

Metaphors and Moral Panics in Copyright:  
The Stephen Stewart Memorial Lecture  
William Patry, November 13, 2007  
to the Intellectual Property Institute  
London, England

*Non-Introduction*

As a lecture in memory of a most distinguished scholar, I confess to feeling inadequate. One reason for this inadequacy is my nationality: U.S. intellectual property writers have a reputation for being parochial, for lacking a solid grounding in comparative law, and for lacking the nuanced thinking that marked Stephen Stewart's work with such greatness.

My sense of national inferiority was, however, happily overcome when I looked through the PowerPoint presentation for Charles Oppenheim's talk to the Institute in July, entitled "What's Wrong with Copyright?" The second slide in his presentation was entitled "Yanks: over-sexed, over-paid and over here." At the risk of insulting my wife, who is present tonight, and colleagues from Google's London office, I take exception to the first two of Professor Oppenheim's accusations, which I chalk up to extreme jealousy.

And what a long-simmering jealousy it is: over 65 years have elapsed since that saying became popular. British men, have you been doing *nothing* for the better part of a century to prove your mettle? If I may be so bold as to offer you some advice, you may want to avoid this look:



in favor of this:



Of course, if you do look and act like that there are many problems, such as approval ratings in the



so you will, I think, be best served by being:



Given the lack of eye-catching images found in Professor Oppenheim's presentation, I wondered whether I should attempt a joke in order to win you over. I consulted with my father-in-law, who is a native of London, and a lawyer. He recommended I look at some collections of British humor. I promptly commenced an amazon.com.uk book search for British humor. The first book listed on the search was "Bears Can't Run Downhill and 200 other Dubious Pub Facts." The second search result was "Enough to Make a Cat Laugh."

I quickly concluded that the British regard animals as particularly amusing, and in a way Americans don't. I then came across a story that convinced me this is indeed the case.

In the middle of July, at the very time of Professor Oppenheim's talk, I read Prince Charles had given Camilla a pair of sheep for her 60<sup>th</sup> birthday, accompanied by a card that read, "Happy Birthday to Ewe." Camilla was reported to have been "chuffed to bits" by the gift. I was unfamiliar with the expression "chuffed to bits." I didn't know if the chuffing was something Charles or the sheep did to Camilla, or whether it was a good thing, no matter who did it. I recalled too a famous episode from the very first Monty Python's Flying Circus show, called "Flying Sheep." This was far from being the only Monty Python sketch about sheep; there was Sheep in Wainscoting segment, and perhaps most famously, the Killer Sheep skit. Between Prince Charles and Monty Python, I concluded that humor, especially about sheep, was better not explored, so I am sorry to say I have no joke tonight.

Lacking a joke, I sought inspiration from those who delivered previous Stephen Stewart lectures. I naturally decided to go to the most recent, by Mr. Gowers. His talk, however, came right before the release of his report, and accordingly he was circumspect in his remarks. Indeed, I understand from the institute's newsletter that what wowed you last year was not Mr. Gowers' presentation, but rather, and I quote, "the chance to own an IPI duck, generously donated by Professor Jeremy Phillips."

This unexplained and perhaps unexplainable enthusiasm for ducks, much like the intense British fondness for sheep, so befuddled me that I gave up on the entire idea of an introduction. Lacking an introduction, I shall instead now launch directly into my presentation, "Metaphors and Moral Panics in Copyright."

## *Metaphors and Moral Panics in Copyright*

The reputation of metaphors in the legal literature is mixed: many judges delight in their usage; Lord Hoffman famously wrote in *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*<sup>1</sup>: “Copyright law protects foxes better than hedgehogs.” Judge Fysh later praised this metaphor as a “sibylline observation.”<sup>2</sup>

Others have, however, regarded metaphors with hostility. Mr. Jeremy Bentham condemned metaphor as the very antithesis of legal reasoning. Even some judges have sought to protect themselves from their perceived dangers. U.S. Supreme Court Justice Benjamin Cardozo wrote, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>3</sup>

Outside of law, metaphors have been valued, albeit in a blinkered way. Aristotle spoke highly of metaphors. In the *Poetics*, he offered that metaphor “is the one thing that cannot be learned from others, and it is also a sign of genius, since a good metaphor implies an intuitive perception of the similarity in dissimilars.” Despite this praise, Aristotle regarded metaphor as ornamental, as “a happy extra trick with words,”<sup>4</sup> as I. A. Richards wrote. Aristotle represents the traditional view, a view in which metaphors are not regarded as doing any cognitive work. Like movie stars, metaphors are just pretty faces.

The traditional view overlooks that much thought is of necessity metaphoric. The traditional view further overlooks that the comparisons made in metaphors do involve a cognitive process, and not just a felicitous turn of phrase.<sup>5</sup> A cognitive role for metaphor was advocated as early as 1936 in Professor Richards’ book, *The Philosophy of Rhetoric*. Professor Richards had been quite taken with a remark of the venerable Dr. Samuel Johnson. Metaphor, Dr. Johnson asserted, “gives you two ideas for one.”

It was not, however, until 1980, that two American linguists, George Lakoff and Mark Johnson, took a rigorous approach to the question, an approach by which metaphor constitutes part of the cognitive process, by which metaphor is an integral step in our brain’s understanding of *one* dimension in terms of *another*. According to cognitive linguistics, we automatically carryover abstract concepts from one domain into another, and *must* use metaphor in order to do so. Metaphors are thus regarded as the very vehicle by which we understand abstract concepts: metaphors are an integral part of our reasoning, and not merely “a happy extra trick with words.”

Let me give you an example of how this works in practice, using the metaphor Love is a Journey. Through this metaphor, we understand the abstract concept Love by concepts we associate with different types of trips we take:

---

<sup>1</sup> [2001] F.S.R. 11, ¶26 (H.L. Nov. 23, 2000)

<sup>2</sup> *L. Wooley Jewellers Ltd. v. A&A Jewellery Ltd. (No.2)*, [2004] FSR 47 at 934. Whether Judge Fysh’s effusion was attributable to his having been boxed around the ears by Judge Hoffman when appearing as counsel in *Designer’s Guild*, I leave to others.

<sup>3</sup> *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84, 94 (1926). The passage was written, as the reporter indicates, when Cardozo was on the New York Court of Appeals. To the same effect are the remarks of Justice Gummow of the Australian High Court, see *Commonwealth of Australia v. Yamirr*, [2001] 208 C.L.R. 1, 68; *Truth About Motorways v. Macquarie Infrastructure Mgt. Ltd.*, [2000] 200 C.L.R. 591, 625.

<sup>4</sup> I.A Richards, *The Philosophy of Rhetoric* 90 (1936).

<sup>5</sup> *Id.* at 94.

*Look how far we've come  
We're at a crossroads  
Its been a long, bumpy road  
This relationship is at a dead-end  
We're just spinning our wheels  
We've gotten off track*

The point cognitive linguists make is that metaphors do not simply express the desired concept in a figurative way, but rather they actively constitute it: we understand the nature of the relationship in question through the particular metaphoric journey employed.

Allow me to give you an example from copyright, the idea-expression dichotomy: ideas aren't protectible but the expression of ideas is. Perceptive judges, and in this audience is there any other kind? - perceptive judges have recognized that the formulation "ideas are not protectible but the expression of them is," does *not* embody an analytical tool; rather, it is merely a way to state a conclusion whether the material at issue is deemed to be the subject of copyright. Our great judge Learned Hand stated this forthrightly: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.'" <sup>6</sup> If there is no principle, then how is the matter decided?

In light of Judge Hand's remarks, I assert that the basis for the dichotomy is grounded in the use of conceptual metaphors. Our Supreme Court Justice Oliver Wendell Holmes wrote:

*The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and as little susceptible of private appropriation as air or sunlight.*<sup>7</sup>

The metaphor was hardly new with Justice Holmes. Lord Camden, in the 1774 Parliamentary debates on copyright, stated that "If there be anything in the world common to all mankind, science and learning are in their nature *publici juri*, and they ought to be as free and general as air or water."<sup>8</sup> Justice Yates made the same point five years earlier in his dissenting opinion in *Millar v. Taylor*.

Those who argue in favor of owning ideas also treat ideas metaphorically, but as objects. Under the ownership approach, ideas are reified and are spoken of as if they have a physical state: Ideas are said to be "thin" or "weighty." Regarded as an object, ideas may be inspected, physically manipulated or controlled, and most importantly for our purposes, they may be owned or transferred. Justice Holmes, however, rejected the argument that ideas can be owned, and therefore he rejected that argument's idea-as-physical-object metaphor. According to Holmes, ideas are "as free as air or sunlight;"<sup>9</sup>

---

<sup>6</sup> Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

<sup>7</sup> Holmes v. Hurst, 174 U.S. 82, 86 (1899).

<sup>8</sup> 17 Parliamentary History of England cols. 992-1001 (Hansard ed. 1813).

<sup>9</sup> Holmes v. Hurst, 174 U.S. 82, 86 (1899):

"The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the

that is, ideas are without physical substance, and hence may not be controlled. The metaphors used by Holmes evoke concepts that can, at best be evanescently perceived but can never be captured, and therefore can never be owned: You can breathe the air and feel the sunlight, but you cannot take them with you, and therefore you cannot exercise dominion over them.<sup>10</sup>

Feeling secure we can agree there is some use of conceptual metaphors in copyright, I shall now turn to something more fundamental: the use of conceptual metaphors to justify the very existence of copyright, because it is from these foundational metaphors that everything else flows.

### *The Importance of Classifying Copyright as Property*

Not all ideas, not all concepts, not even all metaphors are equally privileged in political life; how one metaphor becomes privileged over other, possibly competing, metaphors is a topic that has been little explored.<sup>11</sup> The significance of metaphorically characterizing copyright as a property right was pointed out over a century ago by that wonderful Victorian man of letters and member of Parliament, Augustine Birrell, in a series of lectures he gave as Quain Professor of Law, University College, London in 1898. Mr. Birrell declared:

[T]he Western World has throughout its long history shown an ever increasing disposition to recognise the right of individuals to the exclusive possession of certain things, and these rights it has clustered together, recognised, venerated, worshipped, under the word *property*.

To be allowed to enter this sacrosanct circle is a great thing. None but the oldest families need apply ... Once inside this circle your rights were supposed in some romantic way to be outside the chill region of positive law—they were based upon natural rights, existing previously to the social contract, and without which Society was deemed impossible.

Neither were these romantic conceptions mere *jeux d'esprit*. Consequences flowed from them. If your right to turn your neighbor off your

---

absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas.”

<sup>10</sup> See Justice Thompson’s dissent in *Wheaton v. Peters*, 33 U.S. 591, 673 (1834):

Nothing can be an object of property which has not a corporal substance. The property claimed is all ideal; a set of ideas which have no bounds or marks whatever—nothing that is capable of a visible possession—nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone. Incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality, no trespass can reach them, no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of.

<sup>11</sup> Cf. Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* 8 (2003).

premises, to keep your things to yourself—was *property*, and therefore *ex hypothesi* founded on natural justice, he who sought to interfere with your complete dominion was a thief or a trespasser...<sup>12</sup>

### *The Relationship Between Property and Moral Panics*

Thieves and trespassers are metaphoric descriptions, and I assert also examples of moral panics. Moral panics in copyright are the flip side of the initial classification of copyright as property. The appellation thief or trespasser is meaningless without an owner of property from whom one can steal or commit trespass: in Mr. Defoe's famous novel, did the cannibals care a hoot about Robinson Crusoe's fenced-in habitation and cave? Hardly, to them he was food and if they had eaten him they would not have taken over his created space; nor would it prevented Crusoe from becoming an entrée by asserting a fee simple absolute over his living quarters and refusing entry to the cannibals as trespassers.

What good is it, after all, to say you own property if there are no thieves or trespassers to do battle with?

The concept of Moral Panics got its name from British sociologist Stanley Cohen's 1972 book "Folk Devils and Moral Panics." Professor Cohen studied the reaction to the Mods and Rockers phenomenon of the 1960s. The youngest among us tonight may not know much about this phenomenon, so I quote this brief, droll description from wikipedia:

*Gangs of mods and rockers fighting in 1964 sparked a moral panic about British youths, and the two groups were seen as folk devils. The rockers adopted a macho biker gang image, wearing clothes such as black leather jackets. The mods adopted a pose of scooter-driving sophistication, wearing suits and other clean-cut outfits. Rockers poured scorn on the mods.... The rockers considered mods to be weedy, effeminate snobs. Mods saw rockers as ... oafish and grubby.*

This phenomenon was hardly limited to the UK. In the same period in Northern California, where I lived, it was the surfers versus the greasers. This dichotomy later gave way to the Hippies and the straights, as they were called then. Currently, straights are known as conservative Republican United States Senators who hang out in airport loos and play footsy with undercover police officers.

Moral panics are essential to the theory of copyright-as-property for the most pragmatic of reasons: it is hard to enact indefensible legislation granting powerful rights unless you can convince legislators that folk devils pose an existential threat. In the United States, the most colorful expositor of moral panics and folk devils was Jack Valenti.

Throughout his career as the MPAA's chief lobbyist, Mr. Valenti skillfully and successfully employed moral panics and folk devils before Congress in an effort to gain increased copyright protection. As metaphors, Mr. Valenti's moral panics provided the means by which busy and sympathetic members of Congress could appear to be engaged in sober reasoning. Moral panics in copyright therefore describe the construction of a political strategy for obtaining political benefits. They are not hyperbole; they are the core of a careful strategic plan to alter the copyright landscape.

---

<sup>12</sup> Augustine Birrell, Seven Lectures on the Law and History of Copyright in Books 11-13 (1899).

Allow me to give you a few examples. In 1974, Mr. Valenti testified before Congress about the cable television industry:

*[Cable will become] a huge parasite in the marketplace, feeding and fattening itself off of local television stations and copyright owners of copyrighted material.*

In 1983, he testified before Congress about video cassette recorders:

*We are facing a very new and a very troubling assault ... and we are facing it from a thing called the video cassette recorder and its necessary companion called the blank tape. We are going to bleed and bleed and hemorrhage, unless this Congress at least protects one industry ... whose total future depends on its protection from the savagery and the ravages of this machine.*

*[Some say] that the VCR is the greatest friend that the American film producer ever had. I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.*

Note here that Mr. Valenti spoke of the VCR as a threat not only to the American film producer, but also and much more broadly to the American public: it is the essence of moral panics that folk devils be demonized as a threat to society itself. Mr. Valenti knew keenly that it was not enough to appear before Congress as a special pleader for his clients; instead, he had to appear as the savior of society itself, which could only be saved, of course, by Congress giving powerful rights to his clients.

It is uncontested that both cable television and the VCR became positive sources of revenue for the motion pictures studios in a very short period of time after these moral panics were uttered. The folk devils turned out to be cash cows.

Mr. Valenti was ever adaptable; in an effort to secure the worst piece of copyright legislation enacted in the history of the world, the 1998 Digital Millennium Copyright Act, he testified:

*Like Emerson's doctrine that "for every gain there is a loss and for every loss there is a gain, within the glittering potential of the Internet lies the darker forms of thieves, who armed with magical new technology, are capable of breaking-and-entering conventional barriers to steal copyrighted material borne by the Internet by just about anybody with a working computer."<sup>13</sup>*

Later, in reaction to the advent of peer-to-peer networks, Mr. Valenti sought to tie such networks to the dissemination of child pornography, asserting that peer-to-peer made available "the most throat-choking child porn" "on a scale so squalid it will shake the very core of your being."<sup>14</sup> Two years after the events of September 11, 2001, Mr. Valenti linked copyright infringement to terrorists, testifying before Congress that trafficking in

---

<sup>13</sup> Testimony before the U.S. Senate Foreign Relations Committee on WIPO Copyright Treaties Implementation Act and the Online Copyright Liability Limitation Act, 105<sup>th</sup> Cong., 2d Sess. (1998).

<sup>14</sup> Quote in Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* 123 (2007).

counterfeit and pirated goods “accounts for much of the money the international terror network depends on to feed its operations.”<sup>15</sup>

Two recent studies conducted for the Canadian government, one three weeks ago for Industry Canada, conclude that the Internet has, at least in the case of music, increased sales, rather than decreased them.<sup>16</sup>

When Mr. Valenti died, I did a blog posting remembering him fondly. I had many dealings with him when I was a copyright counsel to the U.S. House of Representatives, and was immensely impressed with him. Others, however, were far less charitable, with blog posts entitled, “What must it be like to have been wrong about everything?,” referring to the fact that the folk devils he railed against turned out in short order to be critical to the economic health of the motion picture industry, contrary to his repeated, impassioned claims that the industry was about to be killed off by them.

It is a profound mistake view Mr. Valenti as a buffoon like Nostradamus. Were that the case, he would have been fired by his own clients decades before he retired, instead of being feted when he retired at the top of his game.

Mr. Valenti had one audience and one audience only, the U.S. Congress, from which he consistently achieved dramatically increased copyright protection. What Mr. Valenti quite deliberately did was to use moral panics to *create* political opportunity through carefully constructed metaphors that conveyed an urgent threat to society from the other, from what Stanley Cohen called the folk devil. It is the other that is to blame and who must be tamed. Moral panics are a way to achieve political gain, and measured by that goal, Mr Valenti was a superstar.

### *The Inapplicability of Moral Panics to Copyright as Regulatory Privilege*

I shall now like to return to the question of copyright as a property right, having already reviewed the importance of that characterization in the creation of moral panics and folk devils. One would not use the terms thieves and pirates if copyright were categorized as a narrow regulatory privilege that exists by the grace of the legislature, and for the purpose of benefiting society as a whole. Terms of approbation like thief and trespasser only make sense if copyright is, as Mr. Birrell put it, “outside the chill region of positive law,” existing in a sacrosanct circle of the oldest of families, families entitled to throw off thieves and trespassers as enemies to property owners and to society at large.

But copyright, at least in the UK and in the United States, is a regulatory privilege; it is not a natural right;<sup>17</sup> on this point it is Justice Yates’ dissenting views in *Millar v. Taylor* that have prevailed in the crucible of history, and not Lord Mansfield’s or Mr. Justice Blackstone’s: Despite their impassioned and articulate arguments, in common law

---

<sup>15</sup> Id. at 124.

<sup>16</sup> See *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, available at: [http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h\\_ip01456e.html](http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h_ip01456e.html). The earlier study, for Heritage Canada, is available here: [http://www.pch.gc.ca/pc-ch/pubs/music\\_industry/tm\\_e.cfm](http://www.pch.gc.ca/pc-ch/pubs/music_industry/tm_e.cfm).

<sup>17</sup> Cf. Benjamin Davidson, *Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights and Literary Property*, Note, 39 Cornell International L. J. 583 (2005).

countries, copyright exists completely *within* the chill region of positive law, created by the grace of legislatures for the purpose of benefiting society.<sup>18</sup>

### *Copyright Metaphors*

Why then are metaphors so prominent in copyright discourse? Because copyright owners find them an indispensable tool to get legislatures and judges to supplant the chill of positive law with the warmth of romanticism.<sup>19</sup> By focusing on the romantic view of authorship, happy associations with those novelists, composers, and artists we love are conjured up, overlooking the reality that authors assign their rights to decidedly less warm and fuzzy corporations who, in the backrooms, regard authors far less romantically as an expense line on a balance sheet, a line that should be ruthlessly diminished wherever possible.

The flip side of authors is the folk devil, conjured up as the reason corporate copyright owners *must*, absolutely *must* obtain legislative or judicial relief. One cannot, after all, permit folk devils to destroy society as we know it. Sometimes an explicit invocation of folk devils is joined with a more subtle technique, the trotting out of a beloved artist as the beard for the corporate content owners behind the legislation. For example, in the U.S., the late country singer Johnny Cash was a lead witness before the U.S. House of Representatives for the corporate content owners who sought, successfully, to have the Digital Millennium Copyright Act enacted. Mr. Cash was there ostensibly to testify about the anti-circumvention and digital rights management information proposals, issues he wouldn't have recognized if they took animate form and sat on his lap.

Mr. Cash's purpose in ostensibly testifying was not to explain the bill at all, but rather to make a statement merely by his presence: I am a revered cultural figure: who are you *with*, me or the other? *Me*, who created the songs you love, or the *other*, the folk devil who is trying to steal from me?

The usefulness to corporations of famous authors and artists in the cause of obtaining copyright legislation that will benefit overwhelmingly the corporation is hardly new, nor is the use of metaphors in that cause. We could begin with Mr. Defoe's lobbying of Parliament in 1710, in which he not only described his works as the "Brat of his Brain," but also lamented that they had been kidnapped: "But behold in this Christian Nation,

---

<sup>18</sup> Professor Ronan Deazley of the University of Birmingham has done a masterful job of explaining these points of the House of Lords' decisions in *Donaldson v. Beckett*, and in *Jeffrey v. Boosey*, see Ronan Deazley, *On the Origins of the Right to Copy* (2004); Ronan Deazley, *Rethinking Copyright* (2006). The U.S. Supreme Court held to the same effect in the 1834 case of *Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>19</sup> Note here the use of the common metaphoric use of temperature to posit cold as having negative connotations, and warmth as positive connotations. Examples include:

There's a fire in my heart and you fan it.  
They embraced warmly.  
He is as cold as ice.  
She gave me an icy stare.  
They were kindling a new romance.

these Children of our Heads are seiz'd, and carry'd away into Captivity, and there is none to redeem them."<sup>20</sup>

Defoe's Brat of The Brain remarks invoke a well-known conceptual metaphor to justify the status of copyright as property. The metaphor is called the creation-as-birth metaphor. Parenthetically, for Defoe, the brain was regarded as the womb of thought,<sup>21</sup> thereby metaphorically overcoming the obvious biological objection to Defoe birthing anything.<sup>22</sup>

Here are some examples of the creation-as-birth metaphor:

*Our nation was born out of a desire for freedom  
Her experiment spawned a host of new theories  
Your actions will only breed violence  
He hatched a clever scheme*

And most on point:

*Her writings are products of her fertile imagination*

There are other metaphors as well, the most common of which is the agrarian metaphor, employed as early as *Millar v. Taylor*. This metaphor takes a number of forms. A recent exposition is by Lord Hoffman in *Designers Guild*, "No one else may for a season reap what the copyright owner has sown."<sup>23</sup> The Australian Prime Minister's Science and Engineering Council took the metaphor to great extremes: "Without [intellectual property law], innovation is like a crop in an unfettered field, free to be grazed by competitors who have made no contribution to its cultivation."<sup>24</sup> A variant -- referring to the author's works as the "fruits" of his or her labor -- is also quite common.

On my side of the Pond, Noah Webster used the agrarian metaphor in lobbying his cousin Senator Daniel Webster for passage of a copyright bill:

Among all modes of acquiring property or exclusive ownership, the act or operation of creating or making seems to have the first claim. If anything can justly give a man an exclusive right to the occupancy and enjoyment of a thing, it must be the fact that he has made it. The right of a farmer and mechanic to the exclusive enjoyment and right of disposal of what they make or produce is never questioned.

---

<sup>20</sup> Less pleasant to present sensibilities, Mr. Defoe also wrote that the unauthorized use of authors' works was "every jot as unjust as lying with their Wives, breaking-up their Homes." See Mark Rose, *Authors and Owners: The Invention of Copyright* 39 (1993).

<sup>21</sup> See Walter Pagel, *Medieval and Renaissance Contributions to Knowledge of the Brain and Its Functions*, reprinted in *The History and Philosophy of the Brain and its Function* 95 (Poynter ed. 1958).

<sup>22</sup> As is often the case in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the person employing the metaphor was a man, paternity rather maternity was the appropriate activity. See Rose, *supra*, 50 U.C.L.A. REV. at 4-5 for a discussion of this point.

<sup>23</sup> [2001] All ER at 701.

<sup>24</sup> Prime Minister's Science and Engineering Council, *2 The Role of Intellectual Property in Innovation: Perspectives* 61 (1993).

What, then, can make a difference between the produce of muscular strength and the produce of the intellect? If it should be said that the purchaser of a bushel of wheat has obtained not only the exclusive right to the use of it for food but the right to sow it and make increase and profit by it, let it be replied, this is true; but if he sows the wheat, he must sow it on his own ground or soil.<sup>25</sup>

Webster omits a rather important fact; that he, and all authors, sow a great deal they have not reaped from their predecessors, and often quite liberally. In Webster's case, with his famous blue-back speller, he copied extensively from the dominant speller at the time, Reverend Thomas Dilworth's. As H. L. Mencken would have put it, Webster was "sufficiently convinced of its merits to imitate it, even to the extent of lifting whole passages."<sup>26</sup> Webster also copied from his former employer, Thomas Dyche. Dyche's 1707 book, *A Guide to the English Tongue*, was copied by Webster down to the typeface and layout of the title page.<sup>27</sup> One need not invoke Bernard of Chartres' aphorism about dwarfs standing on the shoulders of giants<sup>28</sup> to agree that basing a grant of rights on being the first of the giants is facetious.

---

<sup>25</sup> Quoted in David Micklethwait, *Noah Webster and the American Dictionary* 212 (2005).

<sup>26</sup> Bryson, *The Mother Tongue: English and How It Got That Way* 154–155 (1999).

<sup>27</sup> Micklethwait at 24–26.

<sup>28</sup> The origins of this saying, and its phrasing, have been the subject of much scholarly interest, regardless of one's height. The most extensive look at the quote is by Robert K. Merton in a 1965 book called, appropriately, "On the Shoulders of Giants." A 1991 reprint, called the "Post-Italianate Edition," has a "Shandean Postscript" and a foreword by Umberto Eco. Many associate the saying with Isaac Newton: "If I have seen further it is by standing on ye sholders of Giants." Newton's remark first appeared in a February 5, 1676, letter to Robert Hooke (1635–1703), and some have interpreted it as a sarcastic remark given Hooke's slight build and a severely stooped nature. Hooke was not short, however, the two did apparently have a falling out in 1672 over a presentation Newton made to the Royal Society showing that prisms split white light rather than modifying it, which Hooke criticized. See [www.en.wikipedia.org/wiki/Robert\\_Hooke](http://www.en.wikipedia.org/wiki/Robert_Hooke). Hooke was an astonishing polymath: a scientist, inventor, and famous architect. See Robert Hooke and the English Renaissance (Chapman and Kent eds. 2005); Chapman, *England's Leonardo: Robert Hooke and the Seventeenth Century Scientific Revolution* (2004); Bennett et al., *London's Leonardo: The Life of Robert Hooke* (2003). Both Newton and Hooke appear in Neal Stephenson's trilogy of novels *The Baroque Cycle* (2003–2004).

Merton ascribes to Robert Burton's epic masterpiece *The Anatomy of Melancholy* the attribution to Didacus Stella, but my edition of Burton (the 1977 Jackson edition) has Burton tracing it to Plato's *Banquet* (p. 437 n.4). Wikipedia, though, has the most straightforward explanation: The metaphor of dwarfs standing on the shoulders of giants (Latin: *Pigmaei gigantum humeris impositi plusquam ipsi gigantes vident*) is first recorded in the 12th century, attributed to Bernard of Chartres. It is often mistakenly attributed to Isaac Newton.

The attribution to Bernard is due to John of Salisbury, who writes in 1159 in his *Metalogicon*: Bernard of Chartres used to say that we are like dwarfs on the shoulders of giants, so that we can see more than they, and things at a greater distance, not by virtue of any sharpness of sight on our part, or any physical distinction, but because we are carried high and raised up by their giant size. Didacus Stella took up the quote in the 16th century, and it became commonplace in the 17th century.

The agrarian metaphor is based on natural rights, and is intended to influence the legislator or judge with the asserted obvious justice of the pleader's cause, and conversely, to raise up as folk devils those who oppose the pleader. This much is easy to see, and so I would like to go one step further and discuss my belief that property itself is a conceptual metaphor.

### *Property as a Metaphor*

The word "property" is a cognitive metaphor, employed to achieve a particular result, a result that denies the existence of obligations to others and that disfavors regulation: property and regulation are, after all, usually regarded as antithetical. Indeed -- and this is the power of the property as ownership metaphor -- regulation of property is regarded as unprincipled, as government denying personal liberties, as taking away what rightly belongs to you and re-allocating it to those who did not create the property, and who therefore do not deserve to share in its enjoyment. It is reaping what you haven't sown; it is thievery; it is trespass.

It is said ad infinitum that the essence of owning a property right is the unilateral power to exclude others, to say no, for good reason, bad reason, or no reason: if a book publisher

---

Robert Burton (1577–1640) in *The Anatomy of Melancholy* (1621–51) quotes Didacus Stella: I say with Didacus Stella, a dwarf standing on the shoulders of a giant may see farther than a giant himself.

Later editors of Burton's misattributed the quote to Lucan. While Burton had, correctly, Didacus Stella, in *luc 10, tom. ii* "Didacus on the Gospel of Luke, chapter 10; volume 2", this became a reference to Lucan's *Pharsalia* 2.10, where nothing of the kind is found.

Herbert, *Jacula Prudentum*, (1651):

A dwarf on a giant's shoulders sees farther of the two.

Isaac Newton famously remarked in a letter to Robert Hooke, dated 5 February 1676:

If I have seen a little further it is by standing on the shoulders of Giants.

The British Two Pound coin has the edge inscription STANDING ON THE SHOULDERS OF GIANTS in commemoration of Newton.

Coleridge, *The Friend* (1828):

The dwarf sees farther than the giant, when he has the giant's shoulder to mount on

The 13th century stained glass of the south transept of the Chartres Cathedral may also be influenced by the metaphor. The tall windows under the Rose Window show four major Old Testament prophets Isaiah, Jeremiah, Ezekiel, and Daniel as gigantic figures, and the four New Testament evangelists Matthew, Mark, Luke, and John as sitting on their shoulders. The evangelists, though smaller, "see more" than the huge prophets (they saw the Messiah about whom the prophets spoke).

The phrase also appears in the song "King of Birds" by the U.S. rock band R.E.M., which includes the lyric, "standing on the shoulders of giants / leaves me cold.

Google Scholar has adopted "stand on the shoulders of giants" as its motto.

of a decades-old back-catalogue reference work that never earned a profit doesn't want a company to scan it in order to make snippets of the book available via Internet searches, the book publisher should, under the ownership metaphor of property, be quite within its rights to enjoin such scanning. It matters not at all that potential consumers, who would not otherwise know of the existence of the book, will thereby learn of the book, and, as a result may purchase it. It does not matter that potential consumers will only be shown a sentence or two and may learn valuable information in the process, nor that the ultimate showing of such limited portions is fair dealing.

Instead, the only thing that matters is that the book publisher owns the property and can therefore act as it wishes. Property is, under this approach, a right over things, and property owners have dominion over their property much like God gave Adam dominion over Eve.

The ownership metaphor of property is one in which the owners of property are supposed to have no obligations to others, precisely because to *be an owner*<sup>29</sup> of something means you have an obligation only to yourself.

But is the metaphor of property as-dominion-over-a thing correct? I think not. I believe to the contrary that property involves relationships among people.<sup>30</sup> One need not go as far as Pierre-Joseph Proudhon's slogan "Property is theft! (*La propriété, c'est le vol!*)"<sup>31</sup>, to recognize that the allocation of any right is impossible without making a social judgment, without choosing between competing, conflicting interests, and without choosing who can do what: every grant of monopoly power means that others are denied a right to engage in the activity encompassed within the new monopoly.

Property doesn't exist in a Hobbesian state of nature; it requires a legal system that defines, creates, and allocates rights.<sup>32</sup> Property is never "an extra-political institution, free of social choices... Property is quintessentially and absolutely a social institution. Every conception of property reflects ... those choices that we – as a society – have made."<sup>33</sup> Property did not exist prior to the Social Contract, nor is it superior to it; property is a creature of society, for the benefit of society.

This is certainly the case with copyright which, at least in common law countries, is not a natural right, and which requires therefore a foundational, authorizing document and a body recognized as competent to make the necessary social choices. The question therefore is not whether social relationships are the essence of property – they clearly are -- but why the interests of one social group is favored over another? What social objective is being furthered by the decision to privilege one particular group?

The advantage in regarding copyright as a system of social relationships is that it focuses attention where it belongs: in mediating conflicts *within* that system, and not, as the property as ownership model erroneously does, by positing ownership as the natural state of affairs, and by regarding every effort to chip away from that natural state to be a hostile act that must be prevented.

---

<sup>29</sup> As compared, say to a bailee or trustee.

<sup>30</sup> Singer at 28.

<sup>31</sup> Pierre-Joseph Proudhon, *What is Property? Or, an Inquiry into the Principle of Right and of Government* (1840). I thank Professor Sir Hugh Laddie for reminding of Proudhon's saying.

<sup>32</sup> This sentence is paraphrased from Singer at 8.

<sup>33</sup> Laura Underkuffler, *The Idea of Property* 54 (2003).

Allow me to give you a concrete example: Compulsory licenses, the U.S. Copyright Office insists, are a derogation of rights and therefore must be narrowly construed. Such a view regards unfettered rights as the natural state of affairs, and any exception, even those created by the legislature, as hostile to natural rights. The legislature however created both the right and the compulsory license in the same document, *within* the same system, and for the same purpose, to encourage learning. Regarding compulsory licenses and other privileges such as fair dealing as exceptions from otherwise unfettered rights is to place those licenses and exceptions outside the very system they are designed to foster. They are *not* exceptions: they are within the system, and every bit as important as the grant of rights is; they must accordingly be given the same dignity and liberal interpretation.

When we regard copyright as a system for furthering social relationships, the inquiry shifts away from *whether* we should regulate – because the entire enterprise is regulatory – and toward what kind of relationships we want to create.

In the United States, the foundational document that both justifies the creation of copyright, and tells us the social relationships that are to be furthered, is the constitutional provision in Article I, section 8, clause 8, which gives Congress the power to grant authors exclusive rights in their writings in order to promote the progress of science, with science being understood as learning. Our constitutional provision was, of course, based on the Statute of Anne, and I assume that the objective in the UK has not strayed, at least theoretically, from her majesty's initial foray into the field, "An Act for the Encouragement of Learning."

Copyright then, is a system created for a very specific social goal, to encourage learning. If copyright isn't encouraging learning, then it is not serving the sole social purpose for its existence. That system cannot succeed if it is not specifically tailored to encouraging learning, if it does not, in its particulars, concretely take into account *how* people learn, and then let people learn the way that way. It is hypocrisy to state that the purpose of copyright is to encourage learning but then have copyright laws that do the opposite by vesting in copyright owners the sole discretion to determine, whether, how and at what price we learn.

All learning is a community experience, one that takes place over decades, generations, centuries. Learning needs large and liberal room to grow; it requires room to imitate, to parody, to re-purpose for new works providing new insights. Nor, contrary to the folk devil image conjured up so effectively by content owners, is it principally trespassers and thieves who utilize prior works. A classic insight at the influence of prior works upon later authors is provided in Harold Bloom's classic book "The Anxiety of Influence," in which Professor Bloom wrote, "Weak talents idealize, figures of capable imagination appropriate for themselves."<sup>34</sup> This insight explains Brahms' well-known statement that he wrote with the shadow of Beethoven looking over his shoulder: even great composers feared that they took too much from others and added too little of their own imagination.

Learning requires a generosity of spirit towards others; it requires tolerance of others' views, and tolerance of rattling the status quo even when it is your own status quo that is being rattled.

---

<sup>34</sup> Harold Bloom, *The Anxiety of Influence* 51 (2d ed. 1997).

Innovation is inherently disruptive; if it wasn't disruptive, it wouldn't be innovative. We will never thrive as a people if we do not permit those few who are innovative to be disruptive; we will never thrive if we let the metaphor of copyright as property choke or cripple that innovation by either shutting the innovation down or contorting so that it conforms to existing business models and is, therefore, no longer innovative. We owe it to ourselves, but even more to our children and grandchildren, to make our laws fit their purpose, and not to be, as they now are all too often, the vehicle by which a false metaphor furthers the worst, and impedes the best in society.