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Dr. Elena Cooper Presents her Latest Article at Cardozo Law School: Copyright: A Nineteenth Century Publicity Right?

Posted on November 18, 2012

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[Dr. Elena Cooper](#) has been the Orton Fellow in Intellectual Property Law at Trinity Hall, Cambridge since 2009. She is also a researcher at the Faculty of Law on the "Of Authorship and Originality" project, funded by [Humanities in the European Research Area \(HERA\)](#). Dr. Cooper received a law degree from the London School of Economics and a master's degree in Intellectual Property Law from King's College London. She also has a PhD from the University of Cambridge, where her studies focused on the relationship between art and law in the history of photographic copyright. Her PhD thesis was awarded a Yorke Prize.

On September 24, 2012, Dr. Cooper was invited to present at [Cardozo's Intellectual Property and Information Law Speaker Series](#). The presentation was based on her latest article, *Copyright: A Nineteenth Century Publicity Right?*, which explores the history of photographic copyright. The article provides an alternative history of publicity rights law in England. Dr. Cooper explains that although England does not have a general law of privacy or publicity, publicity rights were protected through photographic copyright law in the 1860s.

According to Dr. Cooper, the growing popularity and prevalence of photography in the nineteenth century, and the subsequent recognition of legal rights in photographs of celebrities had a notable impact on the development of copyright law in England. The Copyright Act of 1862 was the first copyright statute to expressly provide protection to photographs. The law was intended to protect rights holders, when photography emerged as a prominent tool in advertisements and media, particularly with respect to the portrayal of public figures. In practice, the statute was interpreted as protecting the commercial value of the photographed subject, typically a celebrity, by assigning a copyright in the image to the subject of a photograph rather than to the photographer. The underlying notion was that the subject of a photograph, as opposed to the photographer, was the author of his or her own image. This practice enabled the concept of copyright law to take on very different meanings: from protecting intellectual creation to protecting the commercial value of the public image. The discrepancy between the letter of the Copyright Act and its practical interpretation reflects what John Baker termed the [law's "two bodies."](#) Baker's concept points to the difference and simultaneous existence of two bodies of law: one in the books—the statute as protecting copyright—and one in practice—the interpretation of the statute that allowed its use to protect publicity rights.

Copyright law in late nineteenth century England also provided an injunction remedy for copyright infringement in the unauthorized use of a public figure's photograph. Rights holders could recover pecuniary damages as well, after proving infringement at summary proceedings. According to Dr. Cooper, this further demonstrates the intertwining of copyright law and publicity rights in the 1860s.

[Cardozo Law School Professor Felix Wu](#) commented on this intertwining by bringing up the case of *Cynthia Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, (2009). The petitioner in this case posted a journal entry on her Myspace page ranting about her hometown. The school principal in the town saw the entry and had it published in the town's local newspaper. As a result, Moreno's family was threatened and forced to close their family business and move out of town. Moreno brought a privacy action—claiming intentional infliction of emotional distress—that the courts dismissed. Professor Wu pointed out that Dr. Cooper's presentation shows us that in the nineteenth century England, Moreno could possibly have prevailed by bringing a copyright claim instead.

Dr. Cooper noted that things began to change in the 1880s as several material changes happened: changes in technology (the development of the snapshot camera and how it did away with the previously necessary concept of the photographed subject's consent); changes in the way celebrities were advertised (the fact that cartes/photos were no longer the only available means for mass advertisement); changes in the difference between public and private (the emergence of the new genre of celebrity photographs called "at home" enabled by the ability to go to the subject's home rather than the artist's studio). These changes complicated the relationship between copyright interests and interests in the "face," which are interests in the commercial use of one's public persona. Despite these changes, there remained some areas where the old relationship could still be observed: the area of theatre and photographing theatrical characters. Theatrical characters retained this physical exclusivity in their "face" in character, and they were very well paid for these contracts to sit for their portraits.

It would be a mistake to think of Dr. Cooper's work as only interesting to those keen on English law. Her attention to this particular moment in time in England does not just involve the history of copyright law in England; it is not just important for England's own understanding of its legal history. It is also an important comparative perspective for understanding the long-standing tension between copyright law (as protecting intellectual creation) and publicity rights (as protecting commercial value of one's identity). One of Dr. Cooper's most poignant claims is that contrary to the usual understanding of publicity rights emerging as a reaction to commercial interests, in this history, publicity rights and commercial interests were intertwined.

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