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WHAT'S WRONG WITH COPYING? By *Abraham Drassinower*. Cambridge and London: Harvard University Press. 2015. Pp. xi, 272. $39.95.

INTRODUCTION

Why does copyright treat certain kinds of copying as legally actionable? For nearly a century, American copyright thinking has referenced a core consequentialist dogma to answer this question: incentivizing the production of creative expression at minimal social cost in an effort to further social welfare.[1] This rationale, routinely traced back to the Constitution's seemingly utilitarian mandate that copyright law should "promote the [p]rogress" of the sciences and useful arts, has come to dominate modern copyright jurisprudence and analysis.[2] By classifying specific acts of copying as a wrong, and thereby recognizing a "right to the use of one's expression," copyright is believed to provide actors with an independent incentive to produce original expression, one that in turn furthers the overall public interest.[3] Copyright is seen as just another mechanism of welfare maximization.

In this welfarist understanding of copyright, the wrongfulness of copying is externally determined in its entirety. In copyright law, copying is wrongful only because it interferes with a creator's legally promised market for her expression, thereby potentially reducing the inducement to create future work. Without a legal basis for stopping such harmful copying, creators might choose not to produce original expression, and society as a whole would be worse off for it. Hence the need for copyright law, at least according to the welfarist account.[4]

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1. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright's purpose is to *promote* the creation and publication of free expression."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("The purpose of copyright is to create incentives for creative effort."); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1572–74 (2009); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 452 (2006); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996)

2. U.S. CONST. art. I, § 8, cl. 8.

3. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

4. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13 (2003) (describing the "traditional economic" account in incentive terms).

In *What's Wrong with Copying?*, Abraham Drassinower[5] forcefully suggests that this dogma is not just superficial or incomplete, but instead that it is utter *balderdash*. According to Drassinower, the welfarist account of copyright has little to say about the precise structure of copyright law as a unique institution. In other words, even if the core assumptions underlying the account (i.e., about welfare and incentives) are taken to be true, it fails to explain why copyright law is delineated using a very specific set of mechanisms, concepts, and principles—most of which have been in existence ever since the origins of the institution in the early eighteenth century. Thus, in the book, Drassinower sets out to offer a normatively coherent account of copyright law that makes sense of its "fundamental features . . . as a coherent whole" (pp. 7-8).

What's Wrong with Copying? should be lauded for its audaciousness, ambition, and coherence. In challenging the dominant consequentialist account, the book attempts to shift the very framing of the discourse by looking inside the conceptual structure of copyright doctrine, rather than to external considerations. Perhaps most impressively, it succeeds in extending its central premise to the most salient parts of copyright doctrine, thereby realizing a degree of explanatory coherence that most modern theories of copyright routinely lack. In short, *What's Wrong with Copying?* develops a theory of copyright that takes copyright law seriously.

Perhaps a little *too* seriously, though. In constructing an account of copyright that takes its doctrinal elements seriously, Drassinower sees a deep rationality within the structure of copyright rules and principles. He believes this rationality is self-contained within copyright doctrine, but also that it is immutable, and necessarily incompatible with other external (and potentially consequentialist) considerations. *What's Wrong with Copying?* thus presents copyright not just as a rationalist institution, but one which has an entirely and exclusively *immanent* rationality.[6]

The book makes a compelling case for looking beyond purely instrumental/consequentialist accounts of copyright to understand the institution and for taking the structure of copyright doctrine as an integral (rather than contingent) part of the institution. It also emphasizes the often-ignored reality that a well-theorized, rights-based account need not risk compromising the centrality and importance of the public domain for copyright (Chapter Five). All the same, it raises a host of unanswered methodological and analytical puzzles about the proper role of rationality and "internalis[m]"[7] in unraveling the structure and function of the legal institution of copyright, which it makes important and unstated assumptions about.

In discerning the rationality of copyright through its legal architecture, how do we determine which parts of the institution are essential and which

5. Professor of Law, University of Toronto Faculty of Law.

6. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 954 (1988) (describing an immanent explanation of doctrine).

7. *Id.* at 955.

ones are contingent (and therefore outside the domain of rational explanation)? Descriptive as this selection may seem, it embodies a deeply normative dimension that deserves its own set of guiding principles. Is the derivation of copyright's rationality from its essential concepts an explanation of copyright law, a justification for it, or both? In willingly conflating the two, the theory consciously elides addressing the independent significance of the overarching normative value it identifies: autonomy. Structurally, does copyright's statutory—as opposed to purely common law—roots[8] require us to adopt a more epistemic approach to rationality, one that aligns better with the actualities of lawmaking? Lastly, and perhaps most importantly, why must a rationalist account of copyright necessarily remain incompatible with consequentialist and instrumental ideals?

Addressing these questions about the method of deriving the rationality of copyright law is particularly important in the wake of an important trend that has recently taken hold of American intellectual property thinking. The entrenchment of welfarism (i.e., a version of utilitarianism) as the core normative goal for copyright law has given rise to the belief that absent verifiable empirical evidence about copyright's ability to realize its social goals, the very basis and necessity of the institution deserve serious reconsideration since otherwise the continuation of the institution is rendered entirely "faith-based."[9] *Empiricism*, the belief that experience and evidence are essential to validating knowledge, has thus emerged as the dominant mode of justificatory reasoning in copyright circles—suggesting that rationalist theories have little to offer.[10] *What's Wrong with Copying?* poses a direct challenge to this trend.[11] Yet, for its challenge to be realized and made overt, its mechanism of deriving copyright's internal rationality requires further explication.

This Review unpacks and evaluates the rationalist methodology that *What's Wrong with Copying?* employs to derive its "communicative act"–based account of copyright (p. 8). Part I begins by examining the book's principal arguments and its challenge to the dominant consequentialist accounts of copyright, most of which remain rooted in economic considerations. It outlines how Drassinower develops this theory using the autonomy-driven principle of "independent creation" (p. 57) and then successfully parlays the principle into a more comprehensive explanation for several of copyright's well-known concepts and ideas. Part II situates the

8. *E.g.*, Statute of Anne 1710, 8 Ann. c. 19 (Gr. Brit.).

9. See Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1337–43 (2015).

10. Peter Markie, *Rationalism vs. Empiricism*, STAN. ENCYCLOPEDIA OF PHIL. (last revised Mar. 21, 2015), http://plato.stanford.edu/archives/sum2015/entries/rationalism-empiricism/ (on file with the *Michigan Law Review*); *see also* W.L. MORISON, JOHN AUSTIN 178 (1982) (describing the empiricist approach to law as seen by Austin as "the attempt to represent law as concerned with events which are empirical in the sense of being open to ordinary observation and yet constitute a scientific field of study which can be presented systematically by the methods of traditional logic").

11. *See* pp. 150–53.

book at the intersection of the rationalist–empiricist divide in copyright (and intellectual property) theorizing. In so doing, it argues that reason—i.e., rationality—can constitute an important basis for theorizing about copyright, contrary to the empiricist belief that moral accounts of copyright are necessarily faith-based. Part III then closely examines the analytical method and reasoning the book employs. As a result, it unpacks the assumptions, limitations, and pitfalls of Drassinower's unique use of rationalism to justify copyright law.

I. The Immanent Logic of Copyright Doctrine

Today, Anglo-American copyright thinking is overwhelmed by a firm and largely unyielding commitment to utilitarianism.[12] Believed to originate in the institution's overall commitment to "[p]rogress",[13] "learning"[14] and social welfare, copyright's modern utilitarian story is indelibly normative. In this vision, as emphatically stated by the U.S. Supreme Court in one well-known opinion, "[t]he purpose of copyright is to create incentives for creative effort."[15] Further, the purpose is then taken to be realized in the very doctrinal machinery of the system, where "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[16] Indeed, it remains the dominant framework of analysis for copyright despite the dearth of empirical evidence validating this account in various domains.[17]

Copyright's utilitarian theory therefore operates as a form of consequentialism—"rule consequentialism"[18] to be specific. The morality and legitimacy of the institution (i.e., copyright) is assessed *entirely* by reference to the consequences that it generates—that is, the incentives to produce creative expression and the creative output so produced.[19] The institution itself is taken to have no value independent of these defined consequences. Copyright law *is*—and can only ever be—justified by what copyright *does*. The institution's individual doctrinal mechanisms—such as its uniquely framed

12. For a fuller account, see Shyamkrishna Balganesh, *The Normative Structure of Copyright Law*, *in* Intellectual Property and the Common Law 313, 313–33 (Shyamkrishna Balganesh ed., 2013).

13. U.S. Const. art. I, § 8, cl. 8 (authorizing Congress to enact copyright law "[t]o promote the Progress of Science and useful Arts").

14. Statute of Anne 1710, 8 Ann., c. 19 (Gr. Brit.) ("An act for the encouragement of learning, by vesting the copies of printed books in the author's or purchasers of such copies, during the times therein mentioned.").

15. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

16. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

17. *See* Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 Theoretical Inquiries L. 29 (2011).

18. *See* Brad Hooker, *Rule Consequentialism*, The Stan. Encyclopedia of Phil. (last revised Nov. 18, 2015), https://plato.stanford.edu/entries/consequentialism-ruel/ (on file with the *Michigan Law Review*).

19. *Id.*

exclusive rights, its structure of liability, its entry devices, and its limiting doctrines are in this reading treated as entirely contingent, dispensable, and of no significance on their own.

In *What's Wrong with Copying?* Drassinower attempts to turn this dogma on its head. He rejects the premise that copyright law is driven by externally determined goals, arguing that the institution's raison d'être should be found in its own individual concepts and devices. Thus, fairly early on, he identifies his task as revealing how certain "fundamental features" of copyright doctrine form a "coherent whole" (pp. 7–8). While the book then executes this task, it nowhere offers readers a definition of what exactly it is that makes something "fundamental" (p. 8). As the argument unfolds, it becomes apparent that Drassinower believes the ideals of *fundamental* and *coherence* have a reciprocal relationship. Something is fundamental *if* and *when* it coheres with other parts of the system, and this is itself a feature of the institution's rationality.

In focusing on the fundamental features of copyright doctrine, Drassinower locates within copyright law and jurisprudence a motivating purpose for the institution. To him, "[c]opyright law protects the integrity of the work as a communicative act" (p. 8). While this observation may appear to be stated in overtly positive terms, it contains within its very framing a crucial normative orientation. Indeed, each of the ideas embedded in the observation represents a feature of copyright doctrine that Drassinower bases his account around.

To Drassinower, copyright should be understood not as a mere property right, but rather as a "right inhering in persons as speaking beings" (p. 56). The principle of "independent creation" (p. 57), which undergirds the originality requirement of copyright—famously described by the Supreme Court as the "*sine qua non* of copyright"[20]—is the crucial anchor in his theory. When copyright scholars speak of independent creation today, they tend to think of it in principally doctrinal terms, as either a defense to infringement or as a component of copyrightability. In the former, it allows a defendant to avoid liability (for infringement) by showing that the alleged copy was not a copy at all, but instead entirely the product of the defendant's efforts;[21] and in the latter, it allows a work to obtain protection by showing that it wasn't copied from another work but instead originated in the claimant/author.[22] To Drassinower, these doctrinal formulations embody a deeper normative principle. Independent creation plays these doctrinal roles because it recognizes that originality—and authorship—are about "speaking in one's own words" (p. 62). When a work of expression is deemed original by copyright

20. Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

21. *Id.*

22. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §13.01[B], at 13-9 (2016) ("[I]f the defendant . . . independently created the work at issue, then infringement liability must be denied.").

law, the system protects it because it represents that author's outward communication, the author's choice to speak. And it is for this reason that copyright's originality requirement does not care about the content or significance of the speech itself, but is instead concerned exclusively with ensuring that the speech is indeed the author's own.[23]

As should be obvious, copyright's commitment to protecting an author's ability to speak in his or her own words derives from the normative influence of individual autonomy. Drassinower's account takes this further. The focus on autonomy contained in independent creation, he argues, also carries with it the affirmation that in granting one author protection, that author is submitting "to every other person's equal right" in their own expression (p. 63). Equality of authorship, therefore, goes hand in hand with individual autonomy. Independent creation as defense and entry requirement are but two sides of the same coin. In insisting that independent creation is all that is needed for the protection of one author's expression, copyright law is simultaneously affirming that another author's independently produced expression (even if identical) is not a violation of the first author's rights but instead the possible subject of its own protection. Copyright's principle of independent creation therefore also affirms the equality of individuals' rights as autonomous agents to speak in their own words.[24]

Having set up independent creation as copyright's core principle, *What's Wrong with Copying?* then shows readers how this principle illuminates several other important doctrinal concepts within copyright jurisprudence. The systemic coherence that Drassinower achieves in this elucidation is staggering and worthy of serious commendation. He first shows how copyright's infamous idea–expression dichotomy—the rule that copyright protection is limited to the particular expression of an idea and never the idea itself—originates in the principle of independent creation. To grant an author protection over an idea would, in effect, deny the equal dignity of other authors by subjecting their own expression—namely, their expression of the first author's idea—to liability. The equal dignity of parties explains the dichotomy (p. 69). To Drassinower, the same principle also explains why most jurisdictions treat the use of protected work that creates a "new expression, meaning, or message"[25] as a form of fair use. Since a plaintiff is therefore always "an author among authors" (p. 76), copyright law exempts independent authorship from liability.[26]

In a similar vein, Drassinower uses the principle to make sense of the landmark copyright case of *Baker v. Selden*,[27] the interpretation of which has generated a good deal of disagreement among scholars.[28] Drassinower finds

23. *See Feist Publ'ns, Inc.*, 499 U.S. at 348.

24. *See* p. 63.

25. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

26. *Feist Publ'ns, Inc.*, 499 U.S. at 340.

27. 101 U.S. 99 (1879).

28. For an overview, see Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 Tex. L. Rev. 1921, 1928–36, 1958–61 (2007).

in *Baker* an implicit affirmation of his theory, insofar as the Court found the defendant's use of the plaintiff's work to be non-infringing without at the same time denying the existence of copyright in the plaintiff's work altogether. To Drassinower, the reason the Court found the defendant's use to be non-infringing was that it was not a "communicative" use of the work (p. 92). Copyright therefore protects a work not because it is a mere object, but because it is a "communicative act" that originates in the author (pp. 92–93). As a logical corollary then, when the defendant's own act isn't a communicative act as such, it doesn't interfere with the author's own communication (or speech), taking it outside the realm of potential liability (pp. 94–95). A noncommunicative use does little to the integrity of the work as a form of communication and is therefore beyond copyright law. It is also for this reason that certain kinds of uses are treated by copyright law as forms of "non-use" (rather than fair use), placing them outside the zone of liability for infringement (pp. 108–09).

The book's analysis of independent creation as the motivating principle of copyright provides a perfect set up for the all-important (and obvious) question, one that it finally arrives at in Chapter Four: So, according to copyright law, just what is wrong with copying? And once again, Drassinower's response fits coherently with his account that autonomy and equal dignity are core normative ideals of the system. In his account, copyright infringement (the communicative reproduction of a work) is wrongful because it amounts to a form of "compelled speech" (p. 111), a form of "ventriloquism practiced on an unwilling subject" (p. 113). By communicating an author's speech without his or her consent, a defendant purports to speak for the author. This operates as a fundamental incursion into the individual author's autonomy—determining not just *what* to say, but also *when* and *how* to speak, and more fundamentally *whether* to speak at all (pp. 119–20). It is this commitment to autonomy, and the need to preserve the author's choice, that explains why proper attribution is never a defense to copyright infringement, and indeed why copyright law makes no principled distinction between published and unpublished works (pp. 120–21).

What's Wrong with Copying? then attempts to extend its account to provide a principled defense of the public domain in copyright law. The public domain has been a fruitful source of theorization by scholars of copyright, an overwhelming majority of whom have come to understand it as the repository of all that is not protected by copyright.[29] The basis for this lack of protection is ordinarily taken to be utilitarian, once again driven by the incentives–access paradigm wherein the public interest is seen as best served by the system's refusal to extend protection to certain types of content. Much like he does with copyright protection, Drassinower argues that this

29. *See, e.g.*, James Boyle, The Public Domain: Enclosing the Commons of the Mind (2008); Lawrence Lessig, The Future of Ideas: The Fate of the Commons in a Connected World (2002); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569 (2009); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Calif. L. Rev. 1331 (2004); Jessica Litman, *The Public Domain*, 39 Emory L.J. 965 (1990).

framing renders the public domain contingent on the public interest, effectively subjecting its utility to an empirical claim about incentives and access (pp. 147–53). In its place, he posits the "inherent dignity" of the public domain (pp. 158–59), which derives from its very constitutive role in copyright jurisprudence. Since a work is a communicative act (rather than just the object of a property right), aspects of the work that do not entail or perform this communicative function are automatically excluded from the copyright system, therefore constitute part of the public domain. When an author chooses to obtain protection, she obtains such protection for the work as a communicative act—and never beyond. The public domain is, therefore, integral to Drassinower's conception of the work as both a protected act and a mechanism of sharing the unprotected elements of the communication (pp. 178–82). Or, as he puts it, an author's "insistence to be respected as an autonomous speaker thus constitutes itself as a gift to the public" (p. 182).

Drassinower closes the discussion by showing how his analytical framework allows copyright law to distinguish between "limitations" and "exceptions" (pp. 187–201). In his understanding, limitations are *internal* to copyright's juridical order and represent limits both to the subject matter of protection and the scope of the rights being conferred (p. 216). Exceptions, on the other hand, represent *external* constraints, or situations "in which acts in respect of copyright subject matter falling within copyright scope do not give rise to liability" (p. 216). These exceptions either can be "grafted attachments" that are sociological rather than jurisprudential in nature, such as statutory exceptions to infringement that are carved out for special interest groups (p. 216), or they can be the product of the interaction between copyright and other "juridical interests" such as free speech (pp. 201–02).

Drassinower's rights-based explanations for several of copyright law's individual doctrines fit together rather tightly, allowing him to articulate a unified vision for the copyright system: protecting the integrity of an individual's communicative act. The account's coherence appears neither forced nor indelibly complex. It instead flows rather seamlessly *if* (and *once*) one accepts the central proposition that copyright cares about a work of expression primarily as a communicative *act* rather than as a *thing*, a view that Kant famously advanced.[30] In this sense, Drassinower correctly characterizes his view as "Kantian" (p. 113).

All the same, there is another equally important sense in which Drassinower's account is Kantian. In locating the purpose and logic of the copyright system within its constitutive doctrines, Drassinower's theory readily assumes that the intelligibility of copyright law is necessarily *immanent*, or internal, to the very object of study.[31] In so doing, the book implicitly adopts

30. *See* Immanuel Kant, On the Wrongfulness of Unauthorized Publication of Books (1785), *reprinted in* Practical Philosophy 27, 27–35 (Mary J. Gregor ed. & trans. 1996).

31. *See* p. 113 (suggesting that the theory of copyright law as communication derives from "well-settled copyright doctrines" such as "[a]nalyses of originality, the idea/expression of dichotomy, merger, [and] . . . the *Baker* doctrine").

the methodology that Drassinower's colleague Ernie Weinrib made famous in tort law.[32] Immanent intelligibility begins with the understanding that something "can be understood self-sufficiently without recourse to something external that would pose the problem of intelligibility afresh."[33] In rejecting external guideposts, the methodology assumes that "intelligibility that is immanent to its subject matter is the most satisfactory notion of understanding, and not merely one among many."[34] Drassinower's implicit emphasis on immanent intelligibility helps explain certain aspects of the account that might otherwise go unnoticed.

Deriving the immanent intelligibility of an institution involves two sequential steps.[35] First, one identifies the "essential" characteristics (or features) of the institution.[36] These are usually features that are taken to be the sine qua non of the institution, without which the institution would not exist at all. In an important sense, they are therefore taken as "fixed"—for otherwise they would hardly be essential.[37] Then, in the second step, these characteristics are shown to form a "coherent ensemble," which allows for their understanding as a unified system.[38] As should be obvious from this description, the two steps are hardly analytically independent. To the contrary, they are quite symbiotic, especially as explanatory steps. The account could, for instance, identify elements that cohere within an institution first, and then—*ex post*—characterize them as essential in order to make the account work. The sequence, therefore, makes sense only if the account begins with a shared (or justified) understanding of what makes a doctrinal feature essential (or fundamental) to an institution, independent of its contribution to the system's overall coherence. One way of doing this is historical, i.e., to show that the features at issue are "fixed" in some epistemically verifiable sense.[39] Another is to have an independent theory of what makes something essential.

What's Wrong with Copying? clearly delivers on the second step (coherence). In fact, much of its persuasive force derives from its overwhelming success on this front. Yet, it avoids engaging the analytical intricacies in the first step. Drassinower seems to assume that something is essential (or fundamental) to copyright if one cannot imagine the institution of copyright without it, which implies a mix of the fixed and sine qua non conceptions of essentiality. Would we, for instance, think of copyright as something other than copyright if the law insisted on a novelty prerequisite for copyrightability, or if it eliminated the independent creation defense? Clearly, Drassinower would. But the point would benefit from further explication.

32. *See* Ernest J. Weinrib, The Idea of Private Law (1995).

33. Weinrib, *supra* note 6, at 963.

34. *Id.*

35. *See id.* at 966.

36. *See id.*

37. *Id.* at 967.

38. *Id.* at 968–71.

39. *Id.* at 967.

Conversely, why isn't "fixation" an essential part of the ensemble that Drassinower identifies? Congress has identified "fixation" as a "fundamental criteri[on]" of copyright law in the United States.[40] Yet it doesn't figure in Drassinower's elaborate exegesis. Perhaps there is a worthy reason for the omission, but it leaves the reader wondering whether the account emphasizes coherence ahead of essentiality, thereby reversing the all-important sequence of immanent intelligibility.

In summary, *What's Wrong with Copying?* provides a coherent and persuasive account of why certain elements of the copyright system that have hitherto been understood as largely irrelevant to the institution's assumed instrumental ideals do indeed have a central role in the very constitution of the system and in understanding its purpose. The book's method involves replacing the contingency of copyright doctrine with a framework where copyright *is* only ever to be immanently understood through its doctrines. In the process, the book's argument has an indelibly rationalist orientation, a feature that the next Part unpacks.

II. Faith and Reason in Copyright Theory

What's Wrong with Copying? intervenes in the debate about the proper justification for copyright law at a rather crucial juncture. The book's main arguments clearly derive from a deontological orientation, rejecting any reliance on consequentialist or utilitarian thinking to justify copyright law. Autonomy, dignity, and equality are Drassinower's principal motivating ideals for copyright, from which all of his arguments flow. In setting up the institution in this manner, the book is therefore unequivocally *rationalist* in an important epistemological sense, a reality that deserves scrutiny.

A. *The Allure of Empiricism*

Rationalism, which represents an important trend in Western philosophy, argues that some concepts and knowledge can be understood and appreciated independent of "sense experience" of any kind.[41] Intuition, deduction, and a set of innate beliefs are believed to be sufficient in a variety of contexts to allow knowledge to be gained.[42] Rationalism is diametrically

40. H.R. Rep. No. 94-1476, at 51 (1976).

41. Markie, *supra* note 10; *see also* George Jacob Holyoake, Rationalism: A Treatise for the Times 3 (London, J. Watson 1845) (describing the "first principle of Rationalism" to be the idea that something is "clearly established by an indisputable process of reasoning"). The most prominent rationalist was, of course, Kant himself, who famously argued that some kinds of knowledge was "altogether independent of experience." Immanuel Kant, Critique of Pure Reason 1 (Marcus Weigelt trans. & ed., Penguin Books 2007) (1781). For an account of rationalism, see John Mackinnon Robertson, Rationalism 1–6 (1912) and A Companion to Rationalism (Alan Nelson ed., 2005).

42. Markie, *supra* note 10.

opposed to "empiricism," which begins with the premise that sense experience remains the ultimate guide to all knowledge.[43] To empiricists, external validation through sense experience—what we may collectively term "empirical data"—is the ultimate and only real source of knowledge.[44] The debate between rationalism and empiricism is a well-known and ongoing disagreement in the world of philosophy.[45]

In recent years, Anglo-American copyright law's strong emphasis on utilitarianism has produced an overt turn towards empiricism as the dominant approach to copyright theorization and thinking.[46] Whereas copyright's utilitarian dogma originated as a largely descriptive idea, in due course the descriptive ideal became a prescriptive or normative one.[47] Among other reasons, this turn was accentuated by the recognition that the methods of the social sciences—initially economics, but eventually others too—could be marshaled to verify and test the normative claims of copyright's utilitarian theory.[48] The claim that copyright produced an incentive to create could be tested, as could the claim that it induced greater creative output in certain domains.[49] The basis of the copyright system—its very validity, so to speak—has over time come to be understood in terms of our ability to verify the myriad consequences that it purports to produce in society.[50] Copyright utilitarianism thus found an able and respectable ally in empiricism, insofar as the consequences of the system could be verified in the external world and thereby generate ideas for law reform.

All things considered, the marriage of copyright utilitarianism with an empiricist worldview has produced important benefits for the utilitarian account. It has allowed some of its core assumptions to be questioned and for copyright's utilitarian theory to be modified and reshaped in various ways, all in the pursuit of a common set of consequences. For instance, it has called into question the simplistic idea that more copyright means more

43. *Id.* For a fuller discussion of empiricism as a philosophical movement, see generally Robert G. Meyers, Understanding Empiricism (2006) and Wilfrid Sellars, Empiricism and the Philosophy of Mind (1997).

44. Markie, *supra* note 10.

45. *See, e.g.*, Bruce Aune, Rationalism, Empiricism, and Pragmatism: An Introduction (1970); Janice Thomas, The Minds of the Moderns: Rationalism, Empiricism and Philosophy of Mind (2009).

46. *See, e.g.*, Nat'l Research Council of the Nat'l Acads., ©opyright in the Digital Era: Building Evidence for Policy 13–14 (Stephen A. Merrill & William J. Raduchel eds., 2013) (ebook) (describing the importance of empirical data to validating copyright's core functional purposes).

47. For a discussion of this move, see Balganesh, *supra* note 12, at 315–20.

48. *Id.*; Christopher Buccafusco et al., *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 Tex. L. Rev. 1921, 1932–46 (2014).

49. *See* Balganesh, *supra* note 12, at 316 (describing an economic study from 1934 that examines copyright in books).

50. *See id.* at 316–18.

creative output,[51] and the belief that as self-interested actors are motivated to create based exclusively on market incentives.[52] At the same time, this marriage has had an important exclusionary effect that has been less overt and far from ideal: the wholesale rejection of rationalism as a form of copyright theorizing. Empirical verifiability is treated as the litmus test of a theory's legitimacy, meaning that when a theory is incapable of such verification, it begins to lose credibility within copyright circles.

A version of this preference for empiricism in copyright law (and intellectual property more generally) can be found in a recent essay by Mark Lemley.[53] In Lemley's account, "reason" and empirical verifiability go hand in hand.[54] The unwillingness and inability to subject a theory to empirical verification, in his view, renders the theory faith-based.[55] The distinction that he draws is thus between theories that "are responsive to evidence and those that are impervious to it."[56] Lemley's real target in this dichotomy appears to be nonverifiable theories that use the inability to test as a reason for indirectly attempting to justify the status quo.[57] Yet his framing is overinclusive. By making empirical verifiability the only criterion for entry into the set of reason-driven theories, the argument effectively leaves no room for a rationalist theory in copyright law, even one not committed to the status quo, but which is nonetheless incapable of empirical validation.

B. *A Rationalist Response*

Lemley's argument conflates "reason" with empirical verifiability through evidence, and "faith" with the lack of such verifiability.[58] For centuries now, philosophers of various traditions have attempted to draw an important distinction between beliefs that emanate from faith and those arrived at through reason.[59] While both faith and reason can form the basis for a belief, the latter is understood to inhere in the existence of a methodology for the inquiry. One scholar defines this requisite as the criterion of

51. *See* Paul J. Heald, *How Copyright Keeps Works Disappeared*, 11 J. Empirical Legal Stud. 829 (2014) (showing through a randomized sample that "copyright law seems to deter distribution and diminish access").

52. *See* Buccafusco et al., *supra* note 48, at 1932–45.

53. Lemley, *supra* note 9.

54. *Id.* at 1330.

55. *Id.* at 1336–37.

56. *Id.* at 1345.

57. *Id.*

58. *Id.* at 1330.

59. For an excellent historical overview, see generally Faith and Reason (Paul Helm ed., 1999).

"demonstrability."[60] All the same, demonstrability is not the same as empirical verifiability. Mathematical proofs, for instance, are reasoned demonstrations of statements, yet they aren't, in any sense of the term, empirical or driven by evidence. They begin with intuitions that are taken to be accepted and demonstrate how further propositions may be deduced from them as a logical matter. Surely, we wouldn't claim that mathematical proofs are devoid of reason, and that they are matters of pure faith, simply because we don't have empirical tests giving us evidence for such proofs. In short then, a belief (or argument) can be the subject of reason—rather than faith—even when incapable of empirical validation. Indeed, this is the core premise of rationalism.

A rationalist theory hardly demands deference based on trust in a way that an argument built on faith does to end the inquiry.[61] A rationalist theory, built around demonstrable reason, can be the target of disagreement when a core premise of its framework, or an element of its reasoning, is called into question. Drassinower's deontological theory represents just such a rationalist effort. Distilled down to its basics, its core normative claim is that copyright law recognizes an individual's autonomy in speaking (or communicating to the outside world) as worthy of protection (pp. 115–20). From this core claim, it reasons outwards to deduce a set of additional propositions which explain various aspects of the copyright system, such as the originality and idea-expression requirements, the rationale for independent creation, and the basis for treating certain acts as forms of infringement.

Now one might quite legitimately *disagree* with the theory's core premise, by, for instance, claiming that there is nothing special—or intrinsically worthy of protection—in an individual's autonomy to speak. One may also dispute how the theory derives its purpose by relying on certain aspects as essential to copyright. One might even disagree with the claim that individual autonomy is worthy of any legal protection.[62] Yet such disagreement would not be premised on an unwillingness to trust the protagonist of the theory, which would be the case if the theory attempted to persuade based on faith rather than reason.[63] By relying on reason and deduction, rationalist theories such as Drassinower's do not require audiences to trust their arguments on faith.

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60. James Swindal, *Faith and Reason*, INTERNET ENCYCLOPEDIA OF PHIL., http://www.iep.utm.edu/faith-re/ [https://perma.cc/7F7Y-RG2S] (emphasis omitted) ("Some kind of algorithmic *demonstrability* is ordinarily presupposed.").

61. For a useful exegesis along these lines, see H.O. Mounce, *Faith and Reason*, 69 PHIL. 85, 92 (1994). Philosophers refers to this as "fideism," the idea that faith is independent of knowledge and reason and operates on trust. *Id.* at 86, 92; Richard Amesbury, *Fideism*, STAN. ENCYCLOPEDIA OF PHIL. (last revised Sept. 21, 2016), http://plato.stanford.edu/entries/fideism/ (on file with the *Michigan Law Review*).

62. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (arguing that welfare rather than fairness—which they understand to include broad commitments to fairness and ideas of corrective justice that are Kantian—should be the normative motivation for law-making).

63. Mounce, *supra* note 61, at 86, 92.

Disagreement with the underlying reasons for a theory is hardly unique to deontological accounts. Consequentialist theories, including utilitarianism and its cousin wealth maximization, begin with important normative premises that they then reason outwards from, such as the very idea that maximizing overall social utility (or welfare) is a normatively desirable goal for an area of law.[64] Surely, this proposition is just as incapable of being tested through evidence as is Drassinower's emphasis on individual autonomy. It is just that the former (i.e., welfare) is more widely accepted than the latter (i.e., autonomy) as a goal of the copyright system.[65]

None of this is to deny the fact that there are, and will likely continue to be, justificatory theories of copyright and intellectual property that turn to rationalism precisely to avoid empirical scrutiny. Lemley's description of some of these theories—built as they are on analogies to property, or on incomplete readings of Locke or Kant—appear to exemplify this troubling phenomenon.[66] Problematic as they may be, they are in reality no different from flawed empirical work in the field, which build into their framework and variables different normative assumptions that in turn drive the conclusion. The key in both is to reveal the deficient application of the particular *method* adopted by the theory rather than to call for an abandonment of the theory's method altogether.

Drassinower's theory of copyright is indelibly rationalist. Its ultimate arbiter—certainly a real one—is reason. In constructing its premises in lucid and overt terms, *What's Wrong with Copying?* never once shies away from distilling its claims into constituent parts and then defending each one independently. This is hardly to suggest that its reasoning is flawless or correct—only that it uses reason rather than trust. Indeed, it is to the theory's credit that in its affirmation of autonomy as the primary normative ideal of the institution, its focus is on both the dignity of individual authorship and the equality of authors as a collective, allowing it to create an equally rigorous normative account for the public domain. This readily distinguishes it from other rationalist theories with a deontic orientation, which invariably focus on the author as an atomistic agent.[67]

In many ways, then, *What's Wrong with Copyright?* is a genuine rationalist response to the utilitarian empiricism that dominates copyright thinking today. It far from abandons reason and rational argument for faith and trust, and willingly sets out its assumptions in exhaustive detail. The theory is hardly driven by a commitment to defending the existing expansionist

64. For a criticism, reference Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980).

65. *See* Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 237 ("Maximizing social welfare, or overall utility, thus lies at the heart of what copyright as an institution is trying to achieve.").

66. *See, e.g.*, Lemley, *supra* note 9.

67. *See, e.g.*, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY (2010) (arguing that American copyright law should be reshaped using the idea that authorial creativity has intrinsic and spiritual dimensions).

trend in copyright law, or indeed the status quo. To the contrary, it argues for a radical reimagination of what constitutes copyright infringement, effectively exempting all noncommunicative uses from the scope of liability.[68] While one may indeed *dislike* where its logical reasoning leads, that alone is hardly a valid basis to jettison engaging the theory on its own terms and examining whether its *reasoning* is convincing as such. And it is to that task that the next Part turns.

III. Unbundling Drassinower's Rationalism

Having argued that *What's Wrong with Copying?*'s rationalist theory is worth engaging with on its own terms, I now unbundle its analytical method. To American legal audiences, both the book and its core argument would benefit quite significantly from a more direct elucidation of its unique methodology. This is so for two interrelated reasons.

First, the method of deriving an explanation for a legal area or institution through examining its immanent logic is, for the most part, alien to modern American legal thinking. Ever since the influence of Legal Realism in the 1930s, the idea that legal doctrine can be understood through itself, without recourse to the goals and purposes *behind* and *beyond* the law, is viewed with deep suspicion.[69] Second, steeped in this Realist tradition, American copyright thinking refuses to accept the reality that copyright law can be anything other than instrumental. The degree and orientation of that instrumentalism might indeed vary, but it is treated as a sine qua non of the institution.[70]

In dispensing with copyright's accepted instrumentalism through a method of analysis that is alien to American audiences, the book would have done well to set out the method's core tenets in more detail. Indeed, in areas where a similar method has made inroads into the instrumentalism of American legal thinking,[71] the project has benefited from a clear articulation of the method being employed.[72] With that in mind, this Part unpacks three important methodological and analytical puzzles that Drassinower's account of copyright raises.

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68. *See* pp. 8–9.

69. For on overview of American Legal Realism, see generally L.L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. & Am. L. Reg. 429 (1934); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L.J. 1037 (1961); Brian Leiter, *American Legal Realism*, *in* The Blackwell Guide to the Philosophy of Law and Legal Theory 50 (Martin P. Golding & William A. Edmundson eds., 2005); Joseph William Singer, *Legal Realism Now*, 76 Calif. L. Rev. 465 (1988) (reviewing Laura Kalman, Legal Realism at Yale: 1927–1960 (1986)).

70. *See, e.g.*, Balganesh, *supra* note 1, at 1576–77; Justin Hughes, *Fair Use Across Time*, 50 UCLA L. Rev. 775, 797 (2003); Sterk, *supra* note 1, at 1198–1204.

71. The prime example is the work of Drassinower's colleague, Ernest Weinrib. *See* Weinrib, *supra* note 32, at 1–21.

72. *See, e.g.*, Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 Colum. L. Rev. 472 (1987); Weinrib, *supra* note 6.

A. *Blending Explanation and Justification*

The first puzzle relates to the project's orientation. Fairly early on in the book, Drassinower consciously disavows straightjacketing the book into any particular orientation, observing that his "account is neither descriptive nor normative" (p. 7). It is instead *both*: a "description of copyright doctrine" with a "normative import" (pp. 7–8) derived from the coherence of the institution. Lurking within the descriptive–normative dichotomy is another, subtler orientation that the book confronts in passing (pp. 221–22). This is the distinction between an *explanatory* account and a *justificatory* one. While the distinction is indeed subtle, it is of some significance in the copyright context, where there is great concern with simply defending the status quo through a theoretical account.[73] Drassinower clearly disavows such desire when he notes that his account finds elements of current copyright doctrine and practice "unjustified or unjustifiable" (p. 8). For this to hold true, though, the theory itself must exhibit certain features.

The explanation–justification distinction is similar to, yet analytically distinct from, the descriptive–normative dichotomy. Jules Coleman argues that an explanation shows us "what the nature of a thing is," while a justification "seek[s] to defend or legitimate certain kinds of things."[74] While this may seem to correspond to the distinction between a descriptive and a normative activity, the correspondence is at best incomplete. Indeed, illuminating the nature of a thing—i.e., an explanation—may itself be driven by a particular orientation and the need to adhere to a set of norms, rendering it normative.[75] Coleman's point is that for internal accounts of an institution, maintaining the difference is crucial, since explanatory (even when normative) accounts do not rely on the "moral or political" defensibility of the value (e.g., autonomy), but instead focus on the "epistemic or theoretical."[76]

Why does any of this matter for Drassinower's theory? If the theory of *What's Wrong with Copying?* is understood as purely explanatory, the moral significance of autonomy as a normative ideal does little to motivate the analysis. Instead, the epistemic reality that autonomy is indeed the thread running through the structure of copyright doctrine drives the analysis. To put the point more bluntly, there would be nothing special about autonomy—as opposed to, say, efficiency or corrective justice—that would motivate such a purely explanatory account. On the other hand, if the account were a justificatory one (or a justification combined with an explanation), it would have to offer a reasoned moral defense of such authorial autonomy within copyright doctrine, or of how this autonomy creates coherence

73. *See, e.g.*, Lemley, *supra* note 9, at 1336–37.

74. Jules Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 3–4 (2001).

75. *Id.* at 3.

76. *See id.* at 4.

within copyright. An explanation can thus remain in the realm of causes, while a justification must proffer reasons defending its claim.[77]

Drassinower's account offers readers no independent defense of autonomy (or the closely related ideas of dignity and equality) while using it to illuminate copyright doctrine.[78] At first glance, therefore, it appears to take speaking "in one's own words" as a value of explanatory significance, which produces a degree of coherence in copyright doctrine (p. 111). Yet Drassinower readily switches into justificatory mode when he is "critical of existing practices at odds with that coherence" (p. 221). In making this move, Drassinower is understandably unwilling to simply ignore elements of the status quo that are incompatible with his theory. But at the same, the theory's justificatory component relates to the ideal of coherence without an explication of why the particular coherence that it identifies, or the basis for it (i.e., autonomy) are normatively desirable for copyright law.

Drassinower's account thus tells us to be suspicious of protecting computer programs against noncommunicative uses, because such protection doesn't cohere with its understanding of copyright as merely protecting the integrity of the work as communication (p. 221). Embedded in this justificatory logic are two alternate assumptions: (i) that the coherence produced through this understanding is itself normatively desirable, *qua* coherence, or (ii) that the coherence at issue is undergirded by a value, autonomy, that is normatively desirable on its own. The book's account takes both for granted, as it moves seamlessly between a causal story (built on coherence) and a putatively reason-driven one (built on the significance of autonomy and dignity) without elaboration.

While this mobility exempts the account from accusations of status quoism, it quite legitimately subjects the theory to a higher burden: of either defending the value of coherence for copyright law, or the moral significance of autonomy as more than just a coherence-inducing ideal for copyright doctrine. In concluding that those parts of copyright law which do not derive from this instantiation of autonomy are not justified (e.g., liability for private copying or personal downloading[79]), Drassinower's theory obligates itself to showing why autonomy—in the sense of speaking in one's words—or the particular coherence that it produces is indeed a morally desirable goal for the institution such that the inclusion of incompatible rules affects our very understanding of copyright law.[80] All the same, *What's Wrong with Copying?* is reluctant to offer us a fuller justificatory defense along these

77. *See* Brian Leiter, *Explanation and Legal Theory*, 82 Iowa L. Rev. 905, 907 (1997).

78. P. 8. One might even take Drassinower to be conceding as much when he observes that the "normative import embedded in the account is not rooted in a deployment of normative claims external to copyright." P. 7.

79. P. 9 ("Copying for personal use purposes is not an act within the purview of an author's copyright.").

80. *See* Coleman, *supra* note 74, at 4–5.

lines. Further compounding this omission is the absence of any a priori criteria for differentiating between elements of copyright that are "fundamental" and therefore of explanatory relevance (p. 8), and those that are nonfundamental *and* potentially unjustified.

B. *Juridical Rationality—Private or Public*

Drassinower's account of copyright in *What's Wrong with Copying?* focuses on explaining the "juridical structure" of copyright law using the coherence of the institution's internal logic (p. 7). In identifying the fundamental features of copyright doctrine, its emphasis is on the substantive content and scope of the "right[ ]" embodied in copyright's basic authorial entitlement (p. 7). Somewhat surprisingly, though, the account provides no explanation for the institution's very specific enforcement machinery, the core of which has remained unchanged in an important respect.

Copyright's *enforcement* machinery does not just encompass the remedial content of the institution. It importantly includes the very manner and method through which copyright's core substantive rights are recognized, and adjudicated, by the legal system.[81] And about this, the book's account makes important assumptions but says very little. The account readily assumes that copyright is juridically validated by private law, which entails enforcement of its unique rights structure as a civil, private enforcement action between plaintiff and defendant.[82] However, nothing in Drassinower's substantive account (of a work, originality, idea, expression, or fair use) dictates this private law structure.

To understand this point, consider a counterfactual to what we currently have in the copyright system. Assume that all of what we have right now—in terms of the subject matter of copyright, the scope of an author's exclusive rights, and the various limitations and exceptions to that exclusivity—remain constant. Now, assume that copyright law does not provide authors with a mechanism of private enforcement (i.e., no civil remedy).[83] Instead, the statute merely criminalizes infringement, rendering enforcement at a prosecutor's discretion.[84] Would this new system be compatible with Drassinower's account of the copyright entitlement? In almost all respects, the answer would be plainly yes. The entitlement at issue (the analogue to a

81. The cause of action—for copyright infringement—so to speak. 17 U.S.C. §§ 501–513 (2012).

82. We see this in the book's recurrent use of the phrases "plaintiff" and "defendant," both of which assume the existence of a private civil action for an infringement. *See, e.g.*, p. 113 ("The argument is this chapter takes off from the intuition that an infringement of the right of first publication is an instance of compelled speech—that is, the defendant publishes the plaintiff's unpublished work without the plaintiff's authorization.").

83. Assume, in other words, that there is no equivalent to section 501(a) in the current Act.

84. As contained in the current Act as an add-on to civil liability. 17 U.S.C. § 506. Assume then that in our hypothetical, the statute only contained such a provision, which provides that "[a]ny person who willfully infringes a copyright shall be punished." *Id.*

property right in the crime of theft) would be the author's ability to communicate in her own words. The system would still protect the integrity of the work as such, and infringement—which would now be a crime—would derive from the recognition that a wrongful publication amounts to compelled speech.

What distinguishes this alternate system from what we have today—a system of private law—is the fact that our hypothetical system takes the decision of whether and when to treat wrongful copying as an infringement *away from the author* in significant respect. Instead, it transfers this decision to the public prosecutor, a representative of the state, who decides based on variables beyond the immediate interests of the author. In no sense then would we treat or term this type of action as one of private law. Indeed, it is for this reason that criminal law is considered distinct from private law.

Copyright's categorization as a mechanism of private law derives principally from its willingness to treat wrongful copying (which lies at the root of infringement) as a private harm, and correspondingly, as creating a private right. And what makes it a private right is more than just its individual-specific conception of harm—for indeed, many crimes do that too (e.g., assault or battery, which begin with obvious infractions of an individual's autonomy). What makes it a private right is instead the law's willingness to allow the author to be the first arbiter of the harm, which the law builds its substantive conceptual structure around.[85] The author, and not the prosecutor, is the one that ultimately decides whether an unauthorized publication is indeed a form of compelled speech—that is, whether it should be rendered actionable at all. The author can terminate a private lawsuit at just about any point under the current system, whereas an author in our hypothetical scenario has no such authority to do so once a prosecution has begun and the state has decided to get involved.

The point is thus clearly more than just an adjectival one. The belief that the author should be making this decision is as much a manifestation of authorial autonomy as the author's decision whether or when to speak. A critical component of copyright's private law story is an author's ability to treat what might be an objective instance of wrongful copying as normatively acceptable (i.e., rightful) based on his or her subjective assessment. I have argued that it is so crucial to copyright that we might fruitfully begin our understanding of the system from this structure.[86] Leaving my own theory to one side, though, Drassinower's account glosses over this question altogether in its focus on the substantive entitlement of copyright. Not only does it avoid discussing the structure of liability, it says very little about the remedial aspects of copyright infringement—aspects which might have shed additional light on the structure of that wrong.

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85. *See* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 771–72 (2013).

86. *See, e.g.*, Balganesh, *supra* note 65; Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012).

One prominent theorist of private law has famously noted that "[t]he most striking feature of private law is that it directly connects [the plaintiff and the defendant] through the phenomenon of liability."[87] Yet, *What's Wrong with Copying?* takes the structure of liability in copyright law as one of the institution's nonessential features. If liability, and its very private structure, were instead fundamental to copyright, the account might have to rely on the ideal of corrective justice to retain its noninstrumental (and Kantian) emphasis. The point is not that Drassinower claims otherwise, just that the account in its current form neither explains nor justifies the private law structure of copyright liability even though it implicitly relies on this structure.

C. *Dynamic and Layered Rationalities*

In developing his immanent account from within the structure of copyright doctrine, Drassinower readily distances himself from notions of instrumentalism and consequentialism that the literature commonly proffers. This is both rhetorically and analytically defensible, given Drassinower's claim that an of account of "copyright law" must explain the intricacies and nuances of copyright doctrine,[88] something that broad-based consequentialist theories of copyright have significant difficulty doing. The book therefore commits itself to a rationalist account that rejects any plausible role for consequentialism in copyright law and doctrine. This poses the question of whether it needed to go this far.

One reality of today's Anglo-American copyright system is that judges discuss the institution and its individual doctrines in consequentialist and utilitarian terms when deciding individual cases.[89] The ideas of "balance,"[90] "incentives,"[91] "market harm,"[92] and the "public interest"[93] are established staples of modern judicial reasoning in copyright. Drassinower seems to acknowledge this reality when he notes that some of the most prominent copyright decisions in American and Canadian copyright law adopt the rhetoric

87. WEINRIB, *supra* note 32, at 1.

88. *See* p. 7.

89. *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (discussing copyright law's rule on attorney's fees in terms of its "purpose of enriching the general public through access to creative works"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (describing the fair use doctrine in incentive-driven terms); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 (1984) (discussing authorized time-shifting in terms of incentives).

90. Stewart v. Abend, 495 U.S. 207, 228 (1990) ("Moreover, although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works.").

91. *Sony Corp.*, 464 U.S. at 450 ("The purpose of copyright is to create incentives for creative effort.").

92. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

93. *Fogerty*, 510 U.S. at 517–18.

of utilitarianism (Chapter Two). The book's critique of these opinions' express reasoning thus confronts a challenge that isn't just theoretical: If copyright law is fundamentally about authorial autonomy, why do courts continue to use consequentialist language in their actual judicial reasoning?

At first blush, one might choose to answer this question in a few possible, but ultimately unsatisfactory, ways. First, one could argue that judges aren't being transparent about the real reasons for their decisions, either because they are misguided or because they choose to conform to the consequentialist orientation prevailing in our legal culture. This explanation is a little too easy, given how pervasive and potentially concerted the concealment would have to be. It also suggests a version of legal realism largely antagonistic to the book's very commitment to the autonomy of law.[94] A second answer is that courts aren't articulating the real (or idealized) copyright law—they are only doing so in relation to a modern version that isn't committed to the ideals that Drassinower identifies. This explanation is also obviously unsatisfactory in that it robs Drassinower's theory of practical importance, something that the account would resist. Note that while both of these explanations are palpably unsatisfying, they have the obvious virtue of affirming the analytical independence of Drassinower's deontic approach.

The challenge posed here—one of contemporary explanatory relevance—highlights two hidden assumptions inherent in the book's rationalist account. The first is that the rationality it posits is *static*. Copyright law's core concepts, doctrines, principles and rules are taken to reflect a deontic morality that is unchanging across time and context. This rationality is avowedly intertemporal and drawn from different eras of Anglo-American copyright reasoning, and it is treated as immune from variations in the socio-political realities of the legal system in each of these periods. The second assumption is that the rationality so identified is *pervasive*. It is taken to be present *both* within the individual doctrines of copyright law, and in the collective functioning of the copyright system. This pervasiveness is an inevitable product of the account's focus on coherence, which combines the individual and aggregate in its justification for the institution. The pervasiveness of this unifying deontic rationality renders it incompatible with instrumental thinking, which is seen as having no role whatsoever in the explanation and justification of copyright—both at the individual doctrinal level and the aggregate systemic one.

Yet, when we relax either of these assumptions, we begin to see an answer to the question posed above. If copyright's rationality is understood as being dynamic, in the sense that the same conceptual ideas and terms can come to incorporate different normative ideals at different points in time, it might well be the case that a term that began its life with a deontic rationality came to adopt a consequentialist one over time.[95] Thus originality, which

94. *See* Shyamkrishna Balganesh, *Foreword: The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1849–50 (2015).

95. For an account of how this evolution might take place, including a philosophical defense of the phenomenon, see Jody S. Kraus, *Transparency and Determinacy in Common Law*

began as an idea rooted in authorial autonomy, might have evolved to incorporate a consequentialist logic rooted in the value of balance instead. The process of common law conceptual evolution,[96] or "radical semantic evolution,"[97] might then explain this change. It might account for modern courts' overt reliance on consequentialist reasoning to explain their decisions, even when rooted in doctrines that originated with a deontic meaning or understanding.

Alternatively, one could argue that while the deontic rationality (of autonomy) informs the individual doctrines of copyright law, the system's overall functioning reflects an instrumental account as a matter of positive law. This argument would relax the assumption of pervasiveness and recognize that the components of the system that individually constitute its rationality can *also* conform to consequentialist thinking when put together in the aggregate. We see a version of this logic in the works of some immanent theorists who are willing to admit consequentialist ideas into a functional account of an institution, while simultaneously rendering the individual doctrines and norms of that institution immune to such consequentialist explanations.[98] In the copyright context, this would entail admitting that while the positive functioning of copyright's individual components—constitutive of its coherence—reflect a commitment to autonomy and equality, copyright law nonetheless affirms the ideals of social welfare and utility.

Drassinower's account in *What's Wrong with Copying?* does not suggest it would be open to relaxing either assumption about its deontic rationality, thereby admitting consequentialist ideas into its theory. To the extent that it is willing to countenance other ideals or values, it does so by treating them as external to copyright law, and as reflecting the interaction between the juridical order of copyright with other juridical orders, rather than as being a tradeoff internal to copyright (pp. 208–14). By insisting that its deontic rationality is both static and pervasive *within* copyright law, it thus confronts an additional challenge borne out in the actual expressed reasoning of modern copyright cases.

Conclusion

In *What's Wrong with Copying?* Drassinower has produced an analytically rigorous effort to reconstruct the rationality of copyright law using the deontic ideals of autonomy, dignity and equality. Questioning decades of uncritical reliance on a utilitarian understanding of copyright, it attempts to displace that logic with a coherent account that is at once descriptive and

Adjudication: A Philosophical Defense of Explanatory Economic Analysis, 93 Va. L. Rev. 287 (2007).

96. *See generally* Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. Pa. L. Rev. 1241 (2015) (defending this process).

97. Kraus, *supra* note 95, at 326; *see* Richard A. Posner, How Judges Think 238 (2008).

98. *See, e.g.*, Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. Rev. 621, 638–40 (2002).

normative, as well as explanatory and justificatory. With an unflinchingly ambitious aim, the book represents a novel and original effort to push the boundaries of our current understanding of copyright law, by laying bare the claim that sometimes the purposes of a legal regime are embedded within the reasons for its very structure. While its particular method of reasoning will, no doubt, cause many to resist its principal claims, its unyielding reliance on reason to develop a coherent account of copyright's core doctrines reaffirms the role of rationalist theorizing in copyright law. For that very reason, even disregarding the persuasiveness of its immanent logic for instrumentally focused audiences, it serves as a significant and enduring contribution to copyright theorizing.