

Copyright's Constitution: User Rights and the 'Deprivation of Property' Misdiagnosis (Or: Lessons from South Africa's Constitutional Debacle over the Copyright Amendment Bill)

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Whether copyright is “property” might seem to be a theoretical rather than practical concern; but, of course, the significance of legal categories lies in the baseline presumptions they establish. What requires justification? What values are taken as given? After all, legal categories should not “divert our energies (and skew our perceptions) by requiring us to rebut presumptions that were never appropriate in the first place.” (Nedelsky, 1993) Unfortunately, this is precisely what is happening in the South African constitutional debacle over the Copyright Amendment Bill. South Africa's President recently refused to sign the Bill into law, referring it instead to the Constitutional Court, citing concerns that its educational and fair use exceptions may arbitrarily deprive copyright holders of constitutional property. In this paper, we argue that, exacerbated by the “property” label, three fundamental misunderstandings about the object, subject, and scope of copyright are producing the appearance of an “arbitrary deprivation of property” problem that does not in fact exist: first, the mistaken idea of the work as a stable object analogous to a corporeal “thing”; second, the misconception of the work as a unitary whole, excluding public domain elements that infuse it; and third, the misunderstanding of copyright as encompassing only the rights of owners to the exclusion of users' rights. The South African situation therefore offers a larger transnational lesson: the constitutional life of copyright law – its dynamic interplay with rights of human dignity, equality, free expression, education, and property – demands a more nuanced understanding of copyright's own constitution.