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ARTISTIC LICENSE: THE PHILOSOPHICAL PROBLEMS OF COPYRIGHT AND APPROPRIATION, by Darren Hudson Hick. University of Chicago Press, 2017. 240 pp., soft cover, $30.00.

ILLEGAL LITERATURE: TOWARD A DISRUPTIVE CREATIVITY, by David S. Roh. University of Minnesota Press, 2015, 200 pp., soft cover, $25.00.

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Debates over intellectual property challenge the autonomy of law and attract the perspective of other academic disciplines. Two books by Professors Hick and Roh—ARTISTIC LICENSE and ILLEGAL LITERATURE bring the insights of Philosophy and English, respectively, to bear on the byzantine tangles of copyright law and policy. Separately, each offers needed reinforcement for battles over legal reform. Together, the books are documentary evidence for moving beyond the boundaries of legal thinking, whatever that may mean.

Hick and Roh both are engaging writers, embellishing their arguments with minimal use of disciplinary jargon but with a clear vision for the terms of the debate. Hick's focus is on appropriation practices in the visual arts. His first chapter follows the call of the cover, reproducing, and thereby appropriating, Mick Haggerty's "Mickey Mondrian," a 1976 painting of a just-completed Mondrian, paint dripping onto the floor into a gloppy depiction of Mickey Mouse. Copyright, Hick argues, often appeals to the natural rights of the creator, here Disney, to punish such appropriation. But Hick makes the case, based on a theory of rights, for justified appropriation, a limit on the natural rights of the creator to support the expressive freedom of artists like Haggerty. Roh advocates for appropriation as well but in the literary, textual (as opposed to visual) realm. Fan fiction is among his causes and is one example of what Roh calls a "disruptive textuality" and a "dialogic response to a creative call" (Roh, p. 127). While Hick speaks in terms of theories of rights, Roh speaks for a discursive culture steeped in digital technologies. Rights of appropriators check rights of authors, according to Hick. Appropriation is a multivalent dialogue, according to Roh.

Though the two books are steeped in different disciplines, there is much in common. Both are making the case for openness in copyright, for liberating the

creative user from the grip of exclusive rights. Hick builds an argument in support of constrained natural rights for authors, the constraint being the need and rights of creative commentators. Whether this constraint in turn has roots in natural rights theory is a challenging question, but may be beside the point. There is a pragmatic turn to Hicks' book, a shift from grounding authorial rights in the nature of the creative process to limiting those rights based on the practical needs of creators to comment and develop their own works. Appropriators seem to remain second-degree creators; they do not so much have rights but needs and desires to which authorial rights must give way. Admittedly, there is something unsatisfactory about this balance. Why should appropriators be second-degree creators? Why are the rights of appropriators not as grounded in natural reason as those of authors? Roh's approach avoids these quandaries by framing the problem as one of cultural exchange rather than of rights. Creative users are part of the free exchange of texts; they are part of a dialogue that intellectual property law must acknowledge in order to realize its goals of promoting creativity. This dialogue is grounded in the practicalities of digital technology and the distribution networks and feedback dynamics such technology unleashes. Rights talk matters less for Roh than for Hick. Rather, technology facilitates interactions that exclusive rights should not deter. But, as with Hick, Roh reminds us that law must confront reality.

Shared pragmatism leads to the second common feature of the two books: their implications for law as a discipline. Both use the language of law, as is evident from the respective titles. Hick's use of the word "license" is double-edged. He is not referring to a grant from the owner but to the liberty taken by the appropriator in using the owner's work. This license, while transgressive of legal rights, is justified, as Hick demonstrates. Similarly, the "illegal" literature that Roh refers to (fan fiction, parodies, open source software) is against the law while in favor of a digital culture. Law is the target of both books even though the respective authors draw on different disciplinary arsenals. It is the villain in their respective stories of appropriation and disruption. This attitude is particularly clear in Hick's assessment of reforms to fair use proposed by leading legal scholars. "[T]his patchwork approach is insufficient for a problem that requires structural revision" (Hick, p. 173). Law is the structure to be dismantled and reconstructed, presumably using disciplinary tools that transgress and transcend law.

This last point reveals the ultimate lesson of these two books. Law itself is a discipline, a set of practices, a way of thinking, and not an overbearing monolith. Lawyers represent clients who feel violated to pursue cases that seek to establish a particular legal rule. Judges consider these cases in ways that reflect their sense of legal order. Legislators in turn establish their own sense of order counter to or reinforcing what judges have imposed. Add in the work of legal scholars, who seemingly try to make sense of all the pieces. These actors, however, are also disruptive, working against traditions and entrenched interests. They each operate within a certain discipline, which accrete into what a previous generation might have unselfconsciously called legal process. Critics of law like Hick and Roh

bring their own discipline into the mix to alter the seemingly placid and unchanging universe of law. As these books demonstrate, they do so at the risk of ignoring law's own discipline.

Martijn Konings' exegesis on Michel Foucault and "disciplinary governance" is relevant here.[1] As Konings describes, Michel Foucault's "work was an argument for displacement of sovereign power by the disciplinary effects of discursive norms and epistemic techniques, and critique of theoretical perspectives that reproduced the illusions of sovereignty."[2] But, as Konings emphasizes, state agency continues on even against the discursive practices of disciplinary governance. Foucault's late lectures at the College of France reintroduce sovereignty "as a configuration of incessant transactions which modify, or move, or drastically change, or insidiously shift sources of finance, modes of investment, decision-making centers, forms and types of control."[3] The discipline of law operates at the intersection of disciplinary governance and sovereignty. Cross-disciplinary takes on law, such as the ones here by Hick and Roh, often ignore law as a discipline, but at a peril to intellectual and political engagement.

What is at stake in ignoring the discipline of law is losing sight of the political and economic interests that drive the practice of law. Both Hick and Roh tacitly understand the play of these interests. Hick recognizes them in the dominance of prominent artists in the art world; Roh, in the dynamics of the publishing industry and the censorious role of copyright. Yet, what is missing is a compelling confrontation with these interests. Instead, the authors seem to find solace in their own disciplinary customs. Their insights reveal cracks and offer a vocabulary and grammar for guiding reform. However, the fear remains that the political and economic interests will nonetheless win. Discipline serves to establish an order with the slim hope of transforming it.

Some may read this argument as a call to develop a different disciplinary approach to law. Perhaps the tools of Economics and Political Science have more to offer than Philosophy and English to the disciplinary debate. The point, however, is not about the right tools. More knowledge does not necessarily lead to better understanding or better practices. Authors like Hick and Roh help in enlivening a debate. They are engaging and stimulating to read; their ideas are seeds for hearty discussion. Real change, however, can spring from scholarship only when discipline ceases to be confining and instead unleashes a flourishing of engagement with reimagining and refashioning the order we take for granted.

Hick and Roh offer disciplinary perspectives, much of which is original and fresh. While I am skeptical of whether their perspectives offer a basis for actual reform, their books do challenge readers to think outside the borders of law's discipline even as those borders may only become further ingrained. And, perhaps, one day we might look up from whatever book we happen to be engrossed in, whatever discipline we may be practicing, and see the world has changed.

ENDNOTES

[1] Martijn Konings, CAPITAL AND TIME: FOR A NEW CRITIQUE OF NEOLIBERAL REASON, at 62 (Stanford University Press, 2018).
[2] Id.
[3] Id. at 65, citing Michel Foucault, THE BIRTH OF BIOPOLITICS, at 72 (Palgrave, 2008) (English translation of 1979 lectures).

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