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AUTHORS IN COURT: SCENES FROM THE THEATER OF COPYRIGHT, by Mark Rose. Harvard University Press, 2016. 219 pp., Hardcover, $29.95.

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Drama is the master metaphor by which Mark Rose characterizes the six historical moments examined in his important book, AUTHORS IN COURT. Each of these moments, he argues, is an "exemplary narrative[] . . . which can be read as an exploration of the drama of . . . the development of authorship and the law" (p. x). Casting history as drama implies narrative tension, conflict, reversal, and recognition; it is not quite clear whether Rose feels he has discovered an inherent plot or telos in copyright history, or whether he is acknowledging the craftsmanship of his own lively storytelling, or both. But we need not decide this ontological question to derive pleasure and profit from his careful study. Where there is drama, there must be dramatis personae, and Rose deploys his dramaturgy around vividly drawn authorial figures supported by a cast of lawyers, judges, expert witnesses, and accused infringers. His six-act drama raises the curtain on Daniel Defoe's misunderstood satires and dream of authorial property; Alexander Pope's resort to litigation to vindicate his privacy and his copyrights; Harriet Beecher Stowe's bid to control the right to translate her nation-changing book; Napoleon Sarony's ownership of the mental conceptions captured in his celebrity photographs; Anne Nichols' attempt to monopolize plot, character, and setting in stage comedy; J.D. Salinger's use of copyright to combat publicity and unwelcome biography; and Jeff Koons' struggle to make readymade art and bankable banality proper subjects for the defense of fair use.

Yet what kind of drama has Rose unveiled for us? What sort of tale does copyright's history unfold? Is this romantic comedy or the theater of the absurd? Are we watching a well-made play or listening to the dire chanting of a Greek chorus? Would Northrop Frye find archetypal tragedy in the growth of copyright's scope, or wintry satire in the professionalization of authorship?[1] At the very least, Rose brilliantly stages a complex problem play in which copyright law first enthrones the idea of proprietary authorship and then, in hubris and avarice, topples the crowned king in a palace coup plotted by the work-for-hire doctrine. My one serious regret is that Rose did not add a seventh exemplary act

in which that seemingly oxymoronic Macbeth, the corporate author, was shown with hands dabbled in the blood of human authorship. The law-abetted split between creative labor and capitalist ownership in modern culture industries has been richly explored, for example, in Catherine L. Fisk's WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE,[2] but Rose stops short of this potentially absurdist drama and only hails it from afar. Yet several of his subplots take us to the brink of that anxious dénouement: the struggle of Pope and Stowe to reap the benefits of professional authorship while maintaining façades of gentility and domesticity, respectively; the posturing of Sarony as a photographic genius while his uncelebrated cameraman humbly operates the shutter; the idiot-savant entrepreneurship of Koons who builds an art empire on the simple proposition that the ordinary world might be a source of vast profit if the public could be taught to swoon before found objects bathed in a glamor of hand-numbered scarcity and Warholian celebuzz.

The main plot of Rose's book asks the question, how did copyright law grow from merely prohibiting unauthorized literal copies of books to forbidding many nonliteral types of exploitation: abridgments, translations, adaptations, use of characters, even paraphrase? His chapter on Defoe shows copyright's construction of the author at an early stage. Defoe repeatedly called for a statute that would secure authors' works as their own indefeasible property, and his agitation contributed to the passage of the Statute of Anne (1710), "the world's first copyright act" (p. 8). In contrast to earlier licensing acts that sought to control seditious texts and other officially disapproved speech, the Statute had the express purpose of encouraging learning, making authors the initial owners of a limited right to print and reprint their works, "by virtue of [their] literary endeavor" (p. 10). Alexander Pope's 1741 lawsuit against the rascally printer Edmund Curll for publishing Pope's letters without permission established a fundamental point of copyright law that is still observed today: copyright protects the particular concatenation of words set down by the author, not the physical document or other tangible medium that embodies them. By detaching the intangible right of publication (owned by the author) from the physical letter (owned by the recipient), Lord Chancellor Hardwicke, who heard Pope v. Curll, helped advance the law from the old printer's claim of copy-right—the right to print from copy acquired from an author—towards the modern idea of an author's copyright, the right to control the intangible work, whatever medium it might inhabit (pp. 24-25). To conceive of authors' works as something separate from paper and ink was a step towards recognizing "the author's right of property in the text" (p. 33). The tangible-intangible split in Pope v. Curll was a metaphysical surge in the abstractive trajectory of intellectual property (p. 90).

Rose points out that in one respect Hardwicke's decision was essentially an act of literary criticism. In concluding that private, familiar letters could be protected by a statute that had been framed for the advancement of learning, Hardwicke was necessarily "turning critical opinion into legal judgment" (p. 23). Rose's subplot of judge-as-critic is a recurrent theme of his study, and his point could be

extended to other judicial performances. Supreme Court Justice Samuel Miller's ruling in Burrow-Giles Lithographic v. Sarony (1884) that a photograph was a "writing" and that a photographer was an "author" within the meaning of the U.S. Constitution's Copyright Clause was a bold interpretative act, comparable in some ways to a contemporary theorist's argument that popular culture should be granted equal dignity with canonical literature as a subject of criticism and pedagogy.[3] When Justice Oliver Wendell Holmes, Jr., concluded that an ordinary circus poster could qualify as a pictorial work under U.S. copyright law, he was creatively expanding the law to accommodate the detritus of popular culture,[4] even as he was endorsing, according to Barton Beebe, "an 'accumulationist' model of progress [that] defines aesthetic progress as simply the accumulation over time of more and more aesthetic things."[5]

Judicial determinations of fair use are often acts of aesthetic interpretation. Where one judge finds copyright infringement in the unauthorized use of a photograph to construct a sculpture of puppies, another might find fair use as a matter of artistic transformation or parodic purpose. Justice David Souter's landmark opinion in Campbell v. Acuff-Rose Music (1994), with its influential distinction between parody and satire, is as much a seminar in literary genres as a ruling on fair use.[6] The growth of transformative fair use as a powerful defense in the twenty years between Salinger v. Random House and Blanch v. Koons[7] shows the judicial mind opening to the lawful possibilities of postmodern collage, allusion, parody, and intertextuality. "Inevitably," Rose writes, "the determination of what is or is not 'transformative' is subject to critical discrimination" (p. 183).

Harriet Beecher Stowe tried to expand authors' rights by pushing copyright further along its metaphysical path. But her lawsuit against the publisher of an unauthorized German translation of her bestselling antislavery novel UNCLE TOM'S CABIN (1852) failed to add an exclusive translation right to copyright's bundle. In Stowe v. Thomas, Justice Robert Grier held that, prior to publication, an author's "dominion" over her thoughts, ideas, and sentiments was "perfect," but, once published, her conceptions were "given . . . to the world" as "common property," and she was left with only the "exclusive right to multiply the copies of that particular combination" of words.[8] Unauthorized translation, because it was a re-clothing of ideas, sentiments, and characters freely gifted to the world through the decision to publish, could not infringe the author's narrow right to protect "the precise words" of her book (p. 90). As Rose points out, the 1870 U.S. Copyright Act would later vindicate Stowe's position by codifying an author's translation right (p. 90), but in 1853 the law was not ready for such an expansive novelty. Infringement lay in literal copying, not nonliteral translation.

In a fascinating passage, Rose analyzes the strange literary-critical moment in Justice Grier's opinion when he played on "the idea of Stowe as a slave owner" suing to control her characters through legal monopoly while preaching an abolitionist politics of non-ownership in her novel (pp. 58-59). Rose suggests that Grier, a supporter of the 1850 Fugitive Slave Law, was flinging a "gratuitous

insult” at Stowe (p. 59), but I wonder if Grier’s edgy dictum went somewhat deeper. In his opinion, he remarked that Stowe’s characters “Uncle Tom and Topsy are . . . publici juris [and] may be used and abused by imitators, play-rights [sic] and poetasters.”[9] The quip hints that, if Stowe had wanted to maintain the perfect dominion over her characters that she now contends for as a litigant, she should have kept them confined to the plantation of her imagination and not manumitted them in the pages of a published volume. Uncle Tom and Topsy may now be lawfully exploited by anyone, subjected to all manner of nonliteral copying in the ruthless and degrading literary marketplace. This was more than the language of insult; it was the rhetoric of paternalism that many Southerners employed to justify the institution of slavery in the mid-1800s. The slaveholder’s relationship to the slave, this rhetoric declared, was that of a kind father to his vulnerable child, a form of protective kindness and solicitude that radical Northerners would cruelly destroy by freeing slaves to enter a world that would use and abuse them. Slaveholders “recoiled from the suggestion that their slaves would be better off as free men,” according to scholars of American slavery.[10] Justice Grier’s barb hinted that the scornful treatment to which Stowe’s thought-slaves were now exposed in the writer’s marketplace would be visited on actual freed slaves, should her abolitionist dream become law.

The playwright Anne Nichols also sought to control the nonliteral elements of a popular work, her smash-hit stage comedy “Abie’s Irish Rose” (1922). When Universal Pictures failed to obtain rights to adapt Nichols’ play for the screen, the company bought the rights to a different play and then altered it to resemble the central theme of “Abie’s Irish Rose”: ethnic conflict between an Irish family and a Jewish family, complicated by a romance between a son and a daughter from each. Nichols sued Universal over the resulting movie, THE COHENS AND KELLYS (1926), and hired an attorney, Moses L. Malevinsky, who also served as her expert witness in the case. Malevinsky had authored THE SCIENCE OF PLAYWRITING,[11] in which he claimed that any drama could be analytically reduced to its emotional components by an algebraic formula, and that this algebra could be employed to detect plagiarism: “A plus B plus C of the Algebraic Formula when paralleled in two plays proves infringement” (p. 99).

This write-by-numbers approach to literary composition had a certain vogue in the early decades of the twentieth century. Hudson Maxim, the U.S. inventor of smokeless gunpowder, argued in his book THE SCIENCE OF POETRY AND THE PHILOSOPHY OF LANGUAGE that the mysteries of poetic composition could be cleared up by a scientific approach to the subject. Maxim coined the words “potentry” and “tro-potentry” to characterize the power of great lines, and gave examples of his own scientifically created verse, even offering a methodological rewrite of Hamlet’s soliloquy to illustrate “continuous primary rhythm”: “How fear doth poise us on the brink of death, / Between contending purposes.”[12] An illustration in the volume showing Maxim taming a bucking Pegasus as if it were a wild bronco gives an idea of the confidence that lay behind his project.[13] The American poet Ezra Pound mocked Hudson’s theorizing as

pretentious and parochial, "designed, in short, for the store-post-office audience in Canastota and Pipe's End."[14] Yet this faith in a rational skeleton key to literature stretched back at least to Edgar Allan Poe's "Philosophy of Composition" (1846) and can be found in sophisticated forms in Frye's archetypal criticism and in the recurrent textual patterns discovered by literary structuralism. Malevinsky's algebraic formula, which Rose describes as bearing "the marks of a quirky autodidact" (p. 99), operated at the ideal level of malleable abstraction for finding plagiaristic similarities in popular drama. He was the perfect lawyer and expert witness for Nichols, who was indignant over nonliteral parallels between her play and Universal's movie. Universal had done something more economically threatening than simply borrowing words and speeches from her play: it had become a competitor for audience response to her story about blind love overcoming family prejudice, her comic rewriting of "Romeo and Juliet."

Judge Learned Hand, of the U.S. Court of Appeals for the Second Circuit, rejected Nichols' claims and Malevinsky's algebraic analysis, holding that Universal had taken no more than general plot elements, comedic conventions, and stock characters. Famously, Hand set forth in his eloquent opinion what has come to be known as the "abstraction test":

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.[15]

Rose suggests, persuasively, that Judge Hand may have formulated his abstraction test partly in response to the battle of experts in the lower court (pp. 106-09). Indeed, Hand's application of the abstraction test turned Malevinsky's algebra on its head, finding non-infringement in the common emotional elements that the expert had proudly identified as evidence of unlawful copying. Hand located copyright's commons precisely where Malevinsky had found invaded property. An irony of the litigation is that Hand complained in his opinion about the use of expert witnesses in copyright cases (p. 107). He felt that they invaded the province of the fact-finder, substituting pedantic dissections and intricate charts for "the firmer, if more naïve, ground of [the court's] considered impressions upon its own perusal."[16] Yet his abstraction test, elaborated and refined, has been the basis of much expert testimony in copyright cases of recent decades, especially those involving software and other technical subject matter.

One of Rose's storylines is the tension between expansion and contraction in copyright's metaphysics, between authors' rights and users' privileges. Pope's

lawsuit broke ground by splitting the intangible work from the tangible medium. Sarony's litigation showed that posed photographs could be the basis of authorial property. Yet, in contrast to these growth spurts, the translation right came slowly to U.S. copyright law, as Stowe learned; and general plotlines, common settings, and indistinctly marked characters remain as unprotected today as they were for Anne Nichols. Copyright expands until it overreaches and impinges on the common pool of materials necessary for others to engage in creativity. Then there is a halt and a readjustment.

Rose's final two chapters shift the focus from plaintiff authors to defendant copiers, and from the changing shape of authors' rights to the dynamic development of the fair use defense. Yet these chapters are also about authors, because the defendants in the Salinger and Koons cases engaged in quoting and copying precisely in order to create. Ian Hamilton quoted from and paraphrased Salinger's private letters with the intention of crafting a biography in which the reclusive author's voice could be heard as a rich melody distinct from Hamilton's own ground bass. Salinger's quoted letters lent individuality and authenticity to Hamilton's account. Koons copied from photographic kitsch and fashion ads in order to transpose the banal and the mundane to the key of postmodern irony. Rose's narrative account of the growth of transformative fair use through the Salinger and Koons cases brings human color and pathos to one of copyright law's most complex and unpredictable areas. Here, Hamilton and Koons, though accused of infringing authors' rights, become the authors in court. Rose shows that transformative fair use is more than just a change in the direction of a murky doctrine; rather, it recognizes the fundamentally creative dimension of copying: copying for a purpose beyond copying. Just as copyright's history shows an extension of authors' rights to nonliteral forms of their works, so the story of fair use is a gradual recognition of the social and aesthetic value of nonliteral copying.

Rose's six-act drama is a worthy successor to his groundbreaking AUTHORS AND OWNERS.[17] As in that book, he anchors copyright law in clear storytelling. Each chapter gives us more than just the facts and the law; it also shows authorship struggling to shape itself in relation to property and its discontents, eager to ensure that being an owner is not inconsistent with being an author. The chief characters sometimes strangely echo one another within their moment and across time. Stowe tries to make property-owning consistent with being a wife and mother; Pope plots and contrives to be a copyright-enforcing author without taking on the taint of ungentlemanly professionalism. Pope and Salinger—separated by two hundred and fifty years, and as different as two authors could be—converge in using copyright to enforce controversial claims to privacy. Napoleon Sarony is a diminutive dandy every bit as committed to flamboyant showmanship as his famous photographic subject, Oscar Wilde. Jeff Koons is in some ways a reincarnation of Wilde, demanding deference to his aesthetic whims and decrees, expecting to be richly rewarded for his aesthetic audacity, absolutely certain of the division between art and non-art yet constantly bringing the two into subversive contact. Rose's chapter on Koons, "Purloined Puppies," is easily the

best account ever written of the Koons litigations, largely because Koons emerges here as a complex artist and businessman, thoughtful and dedicated in his way, far from the cardboard charlatan and greedy clown that he is often depicted as being. Rose tells copyright law's stories with great skill and humanity. In addition to its value as a scholarly monograph, AUTHORS IN COURT would be an excellent supplementary text for courses on intellectual property, copyright, and piracy in law schools and graduate and undergraduate programs.

ENDNOTES

[1] See generally Northrop Frye, ANATOMY OF CRITICISM: FOUR ESSAYS (Princeton Univ. Press, 1957).
[2] Catherine L. Fisk, WRITING FOR HIRE: UNIONS, HOLLYWOOD, AND MADISON AVENUE (Harvard Univ. Press, 2016).
[3] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58-59 (1884).
[4] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).
[5] Barton Beebe, Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law, 117 Colum. L. Rev. 319, 331 (2017).
[6] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 (1994).
[7] Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).
[8] Stowe v. Thomas, 23 F. Cas. 201, 206 (C.C.E.D. Pa. 1853).
[9] Id. at 208.
[10] Eugene D. Genovese & Elizabeth Fox-Genovese, FATAL SELF-DECEPTION: SLAVEHOLDING PATERNALISM IN THE OLD SOUTH 3-4 (Cambridge Univ. Press, 2011).
[11] Moses L. Malevinsky, THE SCIENCE OF PLAYWRITING (Brentano's, 1925).
[12] Hudson Maxim, THE SCIENCE OF POETRY AND THE PHILOSOPHY OF LANGUAGE 199 (Funk and Wagnalls Co., 1910).
[13] Id. at unnumbered page between pages 26 and 27.
[14] Quoted in Omar Pound & Robert Spoo, eds., EZRA POUND AND MARGARET CRAVENS: A TRAGIC FRIENDSHIP, 1910-1912, at 58, (Duke Univ. Press, 1988).
[15] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[16] Id. at 123.
[17] Mark Rose, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (Harvard Univ. Press, 1993).

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