Two questions for Professor Drassinower: (i) What is the meaning of communication in the context of theatre and (ii) when is music speech?

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Abraham Drassinower's 2015 book 'What's Wrong with Copying?' is a bold and imaginative re-thinking of the theory of copyright law. Over the course of the book, Drassinower makes a number of significant, well-reasoned points: first, he outlines the centrality of copying and adaptation to all forms of culture, emphasising that copying is not a moral wrong; second, he argues instead that what is wrongful is the current expansion of copyright law—ostensibly to prevent copying—because it is based upon a misunderstanding of copyright, i.e. a failure to distinguish properly between lawful and unlawful copying; third, he states that the commonly cited instrumentalist, economic theory of copyright—which requires balancing between private and public interests—is not a theory of copyright *per se*, but is rather a theory of efficient production and distribution; and finally—and most crucially—he turns away from this prevalent theory and instead emphasises the idea that the subject matter of copyright law is a communicative act.[1] When reading the book it struck me that the most obvious comparative theory of communication is by Jürgen Habermas, but given Drassinower's emphasis on case law exegesis rather than on theory, this is not explored in the book.[2]

It is from this position that Drassinower begins to develop his own theory. Drassinower's first major proposition is that copyright infringement is wrongful because it is the disposition of another person's speech without that person's permission. It is, as he puts it, 'compelled speech'.[3] The second key element he puts forward is the idea that because copyright centres on communicative speech-acts, copyright law *requires* respect for the speech-acts of others—citing appropriation art and fan fiction as examples of acts that are expressive, and thus, for him, non-infringing. Non-expressive uses without permission would, however, infringe—though copying for personal use cannot be infringement as it is not 'publication' (there is no wider communication). Interestingly, Drassinower roots this theory—which has an admitted basis in Kant—not in a long theoretical diatribe, but via an examination of landmark copyright cases. For the purpose of this essay I wish to emphasise that the book is an excellent read. There is a tremendous amount to admire and I doubt anyone could read it without his or her worldview being enriched. I am impressed both with the clarity with which it is written and much of the overall methodology. There is very little that strikes the reader as incorrect in and of itself.

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[1] A. Drassinower, *What's Wrong with Copying?* (Cambridge, MA: Harvard University Press, 2015), 6-8.
[2] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (translated by William Rehg) (Cambridge, MA: MIT Press. 1996).
[3] A. Drassinower, *op. cit*., 6-8.

However, while reading through the text I was struck by a (perhaps) considerable gap in Drassinower's theory: his idea of communication is clearly founded upon expressions of text, i.e. literary speech. It is unclear, for instance, how forms of *performative* cultural expression protected by copyright—such as dramatic and musical works—fit into his concepts of 'communication', 'dialogue' and 'compelled speech'. My initial conclusion on finishing the book in May 2015 was that Drassinower's theory does not take account of these other forms of expression, and thus, his theory—as it currently stands—should really be described as a well-reasoned theory of literary or textual communication, rather than of copyright *in toto*.

In order to probe this further, the first question I wish to ask Prof. Drassinower in this essay is as follows: what is the meaning of communication in the context of theatre? At present the book offers few clues; there is very little discussion of the meaning of *communication as performance*.

For instance, for Drassinower the metaphor of dialogue guides his theory of communication, with an emphasis on the author's right to speak. At one point he states: "What matters for copyright purposes is not that an author says something new but that she speaks in her own words".[4] This idea—that the author should speak dialogically, in her own words—is inherently problematic in the context of theatre, where textual ambiguity is a virtue, not a vice. Indeed, audience members may take away innumerable divergent interpretations of the text from the performance.

As my own field research in the area of theatre demonstrates, a dramatic work is much more than the words (text) of the script: a play is a type of work that requires—demands—performance, either by the author-playwright, or more likely, by a number of different actors, overseen by a director.[5] This raises the question: who is the author when a play is performed? Even if the words were written by a single playwright, what happens if the context of the play—the setting, the manner of performance, the costumes—is changed so radically that the text's meaning is altered? One might consider the 2003 UK National Theatre production of 'Henry V', set and performed at the time of the Iraq invasion, in which the 'Once more unto the breach' speech was intended to *communicate* an aura of imperial folly, rather than of heroic valour (the far more common interpretation in theatrical history).[6] In such a case, do the actors and/or director become the authors? What, then, of the playwright?

Another example is demonstrated by the legal difficulties that arose when first a French theatre company, and later an Italian company, tried to put on performances of 'Waiting for Godot' with female actors, against the express wishes of the Samuel Beckett estate. In the first case, the French courts stepped in to prevent the performance going ahead, basing their ruling on the author's moral

[4] Ibid., 11, 73.
[5] Luke McDonagh, 'Plays, Performances and Power Struggles - Examining Copyright's 'Integrity' in the Field of Theatre,' *Modern Law Review* 77(4) (2014), 533-562.
[6] M. Billingdon, 'Henry V' *The Guardian* (May 14 2003) - https://www.theguardian.com/stage/2003/may/14/theatre.artsfeatures2

right of integrity; yet the later Italian court, emphasising the freedom of speech rights of the performers under Article 10 of the ECHR, allowed the performance to go ahead.[7] For Drassinower, infringement is the unauthorised appropriation of another's speech, i.e. compelled speech. So, which of the two examples above, if any, should be described as compelled speech? In the first, when the performers attempted to speak—perform—Beckett's words in an alternative gender context, Beckett's estate used copyright to prevent the performers from infringing upon his moral right in the work. In other words, the law compelled the performers *not* to speak, and effectively silenced their expression. In the second, the law was ultimately used by the theatre company to force Beckett's estate to allow their performance to go ahead—and even if this was clearly not a copyright infringement, surely it was an example of compelled speech? Beckett would certainly have thought so.

Although there is a small amount of discussion of theatre in Drassinower's book, it is insufficient to establish how exactly the theory of compelled speech is meant to work in this context.[8] Perhaps Drassinower would argue that these are expressive uses of another's speech, and like fan fiction, they ought to be legal. Even if this is the case, I am not convinced it would solve all the problems of compelled speech in the performative arena. Performance is complex, both in theory and in practice, but it is a key aspect of copyright. It is a shame that Drassinower's book gives it short thrift.

The second question I would like to ask Prof. Drassinower is at once more straightforward and more complex than the first one: if the foundation of copyright is communication, when is music, speech? (And when is speech, music?)

Here the problem with the book is even more urgent than with theatrical expression; music is virtually absent from Drassinower's discussion. Indeed, the word 'music' does not even appear in its index. This is a staggering omission. After all, music has been protected under copyright law for centuries, and it is universally recognised as a powerful form of expression. It is rare for a book on copyright to ignore music. In the absence of any discussion of music in the book, I would like to suggest to Prof. Drassinower that the answer to this question may be straightforward in one sense: music may simply not work with his theory of 'speech' at all, in which case the book ought to be re-titled as a theory of 'literary copyright' or perhaps of 'communication'. On the other hand, the answer may be highly complex, for if music is speech, several difficult questions arise: what is communicated by music, and what is compelled speech in the case of musical notes or rhythms? This is not merely a theoretical point—it is also a practical one. In some of my own articles I have attempted to wrestle with the impact that copyright infringement decisions involving small extracts of text may have when applied

[7] *Godot* TGI Paris 3e ch, 15 October 1992 (1993) 155 RIDA 225; *Fondazione Pontedera Teatro v SIAE (Società Italiana Autori ed Editori and Ditta Paola D'Arborio Sirovich di Paola Perilli)* Tribunale di Roma, 2 December 2005.
[8] A. Drassinower, *op. cit.*, 68-69.

in the context of music.[9] One example is presented by the famous decision of the Court of Justice of the European Union in *Infopaq*, where it was held that the use of 11 words could potentially amount to infringement of copyright.[10] Even now, seven years after the ruling, it is still unclear how this kind of approach might work in the context of music; for instance, could the use of a mere two or three notes lead to a copyright infringement claim? What about the use of a chord progression or a matching rhythm? Unfortunately, Drassinower's book does not help the scholar to understand how compelled speech might occur in the musical sphere.

In conclusion, I wish to congratulate Prof. Drassinower for his lucidly written and thought-provoking book, which could, in due course, come to be seen as something of a classic within its field. The main critical point I have made over the course of this essay is simply that there is much more to be said about copyright than is contained within the book—issues of performance, drama and music still remain to be analysed—and that it is best thought of as a description of communicative copyright in the field of literature.

[9] Luke McDonagh, 'Is Creative use of Musical Works without a licence acceptable under Copyright?' *International Review of Intellectual Property and Competition Law (IIC)* 4 (2012), 401-426 & Luke McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry – the Potential Significance of Fisher v Brooker,' *Intellectual Property Quarterly* 1 (2012), 64-76.
[10] Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] E.C.R. I-6569.