

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

2017

### Review of What's Wrong with Copying? by Abraham Drassinower

Jessica Silbey

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Law Commons](#)

---

#### Recommended Citation

Jessica Silbey, *Review of What's Wrong with Copying? by Abraham Drassinower*, 7 IP Law Book Review 7 (2017).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/2283](https://scholarship.law.bu.edu/faculty_scholarship/2283)

This Book Review is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



# The IP Law Book Review

IP Law Center, Golden Gate University School of Law

**Vol. 7, No. 2 (March 2017) pp. 7-17**

**WHAT'S WRONG WITH COPYING?** by Abraham Drassinower,  
Harvard University Press, 2015, 288 pp., Hardcover, \$39.95

Reviewed by Jessica Silbey  
Northeastern University School of Law  
j.silbey@neu.edu

There are several radical aspects of Abraham Drassinower's book *WHAT'S WRONG WITH COPYING?* One is that he shoves to the side the question of copyright incentives and the economic theory of intellectual property law, both long-standing starting points for copyright theory and doctrine. Drassinower makes no intellectual apologies for this sidelining and justifies it by the second radical aspect of his book: he claims to be exploring copyright law on its own terms, not on terms from outside copyright (economics or behavioral incentives) but from internal to copyright law as written and developed since the Statute of Anne.<sup>1</sup> This he does in impressive fashion, as I will briefly describe below. It is refreshing and a welcome intellectual and aesthetic exercise to work so closely with phrases and arguments of famous copyright cases, as if with one's hands and a pile of clay. As a reader one comes to a new understanding and appreciation for what the cases say and how they can be freshly understood as a way forward in our "copyright wars" debating an increasing copyright scope and a shrinking public domain.<sup>2</sup> As Drassinower says in his introduction, he sets out to "demonstrate that the assumption that copying is wrongful is a radically mistaken way to approach copyright law."<sup>3</sup> And he writes on the first page of the Preface that "[t]he point is to retrieve from within copyright law a neglected appreciation of the copiousness of copying, not as the agitations of wealth-maximization, but as the reverberations of thinking as a shared activity."<sup>4</sup> So while this book engages the on-going debate over the proper scope of copyright – a debate critical for democracy, dignity and peace (could there be any more significant triad?) – the terms of Drassinower's engagement are original and therefore deeply welcome.

There is at least a third radical aspect of Drassinower's book connected to the two already mentioned. Drassinower resets the debate about how copyright law should work and how it explains itself on its own terms by starting with basic concepts mobilized throughout copyright doctrine and recasting them anew. The book begins and ends with "copying" and "the copy," so from the start we have a sense of first principles being righted. But in addition to these cornerstone terms,

Drassinower fully debunks the empty placeholder of “value” in Chapter 1 (“The Poverty of Value”) by showing how foundational concepts like “originality” and “works of authorship” as protected categories within copyright law cannot be derived from the notion of “value” or “balance,” which are ubiquitous terms in the economic analysis of copyright. He pursues similar ends by revising our understanding of “originality” in Chapter 2, “work” in Chapter 3, “infringement” and “speech” in Chapter 4, the “public domain” in Chapter 5 and “rights” in Chapter 6. The book is a thorough and persistent reconceptualization of copyright on its most basic terms.

For example, in Chapter 1, Drassinower razes the fundamental theoretical concept of “value” and posits a new center to copyright law. He begins by saying: “The basic problem with the model [of construing works ... as instances of economic value] is that not any and all value sounds as a matter of copyright law. ... Originality guards the entrance, so to speak, into copyright territory. [And yet] [i]t grants copyright to some but not all instances of economic value.”<sup>5</sup> After a close, patient reading of four principal cases about originality and its relationship to labor, skill and judgment in copyright law<sup>6</sup>, Drassinower concludes the chapter this way:

Framed as a balance, copyright law becomes nothing more than a distributive mechanism, on the one hand designed to achieve a balance between authors and users, yet on the other unable to make the qualitative distinctions necessary to get the entire balancing process going in the first place. In the absence of a principled fulcrum, copyright law is more the field of a struggle for value, and even a source of contested weapons in that struggle, than a juridical practice elucidating the conditions for the possibility of its resolution. ...

[The idea of balancing values] enlists for this task not only the concepts of creativity and skill and judgment, but also the entire arsenal of copyright doctrines that separates out different kinds of values and reserves protection for only some of them. Thus, for example, the idea/expression dichotomy refuses protection to ideas, regardless of their value, and regardless also of the creativity or skill and judgment, if any, that their production may have involved. Similarly, fair use or fair dealing represent a refusal to grant protection for the use of copyright subject matter in respect of certain purposes. These are decision to retain the definition of the author as a value-originator, yet to curtail in light of the public interest the value-amount to which the author is entitled. They are decisions to distribute values toward users rather than authors.

The basic difficulty with this option is that it does not have at its disposal the tools necessary to make the distinctions it requires. It cannot account for the doctrinal operations it deploys precisely because, as distinction between kinds of value, those operations irretrievably presuppose concepts other than value itself.<sup>7</sup>

What replaces “value” as the measure by which we decide the proper distribution of use rights? He says:

The alternative option is to accept the unambiguous affirmation of creativity and skill and judgment as an invitation to elaborate the specificity of authorship. To follow this option is to pursue relentlessly the logic implicit in the transition from sweat of the brow to creativity and skill and judgment, and thus to take on the task of setting forth copyright doctrine in general and originality in particular not as a mechanism designed to distribute the value of a work but as an elucidation of its distinctive nature. It is only in this way, I think, that we can hope to grasp copyright subject matter not as an instance of unspecified value but – to use the language of copyright law – as *the work of an author*.<sup>8</sup>

At the center of Drassinower’s explanation of copyright law, therefore, is not value or balance but a person and her expression. More on this in a moment.

In Chapter 2, Drassinower performs a similar transmutation of underlying copyright concepts with “originality.” He elucidates the term in light of critical and longstanding copyright doctrines of “independent creation” (a defense to copyright infringement in the case of substantial similarity), the idea/expression dichotomy (a limit to the subject matter of copyright), and fair use (an example of the lawfulness of unauthorized copying of an author’s work). At once intuitive and hard to specify, the content of “originality” in copyright law has long been debated as a basic justifying principle as well as a limitation of scope. Drassinower clarifies this all-important concept as rooted in human social values, offering “speech, equality and dialogue in place of value, efficiency and balance as signposts to guide copyright interpretation.”<sup>9</sup> In doing so, Drassinower reveals an underlying preference – a deontological referent as a central feature of his analysis of copyright which he mentioned in his introduction.

In the beginning of the book, Drassinower wagers there exists such an idea of “the inherent dignity of authorship” that “animates” copyright doctrine.<sup>10</sup> He mentions it again when he previews that “the principle of independent creation ... recognizes, *as an equality matter*, acts of authorship per se” and that fair use “affirms and confirms the *equal authorship* of each and all.”<sup>11</sup> In Chapter 2, Drassinower returns to this theme of equal dignity when explaining the doctrine of independent creation as a feature of originality, copyright’s starting point. He writes that it is

“[n]ot the content of an author’s speech, but the *very speaking itself* [that] is at issue in copyright law. ... If an author has a right to her original expression, then so must everyone else, including the defendant in any given copyright action. ... As soon as the law of copyright grants an author rights in her expression the law of copyright also requires that the author submit to every other person’s equal right in *his* original expression. ... As much as the plaintiff’s originality, the defendant’s defense is rooted through and through in independent creation. Each

speaks in her own words. ... At stake is not an external limitation of the plaintiff's claim but rather the principle holding plaintiff and defendant together as parties to a legal action centered on the authorship of each and both. Independent creation shows us unequivocally that copyright law engages the author not as a self-contained atom but rather as an author among authors."<sup>12</sup>

Drassinower builds similar arguments around the "bilateral recognition of the parties' equal claims as authors" to derive the idea/expression dichotomy and fair use.

Chapter 3 continues this theme explaining through an analysis of *Baker v. Selden* how the reproduction right is limited to the recomunication of a work as a work, that is, a repetition of the author's speech and not as a tool or a "nonuse" in copyright terms.<sup>13</sup> "Written in 1879, *Baker v. Selden* remains the most far-reaching reflection available on the relationship between copyright law and digital technology."<sup>14</sup> (Drassinower considers other cases as well, e.g., *Kelly v. Arriba Soft and Canadian Ass'n of Internet Providers v. Society of Composers, Authors and Music Publishers of Canada*.) Central to the distinction between mere copies and an infringement is the reproduction of a plaintiff's work as a recomunication of her speech. Recomunication – what Drassinower intriguingly calls "compelled speech" – would be an infringement whereas a reproduction that is a "reasonably necessary aspect of the defendant's own authorial engagement" or of the "work in its material form" as a "tool" or "thing" is not.<sup>15</sup>

We hear in this and other explanations of fundamental copyright doctrine the centrality of personhood in copyright law defined in terms of equal dignity and autonomy. It is here I want to focus the rest of my comments because Drassinower leaves this point to be assumed as an acceptable and uncontestable orientation for his philosophical and hermeneutic examination of copyright law. To be clear, I do not disagree with this as a fundamental baseline for copyright law or other legal regimes. I seek only to elaborate upon it in hopes of gesturing toward even more fruitful considerations of "equality" and "autonomy" in copyright debates yet to come. And this brings me, first, to the parrot on his book cover.

I presume Drassinower put the parrot on his book cover because parrots copy and his book embraces copying as a good and necessary act, not a wrongful one. But underlying much of this book's argument is the force of personhood, and parrots are not people nor are they people-like. From the standpoint of equality – which is a standpoint Drassinower insists upon – parrots are like foxes (or other animals). In *Pierson v. Post*, another case Drassinower artfully rereads and relies upon to illuminate the centrality of personhood in a discussions around property, he describes the fox as silent and necessarily so in order for the case to be about first possession of *things as between people*. Drassinower cleverly reimagines *Pierson v. Post* with a second fox that sneaks in at the last moment to kill the first fox and carry it away.

“[I]t does not occur to us ... to ask whether Post could sustain a cause of action against Fox 2 in respect of Fox 1. ... On the contrary, if immediately after Fox 2 intrudes on the scene to bite Fox 1, Post smiles gleefully and ensnares either or both foxes, it is clear that Post has indeed constituted a property right to either or both foxes. ... The silence of the fox, then, signifies its exclusion from the community of entities whose voice is recognized as a voice that counts, whose acts are worthy of respect. When the fox screams because a hunter mortally wounds it, we do not ask it to tell us its story. ... But when a hunter screams because another hunter snaps up a prey about to be captured, then we find ourselves before a very difficult question about the origins of ownership and we in fact ask both hunters to tell us their stories. The point is simply that persons, not animals, have standing as owners, as entitle capable of claiming entitlements through their acts, as beings whose stories get a hearing. An entirely different set of concerns would have arisen, for example, had Pierson ensnared and killed Post rather than the fox.”<sup>16</sup>

Drassinower’s exegesis of *Pierson v. Post* continues in a remarkable manner, tying it to and illuminating his asserted copyright foundations.

“If a distinction between persons and things is at the heart of the case, as indeed it is, then the case must be resolved in a manner that respects that distinction. Neither of the parties can be treated as a mere fox. Neither of the parties can be silenced – or treated as if it were nothing more than a means to the satisfaction of the other party’s desire. That is what the fox is and that is why it is dead: silent or silenced. ... We bother about the fox not because we care about the fox *per se*, but because the parties or persons involved have something to say about the fox. The fox has no independent status or meaning here. Only the parties do. And because each and both of them do, we cannot resolve the dispute by denying either of them that status. We must arrive at the decision of who is legitimately entitled to the fox in a manner that is respectful not only of the winner’s, but also of the loser’s, status as a person. That is, we must decide the conflict between persons by being respectful of the principle of personality that, according to the case’s own presuppositions, each of them equally embodies.”<sup>17</sup>

Equality is everywhere in Drassinower’s book, and so I cannot resist equating the fox and the parrot. We may wonder if a distinction exists between the two animals that matters for Drassinower’s explanation of copyright law to justify the parrot’s prominence on the book cover. Of course, Drassinower insists that the “parroting” (my term, not his) of speech is not wrong as long as the speech is in one’s own words. Is therefore the parrot on the cover speaking its own words (likely impossible)? Or, more likely, does it resemble the fox, a puppet or tool lawfully dominated by a person, which domination is a sign of privilege recognized by the law as a form of ownership? If speaking one’s own words

signifies copyright authorship, which is a form of autonomy recognized as equal dignity in Drassinower's analysis, then a parrot is not an author.

On the other hand, when parrots copy human speech, they are not taking our words (they are not "speaking our words without authorization" a form of compelled speech that Drassinower defines as infringement). Parrots copy to be *in dialogue*. Copying is what parrots do as a matter of social behavior, to relate to and recognize what is going on around them, in particular who is speaking and how. So although like the fox, parrots as animals are to Drassinower's analysis irrelevant from the perspective of the juridical logic of copyright as a regulation of speech between people with equal dignity, parrots "dialogue through copying" – often verbatim copying – and this may be key to the parrot's cameo on the cover. A dog (or a fox) on the cover would make no sense. We may talk to our pet dogs all the time, but dogs do not talk back. And although most canine pet owners would confirm that our pet dogs recognize us as persons to be respected and are finely attuned to the goings on around the house and neighborhood, a dog's failure to copy our speech gives us a sense of their dumbness. We don't think of dogs as smart like parrots. A parrot's *copying* is a sign of their *intelligence*, at least that is the story we tell. And that seems another justification for the parrot on his book cover.

This is not to say that Drassinower claims one must be intelligent (as in smart or quick-witted) to be a copyright author. But he does appear to say that intelligence as in *the character of the human mind* and intelligibility as a matter of language and representation is critical to copyright authorship. Parrots don't have the human mind part, but they are intelligible in the second sense. What they lack, however, is equality, as is painfully made clear by the foxes' demise. Parrots (or foxes) are not equal to people. And equality, it seems to me from reading this book, is critical to the argument about copyright as a "bilateral recognition of the parties' equal claims as authors." So what does Drassinower mean by *human* equality after all?

In the literature on the philosophy and politics of equality, it usually takes one of three dimensions, each contestable in its own right but each nonetheless normatively and practically meaningful as applied throughout legal disputes. One concept is comparative and formal in nature, as in "likes being treated alike," or formal neutrality.<sup>18</sup> This is a basic non-discrimination principle. It suffers, as one can realize almost immediately when trying to apply it in practice, from an empty center.<sup>19</sup> What characteristics count for assessing similarity? If we're different on the basis of race but similar on the basis of test scores, does that mean we should be treated the same or that different treatment is not an equality problem for the purpose of doling out benefits on the basis of scores not race?

Alternatively, if an office provides a female employee who nurses her newborn baby keys to a private room in which to pump breast milk but does not give a similar benefit to another employee who wants privacy for making phone calls, are we treating them "unequal" or is the accommodation for a nursing mother the recognition of a different kind of equality – the equality of access and

opportunity? Failure to accommodate the nursing mother may be seen as a denigration of the choice to nurse and it may – in the aggregate and over time – subjugate her to lost opportunities and less benefits as a woman should she therefore stay home while nursing. Failure to accommodate her choice to be a nursing mother at work becomes a form of dominance, leaving her unequal and less free. Accommodation – treating people differently in order to equalize opportunity – is a different kind of equal treatment that recognizes the harm of subordination and dominance in applications of formal neutrality.<sup>20</sup>

Anti-subordination equality is offended when treatment or denial of access is correctly interpreted as a form of denigration. For example, one may deny nursing opportunities to mothers because of a belief they should be home with their children (we disagree with their choice to work outside the home), or because of a belief that mothers make bad workers (we think men are better employees than women). Both judgments are experienced as subjugations, constraints on free will by virtue of a judgment about the lesser quality of a person. As compared to an anti-discrimination equality principle – formal equality – this anti-dominance equality relies on identifying forms of subjugation that are usually less than mortal wounds (see the fox) and more like coercion or duress (like compelled speech). For his analysis of copyright law, Drassinower engages this kind of anti-dominance equality that rejects the presumption of hierarchies (e.g., authors over users) as well as situations that would perpetrate or perpetuate hierarchies (e.g., broad derivative work rights or narrow fair use). Properly construed, copyright doctrine based on the equal dignity of authors cannot be understood to subjugate one person to another if they are speaking their own words and are to have the right of response (what Drassinower describes in terms of fair use or fair dealing as use of another’s words that is “reasonably necessary for the allowable purpose.”<sup>21</sup>

But Drassinower also relies on what appears to be yet a related third approach to equality philosophy, and that is the assurance of independent entitlements or freedoms to “develop capabilities.”<sup>22</sup> This kind of substantive equality rests on the notion that each person is entitled to certain basic needs to facilitate her agency as worker, parent, or intelligent agent in the world. It requires not a formal equality – everyone gets the same – but a contextual equality. We assess a claim of wrongful deprivation of this equality not in relation to the possessions or opportunities of another person (a nursing room or admission to a school) but according to a substantive standard of living as a person. This is an account of rights that people have *as people* (not parrots) and denying these rights is a denial of human dignity – or as Drassinower might say of “autonomy” – that each person may claim on the same basis as any other, that is, equally.<sup>23</sup>

Drassinower’s “equal dignity” approach to copyright, which as I suggest includes both an anti-dominance and a capabilities understanding of equality, deserves a fuller exposition in his analysis. Although to be fair, it appears to be an assumed baseline for the book and not the subject of the book itself. He explains, for example, that equal dignity at the core of copyright requires the absence of



subordination of one copyright author to another. But, as one recognizes quickly, being enjoined from speaking another's words even if you are engaging them as an author *is* a form of control, just not an unlawful form (according to Drassinower). Why? Because he says this control is actually (or should be) manifested as self-restraint and mutual deference to authorship as such. As he says in the very beginning "your authorship is not a prerogative to control mine, as if you could treat my agency as a mere appendage subordinate to yours."<sup>24</sup> Whether restraint appears as noncopying or as a form of tolerance of another's speech (or both) is unclear. Why mutual restraint respecting one another's authorship is not an unlawful form of dominance or control that would otherwise be a denial of equal dignity seems circular unless it rests on an even more basic principle than equal respect of another's choice when, whether and how to speak. Drassinower writes, for example, that "[c]opyright infringement is ventriloquism practiced on an unwilling subject, ... a wrong to [an]other, whose mouth is being moved ... behind her back,"<sup>25</sup> which sounds as form of dominance and submission, whereas engagement through personal use or fair dealing is not harmful in the juridical copyright order he derives because it "fulfills the destiny of a work."<sup>26</sup> These are evocative images that elaborate the conversation, and yet they require more explication if the order Drassinower claims to establish is to make the best sense.

A key to Drassinower's argument is the public domain, a point that could use even more emphasis at the beginning of his book as it eventually, toward the end, refocuses the conversation from persons (individuals) to people (society). This is a tricky analytical move in any legal or political philosophy because of the discomfort with aggregating individual preferences to reach a consensus on what is good for peace and prosperity over all. But Drassinower makes it well by the end of the book when he says forcefully: "equality ... anchors the public domain."<sup>27</sup> And so finally the important question arises as to how to conceive of equality as an individual right (of authors or otherwise) as well as a social good that structures the public or body politic. Conceiving of the public domain as essential to a capabilities approach to social welfare (which includes copyright protection) may help. Whether or not Drassinower is thinking in these terms, he devotes much of Chapter 5 to the "necessary, integral and irreducible status of the public domain" as the fountain from which copyright welfare for all authors springs.<sup>28</sup> And Drassinower's account of copyright "defines and confines the scope of an author's copyright in light of her place in the ongoing *conversation* of which she is but a participant,"<sup>29</sup> the conversation (or "dialogue") being public not private. (The title of the chapter is "Public Domain as Dialogue.") "Dialogue" undersells the point, although it ably amplifies the bilaterality and equality norms structuring the rights at issue. What Drassinower seems to mean he says later at the end of this chapter and then again at the end of the book:

Copyright law arises not as a distributive balance of intangible commodities but as a juridical order addressing aspects of the interaction between speaking beings ... The public domain thus emerges far more forcefully, not as a depository of value for which no payment is extracted,

but as a radically nonnegotiable set of conditions for dialogue flowing from the very nature of copyright subject matter as communication.”<sup>30</sup>

...

In the balance model [of copyright], a work of authorship is a fenced-in or propertized intangible. ... Copyright subject matter is thus imagined as a self-contained entity, a thing, limits to which come from its outside, so to speak, as challenges to its producer’s otherwise despotic dominion. ... In the dialogue model, by contrast, an author’s right to exclude others from his choice to speak or not speak is instead, and necessarily, a mode of inclusion. Speech contemplates audiences and interlocutors. It has with itself, by its very nature as address, the principles of its own self-limitation. To posit the inherent dignity of authorship is simultaneously to posit the public domain. In the world of copyright, an author is no sovereign despot in an inverted world of commodities. She is rather a citizen among others in the great Republic of Letters.<sup>31</sup>

And thus the public domain in copyright is nothing short of the sustainable conditions on which we all rely to communicate and assert ourselves in our society that promises equal dignity to all.

Drassinower suggests that instead of efficiency and value as the public goods copyright seeks to achieve, equality and autonomy (the equal dignity of authors) structure the juridical order of copyright doctrine. If, as he writes, “balance” is a form of “war,”<sup>32</sup> then “equal dignity” is a form of “peace.” As mentioned above, equality does not mean equipose, but a quality of person, a citizen, who may demand to be read or heard in a certain way. This equality of citizenship (which necessarily comes with positive rights) is actually quite revolutionary. (We usually demand freedom *from* interference by the state or others not the freedom *to* engage or use or possess with the help or forbearance from government or others). It is revolutionary in the context of welfare rights (food, housing, healthcare, education) and so it is with copyright. Drassinower dips into this revolution by, among other things, declaring the derivative work right inconsistent with copyright’s own basic structure. He explains that “derivative authorship” imposes a hierarchy of authors, which, if authors are equal citizens, is intolerable. He also does so by immunizing the “personal use” (copying for the purpose of enjoying the work).<sup>33</sup> These are highly contested issues in copyright law today, especially in our digital age when both derivative works and personal uses are inevitable and everywhere, and Drassinower boldly deals with both.

Although he does not say it explicitly, Drassinower implies that we express ourselves, whether through speaking, writing or some other communicable medium, in order to be in the world and to insist on our recognition. Copyright law must be understood to equally facilitate this most basic human feature. This too is revolutionary as a matter of intellectual property law. Only relatively recently do intellectual property scholars resemble human rights advocates; the overlap remains a nascent and promising field for further study and concern.<sup>34</sup>

Whether or not Drassinower would accept this description of his work, *WHAT'S WRONG WITH COPYING?* is a book about human rights inasmuch as it is about equal dignity and self-expression.

## ENDNOTES

<sup>1</sup> Statute of Anne (1710) is considered the first Copyright Act on which the U.S. and Canadian copyright statutes are based. *WHAT'S WRONG WITH COPYING?* at 146.

<sup>2</sup> Peter Baldin, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (Princeton University Press, 2015).

<sup>3</sup> *WWWC*, p. 2.

<sup>4</sup> *Id.*, p. ix.

<sup>5</sup> *Id.* 18.

<sup>6</sup> *Feist Publications Inc. v. Rural Telephone Services Co. Inc. and CCH Canadian Ltd. V. Law Society of Upper Canada, Walter v. Lane, University of London Press v. University Tutorial Press.*

<sup>7</sup> *WWWC*, p. 51.

<sup>8</sup> *Id.*, p. 53.

<sup>9</sup> *Id.*, p. 75.

<sup>10</sup> *Id.*, p. 7.

<sup>11</sup> *Id.*, p. 12 (emphasis added)

<sup>12</sup> *Id.*, p. 57-63.

<sup>13</sup> *Id.*, p. 87.

<sup>14</sup> *Id.*, p. 105.

<sup>15</sup> *Id.*, p. 99-100.

<sup>16</sup> *WWWC*, p. 123-24 (animal rights notwithstanding).

<sup>17</sup> *Id.*, p. 124.

<sup>18</sup> Aristotle's foundational principle of equality—that things . . . alike should be treated alike—grounds constitutional equal protection doctrine. Aristotle, *THE NICOMACHEAN ETHICS* bk. V, at 1129a-1131b (David Ross trans., Lesley Brown ed., 2009) (c. 384 B.C.E.). See Jessica Silbey, *Reading Intellectual Property Reform through the Lens of Constitutional Equality*, 50 *Tulsa Law Review* 549, 553 (2015) (hereinafter *IP and Equality*).

<sup>19</sup> Peter Westen, *The Empty Idea of Equality*, 95 *Harvard L. R.* 537 (1982).

<sup>20</sup> *IP and Equality*, p. 559; see also Reva Siegel, *Equality Talk: Anti-subordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1472-73 (2004).

<sup>21</sup> *WWWC*, p. 210.

<sup>22</sup> The capabilities approach is largely associated with Amartya Sen and Martha Nussbaum. See, e.g., Amartya Sen, *THE IDEA OF JUSTICE* (2009); *DEVELOPMENT AS FREEDOM* (1999) and *Equality of What?* in McMurrin (ed.) *Tanner Lecture on Human Values*, Cambridge: Cambridge University Press (1980). Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and*

Social Justice, *Feminist Economics*, 9 (2/3): 33-59; Human Functioning and Social Justice: In Defense of Aristotelian Essentialism, *Political Theory* 20(2): 202-246 (1992).

<sup>23</sup> In this way, Drassinower embraces a Kantian philosophy, although he mentions Kant only in passing and only in reference to his 1785 essay “On the Wrongfulness of Unauthorized Publication of Books.” WWWC, p. 112.

<sup>24</sup> *Id.*, p. 6. This appears to be a close approximation to Kant’s categorical imperative.

<sup>25</sup> *Id.*, p. 113.

<sup>26</sup> *Id.* cite. The idea that a work has a “destiny” is related (and wonderful!) and worthy of more consideration, but it is beyond the scope of this review essay.

<sup>27</sup> WWWC, p. 221.

<sup>28</sup> *Id.*, p. 147.

<sup>29</sup> *Id.*, p. 187 (emphasis added).

<sup>30</sup> *Id.*, p. 182.

<sup>31</sup> *Id.*, p. 226.

<sup>32</sup> *Id.*, p. 54.

<sup>33</sup> *Id.*, p. 183.

<sup>34</sup> See, e.g., Laurence Helfer, Human Rights and Intellectual Property: Conflict or Coexistence? 5 *Minn. J. of L. Science & Tech.* 47 (2003).

© 2016 Jessica Silbey