, seems to me to be going too far. In this historical analysis, gender-neutral language might actually obscure understanding. See Sandra M. Gilbert and Susan Gubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth Century Literary Imagination* (1988); see also Ann Ruggles Gere, *Common Properties of Pleasure: Texts in Nineteenth Century Women's Clubs* 647 (1992); Marlon B. Ross, *The Contours of Masculine Desire: Romanticism and the Rise of Women's Poetry* (1989); Martha Woodmansee, "On the Author Effect: Recovering Collectivity," 10 *Cardozo Arts and Entertainment Law Journal* 279 (1992).
7. For an early but more comprehensive development of these ideas see

Boyle, "Search for an Author." The original hints for this line of thought can be traced back to Michel Foucault, "What Is an Author?" in *Textual Strategies: Perspectives in Post-Structuralist Criticism* (J. Harari ed., 1979). Woodmansee, "The Genius and the Copyright," provided the paradigm for actual research, and her article gives a marvelous account of the "rise" of intellectual property in Germany. For the linkage between romantic authorship and intellectual property in England see Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship," 23 *Representations* 51 (1988); see also Mark Rose's *Authors and Owners: The Invention of Copyright* (1993). But see John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain, 1775–1842; Part II: The Rights of Authors," 25 *Publishing History* 45 (1989). For the same linkage in France, see Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793," 30 *Representations* 109 (1990). And for the United States, see Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship,' " 41 *Duke Law Journal* 455 (1991).

8. Woodmansee, "The Genius and the Copyright," 427.
9. Harold O. White, *Plagiarism and Imitation during the English Renaissance,* 120, 202 (1935).
10. Johann G. Fichte, "Proof of the Illegality of Reprinting: A Rationale and a Parable" (1793), quoted in Woodmansee, "The Genius and the Copyright," 445.
11. 188 U.S. 239 (1903).
12. In fact, of course, Shakespeare engaged regularly in activity that we would call plagiarism but that Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary. Not only does this show the historical contingency of the romantic idea of authorship, but it may even help to explain some of the "heretical" claims that Shakespeare did not write Shakespeare. Most of the heretics use the fact of this supposed plagiarism and their knowledge of the timeless truth of the romantic vision of authorship to prove that someone else, preferably the author of the borrowed lines, must have written the plays. After all, the Immortal Bard would never stoop to copy the works of another. Once again, originality becomes the key.
13. *Bleistein,* at 249–250 (emphasis added).
14. In the language of romantic authorship, uniqueness is by no means the only characteristic of the author. Originality may imply iconoclasm. The romantic author is going beyond the last accepted style, breaking out of the old forms. This introduces an almost Faustian element into the discussion. The author is the maker and destroyer of worlds, the irrepressible spirit of inventiveness whose restless creativity throws off invention after invention. Intellectual property is merely the token awarded to the author by a grateful society.
15. Jessica Litman, "The Public Domain," 39 *Emory Law Journal* 965, 999 (1990) (footnotes omitted); see also David Lange, "Recognizing the Public Domain," 44 *Law and Contemporary Problems* 147 (1981).
16. By focusing on the truly exceptional work one can even ignore the conceptual deflation that occurs in a case like *Bleistein.*
17. Paul Goldstein, "Copyright," 38 *Journal of the Copyright Society of the U.S.A.* 109, 110 (1991) (emphasis added).
18. Northrop Frye, *Anatomy of Criticism,* 96–97 (1957).
19. John Shepard Wiley Jr., "Copyright at the School of Patent," 58 *University of Chicago Law Review* 119 (1991).