

Authors, Users, and Pirates: Copyright Law and Subjectivity

James Meese

Reviewed by: Amy Thomas

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A type of legal fiction exists in copyright law which presumes the existence of clearly defined and sufficiently delineated legal subjects; certainly, if the law has any duty to be precise, we assume that we should be able to accurately identify these subjects with a high degree of certainty. As attractive as this proposition may be, anyone who is involved in this area will know that this is simply not the case. This less sharply delineated reality fundamentally underlies James Meese's recent book, *Authors, Users and Pirates: Copyright law and Subjectivity*, which proposes a new relational framework of understanding. This account draws on the influential work of Carys Craig (*Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham: Edward Elgar, 2011)) that challenges how we approach three pivotal copyright subjects - the author, user and pirate. Meese demonstrates how these subjects are often subjectively constructed, and their roles and accompanying merits or demerits are invoked by various stakeholders in order to impart a particular view or concept of that subject at any given time. To take a contemporaneous example, authors may argue that creative reuse by internet users represents a risk to the infringement of their exclusive rights if users are permitted to modify existing works in memes, remixes and mash-ups; conversely, online platforms may argue that these are creative, legitimate and authorial acts that should be encouraged, and are a defining trait of internet culture. Which, if either of these, is the correct understanding of a user? Neither? Both? Whilst we may be no closer to a stable definition of any of these subjects, come the end of the book we are in a better position to understand *why* this is the case.

The book's central tenet is the interconnectedness of authors, users and pirates, and how the distinctions dissolve or the boundaries between these legal subjects frequently overlap, as demonstrated throughout Meese's book with the use of a Venn diagram. This results in chimera-esque classifications of entities such as the author-user (eg, of user-generated content, or in referencing another work to inspire the creative process) or the user-pirate (eg, someone straddling the boundary between lawful and unlawful use), subjects which have been explored in Meese's earlier works (see, J. Meese, 'The pirate imaginary and the potential of the authorial pirate' in J. Arvantakis and M. Fredriksson (eds), *Piracy: Leakages from Modernity* (Sacramento, CA: Litwin Books Llc, 2014) and J. Meese, 'User production and law reform: a socio-legal critique of user creativity' (2015) 37 *Media, Culture & Society* 5). These classifications present a direct challenge to more dichotomous and polarising views of copyright as author versus world, and offer up a more harmonious, less adversarial perspective of how copyright may operate.

Meese adopts an interdisciplinary, socio-legal approach, a hybrid between doctrinal law and cultural research. Meese acknowledges that by not committing wholly to either approach, specialist readers from either field may be disappointed (10). On the contrary, this reviewer found the book considerably

more accessible to scholars and students from either field; doctrinal points are covered with clarity without being obscured by legalese, and cultural studies approaches are discussed with sufficient depth to convey the argument, without overwhelming the reader with unfamiliar theory. In this sense, the book is best approached as a narrative that does not attempt to follow structures more typical of either field. The approach is illustrated by the choice to interweave analyses of the three subjects throughout the chapters rather than discussing them in isolation, in line with a view of interconnectedness. Chapter one begins by tracing the historical development of copyright law, emphasising that copyright has ‘always been relational’ (15) despite a seemingly instrumentalist approach to authors rights alone. Following this, Chapter two charts the more recent phenomenon of the user in the Web 2.0 era, demonstrating a shift in perceptions from users as piratical to users as a positive source of creativity. Chapter three then turns to the author, examining how doctrinal boundaries vary in the rights they attribute, and the uses they except. Returning to these uses, Chapter four fleshes out the user in more detail through an analysis of legal reforms which have reconsidered the role of the user as a subject increasingly closer to authorial in nature. Chapters five and six conclude with a discussion of the pirate, the former adopting a cultural lens and the latter a more doctrinal approach, acknowledging that the pirate is constructed equally in rhetoric and law. Throughout, and in providing tangible examples for this relational theory, Meese focusses on four common law jurisdictions for his analysis and application, namely the USA, UK, Canada and Australia. This selection ensures some functional equivalence whilst avoiding being strictly comparative; certainly, no exhaustive comparative approach is adopted throughout, which would be ambitious indeed in the context of a multi-subject, historical analysis. Instead, examples are used as necessary from the most relevant jurisdiction in case law, legislation, policy debates etc to substantiate the author’s relational theory.

Meese’s perspective is appealing, though it is difficult to approach this relational triad without questioning its balance. On this aspect there are two points worth noting. First, we may agree that copyright is written from the perspective of the author, and primarily functions to ascribe them their various entitlements. Users and pirates (at least from an EU perspective) are not, ergo, the subject of copyright law; instead, they take up the space left over where the author’s entitlements end. They are not defined as a separate entity as such, and instead are defined by the limited carve-outs allowed to them in absence of the author, eg through copyright exceptions. A project seeking to understand the user or pirate would find doctrinal materials alone to be unsatisfyingly thin; these are subjects which have been constructed from the ground-up, less so in law and more so in cultural discourse. Meese’s methodology is helpful in this regard, as it blends both, though it is worth noting the difficulties inherent in treating the user or pirate as a viable comparison to the author.

Second, surely the user is more pervasive, if a user is defined as someone who lawfully or legitimately accesses or consumes a work, than an author or pirate? It is plausible that everyone is a user of some

work or another, less so an author or pirate, notwithstanding the very low threshold of originality required for authorship in the EU; user-ship is surely the default rather than the exception. In this sense, it may make more sense to understand the relational triad with the user as the all-encompassing central subject, which includes authors and pirates, but does not exist separately from them.

These points are not to dismiss the work Meese has done in challenging the idea of clearly delineated roles in copyright; in fact, they are made possible by it. The application of a relational approach to these subjects is undoubtedly the most innovative aspect of the book, which allows us to challenge their construction and framing.

As noted above, by the end of the book we are seemingly no closer to establishing clearly delineated or defined roles for the author, user or pirate, but Meese's aim is instead to explain why this is, rather than to provide a solution as such (and indeed, it may be the case that the lack of a stable definition is not necessarily a problem). In keeping with this, Meese stops short of making any concrete recommendations, such as how the analysis is applicable for improving copyright policy. Instead, its relational framework is employed to better understand how these three interconnected subjects are constructed and deployed in both law and cultural discourse. Indeed, this may find ample testing ground in the recent policy discussions on the Copyright in the Digital Single Market Directive, of which I was reminded throughout Meese's book. In particular, the discussion in Chapter five ('Reimagining the Pirate: Approaching Infringement Relationally'), on the controversial Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) in the US, is reminiscent of current Digital Copyright debates in the EU. Meese's relational framework would reveal the presentation of the author, user and pirate in these debates as legal subjects abstracted from any strong foundational justification in copyright, and instead subjectively constructed depending on the stakeholder speaking. In particular, we may look to the debates surrounding Article 17 (draft Article 13 – and sometimes known as the upload filter or censorship machine provision) which purports to expand existing liability regimes for online platforms (such as YouTube or Facebook) by imposing certain obligations regarding infringing content. As per the proposal, absent a licence agreement between the platform and relevant rightholder, the platform must use effective and proportionate measures to *prevent* the availability of infringing content. This requirement for *ex-ante* prevention, as opposed to the current *ex-post* system of notice-and-takedown, has led to concerns that this will inevitably lead to pre-upload algorithmic filtering of user-generated content, a technology which as it presently stands is unable to distinguish between legitimate and infringing content. By way of an example, such technologies usually work by comparing the new content, as uploaded by the user, against a library of protected content, as held by rightholders; when the algorithm detects a match between this content and subsequently blocks it, it may not be able to distinguish the fact that the new content is, eg, a parody of the original (a legitimate use) using the same video or audio elements.

Using the relational framework in this context, we see that the user is very difficult to discern in this provision; arguably, Article 17 targets an individual better understood as the user-pirate *per* Meese, or the construction of users as ‘actual or potential trespassers or pirates’ (as noted by Craig, cited above, 3). Simultaneously they represent both the threat of copyright infringement (the pirate), but also of a legitimate entitlement to access of a free and unfettered internet (the user), which may be jeopardised by a new scheme of platform liability. In this vein, it becomes clearer why Meese challenges dichotomous approaches to copyright roles; without appreciation of the many grey areas that exist, the lawful tends to get subsumed with the unlawful (eg, the lawful user becomes one with the unlawful pirate) for lack of a better classification. The same may be said of online platforms in the debate, a subject that is not strictly included in Meese’s framework unless one considers them a broader extension of a user; whilst at times unclear, the target of the new proposal has been dominant platforms such as YouTube and Facebook. Nonetheless, early versions of the text would have also captured not-for-profit or educational resources such as Wikipedia or Github. Whilst these have since been excepted, such platforms will nonetheless be impacted if volunteers struggle to source information as a result of less content being uploaded due to algorithmic filtering. Once again, we see the overarching narrative of online platforms as potential infringers (pirates) has subsumed lawful use (of users) as a result of presuming clear demarcation of copyright roles and benefits to authors.

Even at this stage, a clearly defined author is also absent in the context of the Directive. Within these debates, we have seen how questions on the regulation of user-generated content are also indirectly a question of the authorial capabilities of a user, or the user-author according to Meese. It is not necessarily a new argument to state that users in this context are actually authors-proper, with many remixes, parodies and mash-ups meeting the low threshold of originality required for copyright protection. Accordingly, user as a term is perhaps utilised as a label to introduce a new normative vector of distinguishing between amateur and professional works, generally understood as being against the principle of, eg, aesthetic neutrality (see D.J. Gervais, ‘The Tangled Web of UGC: Making Copyright Sense of User-Generated Content’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 841). However, such an argument may be particularly worthwhile exploring in the context of algorithmic filtering, or content recognition technologies, such as the digital fingerprint matching Content ID. These technologies are arguably author-centric, serving to automate the process of identifying infringing content uploaded by pirates, thereby hastening and streamlining this process. If this is the case, these technologies should also operate to favour the user-author, who is also presumably entitled to the benefits brought by automation; however, and more often than not, this is not the case, with many lawful works being erroneously removed or as detailed above, unable to be distinguished from illegitimate or infringing uses. Is it possible to design a system that accommodates both the author-proper and hybrid user-author? Untangling and addressing these complex relationships is necessary to

producing good legislation – legal subjects must be identified accurately, or we run the risk of misidentification, mismanagement, and ultimately erasure.

I would therefore propose that Meese’s lack of concrete suggestion is not necessarily a short-coming, and instead this book has produced an adaptable and plausible framework that creates a lens through which we can appreciate the interconnectivity of various legal subjects, rather than simply seeing the opposition (as demonstrated by this brief application of said framework to recent policy debates in the EU). Meese rightly calls for more empirical evidence to develop more concretely the image of the author, pirate and user, in particular citing the detailed ethnographic studies more commonly employed in science and technology studies (108-109). Future researchers may also look to adapt his framework beyond the author-user-pirate triad; intermediaries, platforms, publishers etc may also be legal subjects that are subjectively constructed and worthwhile considering.

Meese’s book is an exercise in breaking down the imaginary concrete barriers between pivotal legal subjects in copyright, and indeed challenging our base understanding of what we know these subjects to be; perhaps we are not all so different after all, and a dichotomous view of the world is less helpful than a relational one. Such a framework can plausibly be employed to break down these barriers and understand how each of these subjects is subjectively constructed both in law and cultural discourses. No doubt, this will inspire further research into the author-user-pirate triad in the hope of leading to a more accurate reframing of copyright law in the future.

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