

## Properties of copyright

Exclusion, exclusivity, non-interference and authority

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### Introduction

This chapter analyses the nature and structure of the property rights proposed by contemporary philosophical and legal theories of property – paying particular attention to factors of exclusion and exclusivity – before exploring the implications of these theories for one part of intellectual property: copyright. It argues that two theories of property in particular give a defensible – though slightly different – account of copyright: the right to exclude others from performing an activity, and protecting a specific activity from harm. More broadly, the chapter shows how different visions of property capture different features of copyright law.

Section 1 describes four different cases where a particular individual has entitlements to particular resources. It uses the Hohfeldian framework to explain the role of exclusion and exclusivity at work in these entitlements, and pins down the slippery notion of a 'right to exclude'. In section 2, these four results are used as templates of the four major property theories in the contemporary literature. With this analysis in tow, section 3 appraises how these four different types of property ideas apply to the objects of copyright. It considers the types of entitlements that emerge from their application, assessing the closeness of fit between these results and actual copyright law.

#### 1 Exclusion, prohibition and exclusivity: a Hohfeldian analysis

What is the essence of property? One attractive answer – and our point of departure here – is the idea that property involves a 'right to exclude'. The general thought that property may be explained by notions of exclusion and exclusivity is a perennial one, dating back to Locke and Blackstone,

and finding voice in several major contemporary property theories.<sup>1</sup> Yet in a way this is surprising, as the idea of a 'right to exclude' is itself not entirely clear, as is the relation between the two concepts of exclusion and exclusivity. If 'exclusion' connotes having a right to exclude, and 'exclusivity' is the property of being the only person with a particular entitlement, it is not at all obvious that the former follows analytically from the latter, or vice versa (as we will see). The opacity of this 'right to exclude' allows ambiguity and equivocation to flourish. For instance, in just one article Thomas Merrill understands the right to exclude to apply in very different ways to a myriad of entities: to *resources*, to *actions*, to *interests* and even recursively to *the right itself*.<sup>2</sup> Not only is shifting content being applied to very different metaphysical entities, the locutions themselves are not perspicuous. It is unclear, for instance, whether *excluding* someone from interference is different from simply *prohibiting* them from interfering. But if it is not different, then many ordinary rights against interference must be categorized as property rights, which is counterintuitive.

With this in mind, this section explores the ways in which making an entitlement exclusive (making one person the *only* person who holds that entitlement) changes that entitlement into a recognizable property right, and whether, in so doing, it creates a right to exclude.

A standard definition of 'exclude' is to act so as to 'deny (someone) access to a place, group, or privilege'. Setting aside the special case of exclusion from a group, and since a privilege connotes a privilege to perform an activity, there are in the context of property two potential meanings of a duty to exclude oneself, one applying to places and another to activities. (A 'duty to exclude oneself' is admittedly a cumbersome phrase; unfortunately it is necessary. A property owner usually does not have a right to exclude in the sense of a general entitlement to remove trespassers. Rather, what she has is a right that they do not trespass; they owe her a duty to exclude themselves.)

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<sup>1</sup> John Locke, *Two Treatises of Government* (New York: Hafner, 1690/1947), II: 27; William Blackstone, *Commentaries on the Laws of England*, 1st edn (Oxford: Clarendon, 1765–69), Bk. 2, p. 2; James Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997); Shyamkrishna Balganesh, 'Demystifying the Right to Exclude: Of Property, Inviolability and Automatic Injunctions' (2008) 31 *Harvard Journal of Law and Public Policy* 593; Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730.

<sup>2</sup> Merrill, 'Property and the Right to Exclude'.

A duty to exclude oneself from a *place* carries a plain enough meaning, namely to physically 'keep off' a resource. If Bill excludes himself from Blackacre, then he accepts that he may not enter it; he may not cross its physical borders. I will term this *exclude* (*Trespass*) or *exclude<sub>T</sub>*, keeping in mind that trespass in this context strictly connotes border-crossing, and not a broader concern with non-interference.

Applied to *activities*, the right to exclude is not entirely straightforward.<sup>3</sup> Because exclusion-from-a-thing is framed around exclusive liberties to use that thing, I will take it that the implied connotation when applied to activities is the exclusive liberty to perform the activity – that is, the duty of all non-owners not themselves to engage in the specific activity that the owner is entitled to perform. The constraint on others may be universally applicable ('no one *anywhere in the world*, except me, may perform the dance I created') or tied to a specific locale ('no one may hunt *in this forest* except me'). With its focus on proscribing one particular activity to all but one particular agent (and perhaps her delegates), I will call this *exclude* (*Monopolize*) or *exclude<sub>M</sub>*.

Hence, if Annie has a right to *exclude<sub>T</sub>* Bill from Blackacre, then Bill must not trespass across Blackacre's borders, while if Annie has a right to *exclude<sub>M</sub>* Bill from hunting on Blackacre, then Bill may not hunt on Blackacre (though he may be allowed to enter it for other reasons).

### 1.1 Recapping Hohfeld

In property theory it is often supposed that we can move logically from a property-holder having an exclusive right to their having a right to *exclude*.<sup>4</sup> To the contrary, however, the fact that Annie has an exclusive entitlement need not imply that she has a right to *exclude<sub>T</sub>* or *exclude<sub>M</sub>*. To see this, and to investigate more generally the way exclusivity relates to exclusion, it is necessary to review Hohfeld's analysis of rights and jural relations.<sup>5</sup>

<sup>3</sup> The term might be used to connote non-interference or harm-protection. However, as section 1.3 below describes, it is possible to have harm-protection without zones of exclusion or exclusive entitlements. For this reason it is dealt with separately.

<sup>4</sup> An important exception is Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 *University of Toronto Law Journal* 275.

<sup>5</sup> Wesley Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning*, Walter Cook (ed.) (New Haven: Yale University, 1946). One further, controversial, part of Hohfeld's project aimed to recast the *in rem* feature of property rights. That aspect is not utilized here.

Hohfeld famously distilled larger legal entitlements into their building blocks – the basic and irreducible components out of which all more complex entitlements were constructed. These ‘jural relations’ (as he termed them) are tightly linked with one another; the existence of one jural relation held by a person implies (by Hohfeldian *correlation*) the existence of its correlative held by another, while the lack of a jural relation in one person implies (by Hohfeldian *opposition*) that that person holds its jural opposite. This can be briefly stated as follows:

**Liberty (privilege):**

Person A has a *liberty* to do action X with respect to another person B when A has no duty to B not to do X. For example, in an ordinary case Annie will have a liberty (with respect to some other beach-goer Bill) to swim at a public beach if she is not under any duty to Bill not to swim at the beach. The necessary correlative of Annie’s liberty is the absence of a right in Bill (a ‘no-right’) that Annie refrain from swimming. The opposite of a liberty is a duty; if Annie does not have a liberty to swim, then she by definition must have a duty not to swim.

**Claim-right:**

Person A has a claim on another person B to do X when B is under a duty to A to perform X. For instance, Annie has a claim-right that Bill not hit her – a claim that correlates with Bill’s duty to Annie to refrain from hitting her. The definitional correlative of Annie’s claim-right is Bill’s duty. If Annie does not have a claim-right that Bill do X, then (via Hohfeldian opposition) she has no-right that he do X.

**Power:**

Person A has a power over person B with respect to X when A can alter B’s jural relations with respect to X. For instance, when Annie alters Bill’s liberties by waiving her claim-right that he not kiss her, she exercises her power to dissolve Bill’s prior duty. Promising, waiving and selling are all examples of using powers because they all involve the agent altering people’s duties. The correlative of Annie’s power to change Bill’s normative standing is Bill’s ‘liability’ to have his jural relations changed by Annie. If Annie does not have a power over Bill with respect to X, then Hohfeldian opposition requires she has a ‘disability’ – the lack of power to change his normative standing with respect to X.

**Immunity:**

Person A has an immunity against a person B with respect to X if B cannot alter A’s claims or liberties with respect to X. For instance, if Annie has an immunity against Bill with respect to her freedom of association, then Bill cannot impose new duties on her to refrain from associating (with Charles, say). By Hohfeldian correlation, if Annie has an immunity from Bill changing her jural relations with respect to X, then Bill has a disability to do so. By Hohfeldian opposition, if Annie does not have an immunity with respect to Bill, then he does have the power to change her normative standing, and she has a liability.

These relations are set out in Table 6.1.

Table 6.1 *Hohfeldian correlatives and opposites*

|                            |             |          |            |            |
|----------------------------|-------------|----------|------------|------------|
| <i>Jural Relation:</i>     | claim-right | liberty  | power      | immunity   |
| <i>Jural Correlatives:</i> | duty        | no-right | liability  | disability |
| <i>Jural Opposites:</i>    | no-right    | duty     | disability | liability  |

If Annie has one of the first set of jural relations in the top row of Table 6.1, then there necessarily must be some person or persons who have the jural correlative of that entitlement (directly below it in the table). Conversely, if Annie *does not* have a particular jural relation, then she necessarily has its opposite (in the bottom row).

The remainder of this section considers in turn four situations where a particular individual has entitlements to a particular resource. The purpose is to sharpen our understanding of exactly how exclusion is related to exclusivity. In Cases C1 and C2, exclusive entitlements lead to recognizable rights to exclude. Case C3 illustrates how proprietorial attachments may occur without requiring either a right to exclude or exclusivity. Case C4 involves exclusivity without necessitating a right to exclude. Paralleling this analysis, section 2 uses these four cases to illustrate four major theories of property.

### 1.2 Case C1: From exclusive liberty of use to the right to exclude<sub>r</sub>

In Case C1, Annie has the right to enter and use a piece of land (Blackacre), in the sense of being *permitted* to do so. (For our purposes here and throughout, consider 'use' to connote *open-ended use*, such that while there may be some discrete limitations on her use, the uses Annie may put to Blackacre cannot be finitely enumerated. When we turn in Case C2 to consider specific, discrete activities, I will refer to Annie 'acting in' a place, rather than her 'using' it.)

In Case C1, Annie has a Hohfeldian liberty:

(C1.1) Annie has a general liberty to enter and use Blackacre (she has no duty to anyone not to enter and use the land).

And via Hohfeldian correlation:

(C1.2) All others have no-right that Annie refrain from entering and using Blackacre.

Now add that Annie has the *exclusive* liberty to enter and use Blackacre. If no other person has the liberty to enter and use Blackacre, then from Hohfeldian opposition we derive that:

(C1.3) All others have a duty (to Annie<sup>6</sup>) not to enter or use Blackacre.

And then by Hohfeldian correlation:

(C1.4) Annie has a claim-right against all others that they do not enter or use Blackacre.

As a result, Annie has a claim-right to exclude<sub>r</sub> Bill from Blackacre; if Bill crosses Blackacre's boundaries without Annie's permission, then he has acted in a way that is exclusively granted to Annie. From an exclusive liberty to enter and use (or to *possess* and use, if we turn from land to chattels), a claim-right to exclude<sub>r</sub> is derived. This effectively creates a zone of non-interference in which Annie can act unmolested by intrusions from others. Note, though, that the non-interference in question is not indexed to the protection of any particular activity of Annie's. It is derivative of the physical *boundary* that is created by all other people's duties not to trespass. Annie's exclusive liberty to enter and use does not of itself imply that she has (say) protections against her neighbours playing loud music late at night. The neighbours are not in so doing entering, possessing or using her resource. They may be making it difficult for Annie to use the resource to get a good night's rest, but that use was not protected from harm (for which see Case C3 in section 1.4 below).

### 1.3 Case C2: From exclusive liberty of action to the right to exclude<sub>M</sub>

In Case C2, Annie has the right to fish in a stream (Whitewater), by which, again, we mean only that she is *permitted* to fish in Whitewater.

(C2.1) Annie has a general liberty to fish in Whitewater (she has no duty to anyone not to fish in Whitewater).

Via Hohfeldian correlation C2.1 implies:

(C2.2) All others have no-right that Annie refrain from fishing in Whitewater.

Now add that Annie's entitlement is an exclusive one (and, again, that the exclusiveness is owed to Annie).

As in Case C1, from Hohfeldian opposition we derive:

<sup>6</sup> The directionality of the duty ('to Annie') must be superadded here, for it is possible that Annie could be the beneficiary of the duty without it being owed *to her*.

(C2.3) All others have a duty to Annie not to fish in Whitewater.

And then by Hohfeldian correlation we can formulate Annie's entitlement:

(C2.4) Annie has a claim-right against all others that they do not fish in Whitewater.

As in Case C1, from an exclusively held Hohfeldian liberty we derive claim-rights to exclude, in this case claim-rights to exclude<sub>M</sub>. Annie can exclude all others from the activity of fishing in the stream. If Bill fishes in Whitewater without Annie's permission, then he has acted in a way that is exclusively granted to Annie. However, she cannot – at least, not on the basis of the entitlements in C2.4 alone – exclude<sub>T</sub> Bill from entering or otherwise using the stream. Indeed, Annie's claim-right to exclude<sub>M</sub> does not guarantee that others cannot harm or interfere with her fishing endeavours by, say, poisoning all the fish in Whitewater. In a given situation Annie may well also have that entitlement, but it does not follow simply from the fact of her exclusive liberty.

#### 1.4 Case C3: Claim rights against harm

In Case C3, Annie has a claim-right that others do not *interfere with or harm* her activity of fishing in the stream; all other people are duty-bound not to interfere with Annie's fishing activities, and they cannot impact on the stream in such a way as to deplete it as a fishing resource. Call this a 'property-protected activity'.<sup>7</sup>

(C3.1) Annie has a claim-right against interference in and harm of her fishing activities in Whitewater.

(C3.2) Others are duty-bound not to interfere with or harm Annie's fishing in Whitewater.

In some cases, harm-protection may necessitate exclusivity of the liberty to perform that action. If Whitewater were small, and intensive fishing gear were available, then other fishers on the stream would deplete its stocks, and so harm Whitewater *qua* Annie's fishing resource. If so, then harm-protection of fishing in Whitewater would have to include the exclusivity of the activity of fishing on the stream, meaning that C3.1 implied also:

(C3.2a) Others are duty-bound not to fish in the stream.

<sup>7</sup> Here I follow Hugh Breakey, 'Two Concepts of Property: Ownership of Things and Property in Activities' (2011) 42 *The Philosophical Forum* 239.

This would not be a surprising state of affairs. Often, a prime way to impact on the prospects of an activity on a resource is by engaging competitively in exactly that activity. As such, claim-rights to harm-protection can imply rights to exclude.<sup>8</sup> On the other hand, they need not. If the stream were long and fishing gear non-intensive, then a limited amount of other fishers on the stream might not impact on Annie's fishing. In this case C3.1 would not necessitate C3.2a. Both Annie and Bill would have property-protected fishing rights in Whitewater; each of their rights would be proprietary, but not exclusive (because there are two of them holding the same entitlement).

If Annie holds the claim-rights against harm-protection *exclusively* then this will imply:

(C3.3) Others have no-right against people interfering in their fishing in Whitewater.<sup>9</sup>

And by Hohfeldian correlation:

(C3.4) Annie is (and people are) at liberty to interfere with others' fishing in Whitewater.

There is a sense in which the addition of exclusivity to Annie's claim-rights, as expressed in C3.3 (or even the addition of exclusivity to the liberty to perform the action, as expressed in C3.2a), does not add substantially to Annie's entitlements, at least with respect to her own actions and their prospects. With or without these explicit additions, C3.1 alone ensures that no-one can act to harm Annie's fishing exploits on the stream. If C3.1 does not necessitate Annie having the exclusivity present in C3.2a or C3.3, then the addition of exclusivity will not impact materially on the prospects of her fishing (because *ex hypothesi* those entitlements were not necessary to protect her fishing from harmful interference). Despite this, the entitlements of the exclusive liberty (C3.2a) or the exclusive claim-right (C3.3) may be extremely valuable to Annie if she has the power to sell them or license them out. Even if another ten fishers would not impact at all on her fishing activities, Annie would benefit from having the exclusive claim-rights of C3.3, for they would enable her to exclusively license

<sup>8</sup> It is even possible they could include rights to exclude, for instance if the stream was extremely ecologically fragile.

<sup>9</sup> C3.3 describes the situation where Annie's claim-right is exclusive: she is the only one whose fishing in Whitewater is protected. To complicate matters, however, what can be implied when it is asserted that Annie has an exclusive claim-right against interference in her activity is that Annie has (a) an exclusive *liberty* to perform the activity, and that she has (b) a claim-right of non-interference. This is the conjunction of C3.1 and C3.2a.



out the right to fish to those others. Even bearing this in mind, it is still worth emphasis that in C3.1 Annie can have a recognizably proprietorial entitlement to a specific resource (that is property-protection for her fishing in Whitewater) *without* that activity giving her a right to exclude<sub>r</sub> or a right to exclude<sub>m</sub>, and – indeed – without her holding that entitlement exclusively.

### 1.5 Case C4: Powers of disposition and exclusivity

Suppose now – Case C4 – that Annie has *disposition* over the exclusive fishing rights in Whitewater that she held in Case C2; that is, she can waive, gift, license, abandon or trade them. These entitlements are each the jural relation of *power*; waiver and license allow Annie to alter the duties regarding Whitewater that others owe to her (for instance by allowing certain others to fish in Whitewater), while gift and trade allow Annie to entirely dispose of her entitlement package (liberties, claim-rights, powers and all) by fully transferring it to others.

In Hohfeld's terms:

(C4.1) Annie has the power to dispose of her fishing rights in Whitewater.

Via Hohfeldian correlation:

(C4.2) All others have a liability such that Annie can change their normative standing with respect to fishing in Whitewater.<sup>10</sup>

While Annie's power of disposition in C4.1 does not explicitly include mention of exclusivity, it can seem implied. If others can unilaterally gift or transfer Annie's fishing rights, for example, then it is puzzling how their powers of disposition interact with, and leave intact, Annie's power of disposition described in C4.1. (This was not the situation in Cases C1 and C2 involving Annie's liberties. A non-exclusive liberty is quite understandable, and the addition of exclusivity implies very new, distinct entitlements, namely claim-rights to exclude.) As such, it appears that powers of disposition necessarily include exclusivity, and so by Hohfeldian opposition that:

(C4.3) All others have disabilities with respect to the disposition of Annie's fishing rights in Whitewater.

The correlative of C4.3 is:

<sup>10</sup> The liability is a complex one because, inter alia, recipients of gifts have a complementary power of rejecting the gift.

(C4.4) Annie has an immunity from having her entitlements to fish in Whitewater transferred without her consent.

In this case, the exclusivity of Annie's powers of disposition does not *in itself* result in a power to exclude<sub>M</sub> or to exclude<sub>T</sub>. The exclusive power to dispose does not exclude others in any further way than the initial exclusive fishing right accomplished. Indeed, this exclusive power does not prohibit others from *doing* anything; it simply determines that others do not have the legal capability to accomplish a transfer of the entitlements. While C4.4 is framed in terms of Annie's exclusive disposition over her entitlements from Case C2, the situation is entirely parallel with respect to Annie's entitlements to Blackacre considered in Case C1, or her protections from harm in Case C3. Annie's exclusive disposition over those rights adds an important feature to her property rights in each case, but in itself it does not create rights to exclude.

However, there is a sense in which disposition provides a key element of the right to exclude, such that without Annie's entitlements including substantial powers of disposition we may resist characterizing Annie's entitlements in C1.4 and C2.4 as a full-fledged right to exclude. Both the notion of 'right' and the notion of 'exclude' suggest this. With respect to 'right', a common view of rights is that they serve a *gatekeeper function*; they describe a normative boundary around a person and her actions that the person can open or close at will. This position is the centrepiece of the 'Will' or 'Choice' theories of rights, associated with the work of H. L. A. Hart, whereby having a right conceptually entails the capacity to alter another person's normative standing – to have Hohfeldian powers over them.<sup>11</sup> If we think that – at least in the ordinary case – rights are best understood as gates that may be opened or closed at will, then a right to exclude must include exclusive powers of disposition.

This view gains further support from the thought that this right to exclude, as a *right*, is *owed to* Annie. It is intuitive to think that if the duties others have to exclude themselves from the property are owed to Annie, then such duties should not be performed against her direct expressed will. They are owed to her, after all.<sup>12</sup>

<sup>11</sup> Herbert Hart, *Essays on Bentham* (Oxford: Clarendon, 1982), pp. 183–8; Herbert Hart, 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175; Hillel Steiner, 'Working Rights' in Matthew Kramer, N. Simmonds and Hillel Steiner (eds.), *A Debate over Rights* (Oxford and New York: Clarendon Press, 1998), p. 247.

<sup>12</sup> It is of course arguable that at least some of the rights owed to Annie are not waivable (these being her 'inalienable rights'). Even in such cases, however, limitations on alienability are usually imposed *for the benefit of* the right-holder, and owed to her in that

Turning from the implications of the term 'right' to the term 'exclude', it is arguable that, as a verb describing a volitional action, 'exclude' suggests that exclusion is not automatic, but is at the discretion of the person empowered to exclude. Comparatively, 'a right that everyone else be excluded' does not carry this extra connotation of discretion. Such a right points to an entitlement to a state of affairs, not to an exercise of will. A right to perform a volitional act, however, does carry this extra connotation of wilfulness, suggesting that a right to exclude also includes a right *not* to exclude.

For these three reasons – (i) the choice factor implied in the concept of a right; (ii) the fact that rights are *owed* to the right-holder; and (iii) the nature of 'exclude' as a volitional verb – some powers of disposition appear to be a necessary but not sufficient element of a right to exclude.

### 1.6 Summation

The results of the foregoing analysis are as follows. Regarding liberties, there is no necessary implication from the mere presence of a liberty to its being exclusive; the addition of exclusivity adds decisively to the entitlement by creating claim-rights to exclude. The grant of exclusivity to a specific activity creates a right to exclude<sub>M</sub>; the grant of exclusivity to liberties of entry, possession and use creates a right to exclude<sub>r</sub>. Turning to property-protected activities, the proprietorial entitlements that protect an activity from harm can inhere even if the entitlement is not exclusive. Regarding powers, a power of disposition already implies the condition that those powers are exclusively held. While the exclusivity of the power of disposition does not in itself create rights to exclude, it is plausible to think that the reverse is true: some discretionary powers are constituent features of a right to exclude.

## 2 Exclusion, exclusivity, prohibition and disposition in property theory

Each of the four cases explored above represents a different theoretical position on the nature of property.

sense. This special case aside, a general presumption of Annie's discretionary waiver and control seems appropriate.

### 2.1 *The right to exclude<sub>T</sub>: 'ownership of the thing'*

Case C1 involved Annie having exclusive liberties of possession, entry and use, and hence a right to exclude<sub>T</sub> others from possessing or entering. Such a right is widely held to be a signature feature of property. Many modern property theories – 'Exclusion Theories', as they are termed – have as their centrepiece this claim-right against physical trespass by others, of which James Penner's work is perhaps the best developed.<sup>13</sup> Penner's 'exclusion thesis' determines that 'the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things'.<sup>14</sup> While interest in use grounds the right, the right itself is constituted by the duties others have to exclude<sub>T</sub> themselves from the object.<sup>15</sup> Thus the essence of property is held to be a claim-right that others exclude themselves from physically entering, possessing or using the object; that they 'keep off' it.

### 2.2 *The right to exclude<sub>M</sub>: 'ownership of the activity'*

In Case C2 Annie had the right to exclude<sub>M</sub> others from performing an activity that she alone could perform. Combined with discretionary powers to license others to perform the activity, this entitlement has seemed to some the *sine qua non* of property: 'Without freedom to bar one man from a certain activity and to allow another man to engage in that activity we would have no property.'<sup>16</sup>

On this footing, ownership of an activity comprises:

- Others holding duties to refrain from performing ('exclude<sub>M</sub> themselves from') that activity.
- The owner having the liberty to engage in the activity.
- The owner having wide powers of waiver and alienation, allowing others to perform the activity at her discretion.

A paradigm of ownership of an activity would be a guild monopoly of the seventeenth century, such as a *letters patent* in selling salt or law books. Much older examples are known. While many aboriginal cultures routinely observed exclusive entitlements over songs, myths and magic spells,

<sup>13</sup> Penner, *The Idea of Property in Law*; Felix Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357; Merrill, 'Property and the Right to Exclude'.

<sup>14</sup> Penner, *The Idea of Property in Law*, p. 71.

<sup>15</sup> *Ibid.*

<sup>16</sup> Cohen, 'Dialogue on Private Property', 321.

Lowie notes that for the Trobriand islanders: 'Dances are more definitely individual property, the original inventor having the right to perform it in his village. If another village takes a fancy to this song and dance, it has to purchase the right to perform it.'<sup>17</sup>

### 2.3 *Property-protected activities*

In Case C3 Annie's entitlement to fish in Whitewater did not necessarily involve a right to exclude (in either sense) or a right of exclusive disposition. Rather, the entitlement granted was of the protection of an activity or set of activities from harm or interference. Now momentary protection from bodily harm, or occurrent protection from interference in an activity that is actually being performed, is just an ordinary right, as distinct from a property right. However, when the protection attaches to particular resources and applies whether or not the activity is at that moment being performed, a recognizably proprietary right emerges. On the property-protection approach, then, the question is not (or not primarily) whether physical boundary-crossing occurred, but whether harm – especially economic harm – was dealt to the property-owner as she engaged in the protected activities.

These protected activities may be very specific, as occurs with hunting, foraging or mining rights. Such rights – like Annie's fishing right in Whitewater – protect the property-holder's liberty to perform the specific activity and claim-right against interference in their performing that activity, as well as the protection of the resource against harms that would impair its capacity to function as a resource for performing that activity, and the property-holder's ownership of the fruits of that activity.<sup>18</sup> Alternatively, a wide cluster of activities may be protected – for instance in protecting an owner's 'quiet enjoyment' of his land.<sup>19</sup> Rather than making central trespass across borders, this property right shifts the focus to questions of harm, nuisance, interference and worsening with regard to activities taken on the land,<sup>20</sup> and neighbours are required to use their

<sup>17</sup> Robert H. Lowie, 'Incorporeal Property in Primitive Society' (1928) 37 *Yale Law Journal* 551 at 561.

<sup>18</sup> Breakey, 'Two Concepts of Property', 244–6.

<sup>19</sup> Eric Freyfogle, *The Land We Share* (London: Shearwater Books, 2003), pp. 16, 56. Further protected activities can include 'reasonable', 'indigenous', 'traditional', 'prior', 'natural' and 'historical' uses.

<sup>20</sup> See *ibid.*; Joseph Singer, *Entitlement* (London: Yale University Press, 2000), pp. 87–91; Katz, 'Exclusion and Exclusivity in Property Law'.

property according to the ancient *sic utere tuo* rule: 'Use your own so as to cause no harm.'<sup>21</sup> To be sure, these concepts of harm and non-interference will often overlap with trespass, but they are not coextensive. In some cases a boundary-crossing will not interfere with the property-holder's activities, and there will be 'no-harm, no-foul'. In other cases, harm can occur without border-crossing – such as when Annie pumps out groundwater to the point where Bill's land collapses, or when the dam Annie builds on her property causes Bill's land to flood.

In sum, harm-protection of activities – either specific activities or broad clusters of activities – is a distinct organizing idea for property, separate from property conceived as the right to exclude.

#### 2.4 *Exclusive disposition and authority theory*

In Case C4, Annie had exclusive disposition over her entitlements, such that she could waive, license, transfer or abandon them. There are several ways that disposition can be implicated in property theories. It can be conceived as a vital ingredient added to other types of entitlements to grant them the status of property, or it can be understood as the essence of property itself.

In terms of the first mode (as a necessary addition to other elements of property), if property involves the right to exclude<sub>M</sub>, or the right to exclude<sub>P</sub>, then substantial powers of disposition are required in order to vindicate the volitional, discretionary aspect of excluding; powers of waiver, license and abandonment will be required, and powers of full transfer (sale) of the entire package of entitlements are at least suggested.<sup>22</sup> The combination of exclusive powers of disposition with the right to exclude<sub>P</sub> creates the familiar tripartite notion of property as the amalgamated rights to exclusive acquisition, use and disposal over an object.<sup>23</sup> Finally, at least some powers of disposition are implicated in the harm-protected activity considered in sections 1.3 and 2.3. As the common law apothegm goes, *volenti non fit injuria* – 'to he who consents, no harm is done'. After all, rights against harm need to be sensitive to the holder's waiver so they are not themselves impediments to her projects.

<sup>21</sup> Freyfogle, *The Land We Share*, pp. 67–83; Singer, *Entitlement*, pp. 34–9.

<sup>22</sup> Penner, *The Idea of Property in Law*, pp. 77–103.

<sup>23</sup> Adam Mossoff, 'What Is Property?' (2003) 45 *Arizona Law Review* 371 at 376.

Other theorists have taken the view that, rather than being merely one element of property, exclusive and sweeping powers of disposition constitute property's very essence. Section 1.4 described reasons why powers of disposition are implied by the idea of *rights* in general. These powers to dispose are even more intuitive in the context of property rights, where the 'gatekeeper' aspect is manifest: 'The right to property is like a gate, not a wall ... [it] permits him to make a social use of his property, by selectively excluding others, which is to say by selectively allowing some to enter.'<sup>24</sup> There is a long-standing and popular view that a thing is property if, and only if, it can be traded in a marketplace. Avihay Dorfman takes a more theory-based tack, arguing that powers of exclusive disposition are needed to distinguish the right of property from lesser entitlements like possession: 'Being an owner involves a special normative power – that is, the power to change (in some nontrivial measure) the rights and duties that non-owners have toward the owner with respect to an object.'<sup>25</sup> I will call this conceptualization of property as exclusive disposition '*Authority Theory*'.

### 3 Copyright and property

This section takes the four property theories outlined in section 2 – right to exclude<sub>P</sub>, right to exclude<sub>M</sub>, property-protected activities and exclusive disposition – and appraises how they apply to the objects of copyright. It shows how the different concepts of property cast light on the subtle and distinctive types of freedom and control present within various aspects of copyright.

At the outset, however, it must be acknowledged that no single theory of property can possibly explain all the nuances of copyright law, even if we were to confine the analysis to a single jurisdiction. Copyright lies at the intersection of a wide range of human rights and social utilities. Just as real property has countless exceptions to its functioning in the abstract (for example, regulation, zoning, taxation and takings), so too does copyright. The question at issue, then, is whether a concept of property approximates the macro-level functioning of copyright closely enough to be considered its basic organizing idea.

<sup>24</sup> Penner, *The Idea of Property in Law*, p. 74.

<sup>25</sup> Avihay Dorfman, 'Private Ownership' (2010) 16 *Legal Theory* 1 at 16.

### 3.1 'Ownership of the idea/expression': the right to exclude<sub>T</sub>

The most intuitive way of conceptualizing copyright as property, at first blush, is modelled directly on the right to exclude<sub>T</sub>. The 'thing' in this case (the *res*) is identified as being the novel idea or the created expression.<sup>26</sup> Thus we arrive at 'ownership of the idea'; the creator, as owner of what she creates, has open-ended liberties to use and manage her created idea (or expression), while all others are required to exclude<sub>T</sub> themselves from using her creation or engaging with it. However, while the 'ownership of thing' approach gives an attractive account of tangible property, in application to copyright it is of limited appeal, with numerous authors recognizing that copyright does not, should not and cannot require non-owners to 'keep off' ideas or texts.

An initial challenge for this approach to copyright is to clarify exactly what the owned entity is. Is the owned thing the precise wording in the text – the *expression* of the idea? Or is it the particular *ideas* that are set out in the work? The problem is that in different contexts copyright can protect either one (and sometimes both, or neither). The classic example of copyright violation remains the verbatim copying of expression, but in a widening variety of cases direct copying of the text is not necessary. In modern copyright law:

close approximation of the plot of a novel or play, preparation of a screen-play based on the novel, use of the characters from a movie or book to create an unauthorized sequel – all these are now understood to constitute infringements.<sup>27</sup>

But the central problem for this theory is simply that it advances an overly strong characterization of the rights of the copyright owner. In copyright, no one is required to exclude themselves from using or interacting with the idea (or from using or interacting with the expression in order to get at

<sup>26</sup> An alternative is to consider whether exclusionary property rights (right to exclude<sub>T</sub>) over *tangible* objects (such as physical books) and contract can combine to create copyright-like institutions. See Hugh Breakey, 'Liberalism and Intellectual Property Rights' (2009) 8 *Politics, Philosophy and Economics* 329. This approach results in a weak copyright system, approximating only some features of copyright law. It may be, however, that such a regime has affinities with earlier literary property regimes, whose protections were applied to less abstract entities. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 1999).

<sup>27</sup> William W. Fisher III, 'The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States' in David Vaver (ed.), *Intellectual Property Rights* (London: Routledge, 2006), p. 74.



the underlying ideas). Such a right of exclusion would require unauthorized others being under a duty not to apprehend the idea or expression in the first place, or – having been unable to look away in time – being under a duty not to think about the idea and interact with it mentally or in communication.<sup>28</sup> Copyright requires no such duties, and never has:

An actual right that may be close to a true right [to exclude<sub>T</sub>, in my terms] to an idea is the right of the State to its official secrets, which might be regarded as a property right to certain information, since the law imposes a general duty on everyone to exclude themselves from it.<sup>29</sup>

To explain: copyright does not prohibit use of any of the general ideas, themes, narratives or methodologies put forward in a work. Direct and flagrant copying of such abstract ideas has always been allowed.<sup>30</sup> Even for more particular ideas that do have some protection in copyright, there must also be *substantial* copying in order to violate copyright; merely copying the narrative structure of one scene into a large and otherwise original work will not attract copyright action. Further, copyright protection has always been subject to important fair-use/fair-dealing exceptions, allowing its use for privileged purposes of education, history, journalism, critique, commentary and satire. For these protected activities, direct communication of both particular ideas and the exact expression are privileged. Indeed, for purposes of personal research substantial direct copying is often allowed. Finally, copyright regimes have various mechanisms for ensuring the dissemination of the works – mechanisms over which the copyright-holder has few powers of control or limitation. An important provision here is the ‘first-sale’ provision that allows first-buyers of books to loan, rent or sell those books, allowing for the existence of libraries.

Ultimately, the deliberate, conscious use of copyrighted ideas and expressions by non-owners is the rule, not the exception. If property necessarily implies exclusive open-ended use – and so the right to exclude<sub>T</sub> – then *copyright is not property*.

<sup>28</sup> Jessica Litman, *Digital Copyright* (New York: Prometheus Books, 2006), p. 13; Penner, *The Idea of Property in Law*, pp. 109, 119–20.

<sup>29</sup> *Ibid.*, p. 120.

<sup>30</sup> *Nichols v. Universal Pictures Corporation*, 45 F.2d 119, 121 (2d Cir. 1930) *cert. denied*, 282 US 902. On the ‘copyright exceptions’ discussed in this section and hereafter, see Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (New York: Cambridge University Press, 2005); Hugh Breakey, ‘Natural Intellectual Property Rights and the Public Domain’ (2010) 73 *The Modern Law Review* 208 at 212–16.

### 3.2 'Ownership of the activity': the right to exclude<sub>M</sub>

The 'exclusive activity' approach empowers the owner alone to perform certain activities; bound by the owner's right to exclude<sub>M</sub>, all others must refrain from these activities unless they have the owner's consent. While it is rarely articulated explicitly as an 'exclusive activity' approach, this is a common way of picturing copyright.<sup>31</sup> In Wendy Gordon's words:

Persons who enjoy a work in the ways reserved to the copyright owner's exclusive control – for example, reproducing the work verbatim, adapting it for use in new works, or publicly performing it – may be liable for injunctions, damages, accounting for profits, criminal penalties, and other sanction.<sup>32</sup>

The ownership of activity grants the copyright-holder an exclusive liberty regarding the activities of substantial verbatim reproduction, fashioning (closely) derivative works and (commercial or large-scale) public performance.

This position maps well onto copyright's functioning. The problems encountered by the 'ownership of the idea' approach are largely avoided. There is no sweeping duty to avoid general use of the idea, so apprehending and thinking about the idea pose no problems. The derivative use of broad ideas and abstract methodologies is not an annexed activity of the owner, so it is not prohibited in non-owners. Fair use usually does not require large-scale verbatim copying and so is not prohibited. (However, the larger-scale copying that is granted for the purposes of personal research is not so easily assimilated.) And first-sale doctrines allowing second-hand book stores and libraries are unproblematic: such doctrines do not involve reproduction, adaptation or public performance.<sup>33</sup> Thus the 'ownership of activity' approach for the most part makes room for the major copyright exceptions.

While avoiding the unhelpful absolutism of the 'ownership of idea' approach, this approach retains an important feature of this view – the *trespassory* notion of ownership and exclusion. Policing copyright need not require difficult questions such as evaluating the loss of revenue from

<sup>31</sup> E.g. Cohen, 'Dialogue on Private Property', 369; Penner, *The Idea of Property in Law*, pp.109, 119–20.

<sup>32</sup> Wendy Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' (1989) 41 *Stanford Law Review* 1343 at 1366.

<sup>33</sup> Though modern libraries may allow electronic copying in various forms, and this may trespass across the exclusionary right.

the work's target audience. All that need be shown is that the non-owner engaged in an activity that was prohibited. 'For realty, physical intrusion triggers restitution; for copyright, violation of a specified exclusive right does the same.'<sup>34</sup> If trespass, rather than harm, is the central organizing idea of property, then ownership of the activity is an apt proprietorial model for copyright.

### 3.3 *Copyright as a property-protected activity*

This approach to property protects a particular activity or set of activities from those actions of others that would interfere with it, or harm the natural fruits of performing it. On this approach, copyright resembles other property-protected activities like Annie's fishing rights in section 1.4. The activity in question might be framed as: 'Authoring and vending one's work to those members of the work's target readership who wish to buy it (and managing such vending).' These terms require some explanation. The author, Peter, has property in the activity of selling his book to all those readers who want to buy it at Peter's asking price. 'Vending one's work to those members of the work's target readership who wish to buy it' is not the same as merely giving the agent the liberty to bring the product to market. The expanded sense of non-interference offered by property-protection precludes others from selling Peter's work to his buyers – from *usurping his target audience*, as the point is sometimes put. Others can convince third parties not to buy Peter's work, of course – they can write different and superior books, or pen devastating critiques of Peter's book. They just cannot interfere with the activity of Peter vending his book to his target audience by getting Peter's book to them before he can. Ultimately, this type of protection aims to protect the natural consequences of Peter's activity of being a professional author; namely, Peter being able to create works that potential readers wish to read and are willing to pay for, and his being unimpeded in selling his work to them. This activity is itself one instantiation of a broader action-type, namely the activity of creating a product that many people wish were available to them, and of selling it to all of those people who are willing to purchase it at the asking price.<sup>35</sup> (Ordinary property rights over land and chattels protect this

<sup>34</sup> Gordon, 'Merits of Copyright', 1379.

<sup>35</sup> This activity can be understood prior to and independently of its legal protection. Contrary to some property theorists' claims, in copyright there is something that 'pre-exists the legal protection'. Boudewijn Bouckaert, 'What Is Property?' (1990) 13 *Harvard Journal of Law & Public Policy* 775 at 797.

larger productive activity in many contexts – but the creation of literary works is not one of them.)

As formulated above, Peter's property right is not necessarily to sell to every person who might want to use the book. The activity in question involves creating a product that people wish were available, and selling to those people. This class of people is the book's 'target readership' or 'natural audience' – usually those who read the book for enjoyment and edification. But not all those who will want to read the book are necessarily pleased it was created in the first place; social scientists using the book as evidence of some political change, or journalists reporting on aspects of its historical context, for example, are not target readers in this sense. Such persons would go on collecting and analysing social data irrespective of whether these books are being created – but if such books *are* created, then they will need to access them to perform their roles.

As with 'ownership of activity', this notion of property captures much of copyright's actual functioning. Authors are protected from direct 'piracy' in the sense of others copying and vending a work in any way that usurps the author's target audience, and from other activities that effectively provide the author's target audience with his work – for instance by public performance of it or by the creation of closely derivative works (such as abridgements, and perhaps sequels). Copyright owners often hold strong powers to deny access to their work to those who are clearly members of the target audience for the work and who have the capacity to pay for it. This is exactly the protection foregrounded in the harm-protection approach, where the acid test is always whether the potentially infringing activity effectively provides the work's target audience with the work in such a way as to replace sales.

Such a property-protection approach allows the key copyright exceptions. Ideas are not owned, so their apprehension and excogitation are not prohibited. Copying large-scale genres, styles and methodologies do not involve simply providing Peter's work to his readers – such derivative writings will offer something new to readers, and may well not replace the original work from being purchased in any case. Fair use (even when requiring substantial copying) is justified so long as the effect is not to simply provide target buyers with the core of the work itself. Research exemptions are unproblematic so long as the researchers are not the target readers of that type of work, but will clash with the property-protection approach when they are.

First-sale doctrines and library privileges are more problematic. In these cases it is an empirical issue whether such practices replace

customers who would otherwise have purchased the work, or instead whether institutions such as libraries provide an additional potential purchaser of the work. To the extent the latter is true, these provisions could be assimilated.

### 3.3.1 Similarities and differences between the 'ownership of activity' approach and the 'property-protected activity' approach

While the 'ownership of activity' approach and the 'property-protected activity' approach are different theories conceptually, in application to ideational projects they have quite (though not exactly) similar results. Is this result surprising?

It should not be. Often a key way of stopping a person gathering the fruits of their activity is to do *exactly* what they are doing (usually with an eye towards gaining those fruits yourself). This is as true in non-physical projects as it is with respect to fishing a river. One can interfere with another's project by (say) broadcasting on exactly their wavelength, or using exactly the (trade) mark they use to distinguish their products. For this reason, granting ownership of an activity is often a key way of achieving the property-protection of that activity. So too for copyright, as Wendy Gordon notes: 'An exclusion right against copying greatly increases the copyright owner's ability to prevent strangers from interfering with her ability to market the work.'<sup>36</sup> That is, the best way of respecting an author's property in the activity of authoring and vending her work may be to grant her ownership of the activity of publishing it.

That said, there are differences between the two approaches. First, property-protection comports better with royalties and compulsory licences. The holder of a property-protected activity cannot necessarily prevent others interacting with their activity; they merely must not have their natural consequences of that activity worsened. So if appropriate economic compensation is forthcoming, such interactions need not be prohibited. On a like footing, if we think that copyright should be especially responsive to economic interests, as distinguished from other interests the author may have in controlling access and use,<sup>37</sup> then the property-protection approach will be apt. This approach facilitates

<sup>36</sup> Gordon, 'Merits of Copyright', 1390.

<sup>37</sup> Wendy Gordon, 'Towards a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship' (1990) 57 *University of Chicago Law Review* 1009 at 1041-2.

a narrowly defined protection of economic activity – as opposed to the ownership of activity approach, where the right to exclude<sub>M</sub> makes no distinction between exclusion for profit and exclusion for suppression. Still, the ownership of activity approach arguably aligns better with existing law on this point; copyright has been used to suppress speech for personal and ideological reasons, for instance to defend the esoteric writings of Scientology.<sup>38</sup>

Second, the property-protecting activities approach fits better with the dissolution of the property rights at the end of the copyright period. Property-protection of an activity naturally ceases when the property-holder ceases to be able to perform the activity – namely, at their point of death. So dissolution of the property rights after this event seems appropriate. Furthermore, as a generalization, most copyrighted works make their largest sales in the early years after their first release, and inflation, interest and the time-discounting of rational economic actors makes early returns comparatively more valuable than later ones. As such, protection of the activity of vending matters most in the early years (and decades) and comparatively less as time goes on.

### 3.4 *Exclusive disposition, authority theory and copyright*

Both the theories just explored carry consequences for powers of disposition. The right to exclude<sub>M</sub> carries a gatekeeper power, not only allowing the person the exclusive liberty to perform the act, but also granting them the power to authorize others to perform it. For its part, because the property-protected activity approach foregrounds protection against harm to the activity, and since *volenti non fit injuria*, the property-holder is authorized to allow others to publish and vend the work when it is beneficial, rather than harmful, to his goals.

In the context of copyright, two points about discretionary disposition are worth particular note. First, one way entitlement-holders can finely craft the types of duties they do and do not want with respect to their published work is by use of devices like the Creative Commons licences, where authors can elect via a unilateral licence to cede many of the rights that copyright vests in them, in order to better align the duties owed to them with the purposes they have for the work.<sup>39</sup>

<sup>38</sup> Ann Brill and Ashley Packard, 'Silencing Scientology's Critics on the Internet: A Mission Impossible?' (1997) 19 *Communications and the Law* 1.

<sup>39</sup> Lawrence Lessig, 'The Creative Commons' (2004) 65 *Montana Law Review* 1.

Second, it should not be forgotten that *abandonment*, as much as sale, is an important power of disposition. In cases where the copyright-holder perceives the copyright duties held by others to be an impediment to her purposes (perhaps altruistic goals, or a desire to increase the dissemination of her ideas), she needs to be able to dispense with them entirely and unequivocally. Contemporary copyright regimes do not deal particularly well with the case of abandonment, to the point where some theorists have argued that copyright entitlements cannot be abandoned.<sup>40</sup> In this respect copyright regimes are less proprietorial than property theory would imply.<sup>41</sup>

All these powers of exclusive disposition will be all the more significant from the standpoint of the Authority Theory, which holds that unrestrained powers of disposition are essential to property rights. Emphasizing the importance of the copyright-holder's control and authority over the duties they are owed, this approach would embrace all those mechanisms allowing copyright-holders to fully determine the normative standing of others with respect to the work, including by measures such as fine-grained licences (including Creative Commons licences), sale and abandonment. Equally though, Authority Theory conflicts with all restrictions on the owner's will in matters of disposition, such as occur in compulsory licensing, first-sale provisions, inalienable moral rights and – arguably – the dissolution of the property right at the end of the copyright period.

#### 4 Conclusion

A Canadian government report on the revision of copyright once declared, 'ownership is ownership is ownership. The copyright owner owns the intellectual works in the same sense as the landowner owns land.'<sup>42</sup> This chapter has argued that such a position is doubly wrong. First, there are different and conflicting types of ownership, each shaped around different normative fundamentals: exclusion, exclusivity, non-interference and authority. Second, one of the most compelling theories of property with respect to physical objects – the 'ownership of thing' approach – was

<sup>40</sup> See Robert Burrell and Emily Hudson's chapter in this collection.

<sup>41</sup> Previous regimes that required registration for copyright were therefore more property-like, as authors could abandon their property claims over a work simply by failing to register it or renew its registration.

<sup>42</sup> Cited in Carys J. Craig, 'Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law' (2002) 28 *Queen's Law Journal* 1 at 13.

found to be untenable with respect to copyright. However, two other recognizably proprietorial theories do offer a plausible account of copyright as property – the ownership of activities built on a right to exclude<sub>M</sub> and the property-protection of an activity protecting it from harm and interference. While giving similar results in many circumstances, the two theories nevertheless diverge on several issues, and it is possible that different appraisals of compulsory licensing or library exemptions (for example) may reflect the deeper, even tacit, undergirding vision of property that predominates in a given case.