David Saunders*

J. M. Gaines, *Contested Culture. The Image, the Voice, and the Law* (1991) Chapel Hill, N. C. and London, The University of North Carolina Press, 340 pp.

The empirical object of *Contested Culture* is the emergence of entertainment law in U. S. jurisdictions. The book deals with such important issues as individual privacy rights, corporate publicity right, the ownership and control of images both visual and audio, and the legal phenomenon of character merchandising. The theoretical object is rather different and much more problematic: nothing less than the construction of a relation between law and culture, a task defined in practice within the narrower terms of a relation between critical legal studies and cultural studies as a sort of popular front against "late capitalism", represented by the culture industries, the studio system and the law of intellectual property. Here the key category is "text" and the key conviction is that legal and cultural institutions – despite their different histories, purposes and procedures – find their point of unity in being "textual". "Textuality", as it happens, is what the neo-discipline of cultural studies claims as its special object of knowledge.

Jane Gaines, a professor of English at Duke University, identifies herself as a "scholar who works within a Cultural Studies methodology".[1] This is not a prelude to modesty: we learn that "whereas legal scholars are now refining their analysis of the structural function of ideology, scholars in Cultural Studies are looking more and more at the points of opposition to it".[2] The Conclusion repeats the claim that the cultural studies intellectual is the one able to give an "oppositional inflection" to whatever "culture" capital produces.[3] With all the enthusiasm of a neo-disciplinarian, Gaines sweeps law aside:

> If the [legal] entitlement to an image reproduced in a commercial advertisement is in dispute, then the first place that the image should be reproduced without question is in the context of a critical commentary on that very controversy.[4]

She takes her own work to be such a commentary. Yet despite her generalised anti-monopolistic disposition – "My funda-

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mental premise [is] that copyright is a monopoly grant"[5] – Gaines never queries cultural studies' claim to a monopoly on critique. The book ends with a backhand compliment to law from this self-accorded moral high ground:

> One way in which legal studies can supplement cultural studies, then, is in its identification of points of contention that we [cultural studies scholars] might want to interpret in terms of other ideological conflicts.[6]

Law ends here, but cultural studies pushes on beyond.

*Contested Culture*, however, does not lack good points. These include the further exposure of the work of the French jurist, Bernard Edelman, to English language readers. Edelman's witty analysis of the emergence of protection for photographers under the French regime of the *droit d'auteur* or author's right remains second to none. We are in Gaines' debt for her clear exposition of Edelman's account of the distinction between "reproduction" and "appropriation", the latter requiring a personality to be "inscribed" in a work for the producer of that work to be recognised as an "author" with the subjective right attaching (under French law) to this status.[7] But there are two problems, one cultural and the other historical. First, the lack of direct contact with the body of Edelman's writings in French Gaines' clever postmodernist speculations on the "meaning" of the term "saisi" in the French writer's 1971 *Le droit saisi par la photographie* lose some of their gloss when she gets the gender of the definite article wrong ("le [sic] photographie")[8]. Second, and more important, is the historical problem. Gaines gives us an image of Edelman frozen in a snapshot from yesterday's marxist family album. In 1991 she writes of "the project Edelman has begun",[9] despite the fact that the French jurist has long since shifted his ground, being no longer attached to the political positions he happened to embrace in the late sixties and early seventies when, with other French intellectuals, he was attracted to Althusserian leftism. This could have been avoided by a look at Edelman's continuing contributions to the *Recueil Dalloz Sirey* under the rubric of "la propriété littéraire et artistique", his comprehensive 1987 *Commentaire* (for Dalloz) on the 1985 French legislation and his 1989 volume in the "Que sais-je?" series, *La propriété littéraire et artistique*, for the Presses Universitaires de France. In more specific matters too, a more up to date account of Edelman's work would have helped.[10] Gaines asserts that the history of copyright shows the "ascendance of the author over the *work*, which, in the end, is the category that loses out".[11] This would come as a surprise to Edelman. According to him, in the copyright system "the work is radically detached from the person of the author, and acquires an absolute juridical autonomy. ... [T]he work can



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lead a free economic existence".[12] As a result of this freedom, "[i]n the copyright system, one cannot talk in the strong sense of author's rights but only of rights in the work. In other words, the author, as person, disappears in favour of his creation".

Gaines draws some clarifying distinctions, particularly when she does not fall into simple dualisms. She clarifies the different legal treatments of the name, voice or image of celebrities, and the crucial slippage between copyright and trademarks as corporations' preferred mode of protection for cultural commodities (see the discussion of the survivability of Elvis Presley as a registered trade mark).[13] Indeed, the book's achievement is to have gathered a diversity of information on matters ranging from the familiar – the merchandising of fictional characters – to the much less well known relations of camera technology, the practices of photographic portraiture and the emergence of the U. S. (Hollywood) star system. We can appreciate Gaines' observations on the relation between the new short exposure times and the idea of photographic spontaneity and immediacy – in the days when photographers were still "photographists".[14] There is a notable discussion of the commercial use of the celebrity image and the norms concerning look-alikes and sound-alikes. It is interesting and useful to learn that no right of privacy has emerged in relation to a person's voice equivalent to that which now exists in relation to the face or image.[15] There is also a provocative comparison of the history of U. S. copyright in photography and that in recorded sound (and, in relation to the latter, the emergence of melody as the criterion of resemblance).[16] This rich miscellany includes a reminder that, as rumour had it, Buster Keaton's contract forbade him to laugh in public, lest the value of his cinematic image be compromised. As for the case law, who could resist *Onassis* v. *Dior*, where Jacqueline Kennedy Onassis' suit for invasion of privacy against the plaintiff's use of a Jackie "look-alike" in a publicity campaign required Judge Greenfield to decide the issue of whether one person (Onassis) can enjoin someone else (the look-alike) using their own face?[17] And in *Lugosi* v. *Universal Pictures Inc.*, the court had to decide whether an actor's image – Lugosi as Dracula – survived as an inheritable property after the actor's death.[18]

Yet there are major problems. Let me focus on three of them which, for the moment, I simply name Critique, Theory and Dialectic. I have noted Gaines' claim to "oppositional", i. e., critical, status. Here the pretensions of critical legal studies and cultural studies overlap; for both these movements, what matters about law are not its particular forms and procedures but the manner in which, for them, law condenses the oppressive social forces and



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authoritarian structures of capitalist-bourgeois society. In elaborating a critique of this society one can then claim to be making a critique of law, as if there was a sure homology between law and "society". A representative instance of this sort of condensation is the assertion that "the legal ambiguities" around which case law accumulates are "in turn often signs of an ambivalence in the wider culture".[19] An instance of a different sort is the relation Gaines sets up between the notion that we are "imprisoned by legal discourse"[20] and the comment that "my discussion ... could be construed as a critique of the restriction of meaning".[21] It's as if the real issue was one of "meaning", legal arrangements being mere epiphenomena of this more fundamental structure. Even when it seems a limited point is being made, for example when sound is described as a "phenomenon that has been more successful than the photographic image at eluding cultural coding",[22] this critique is making the olympian claim to know the deeper freedom.

Second, the problem of "theory" in its cultural studies usage. Here theory claims to uncover structures hidden and invisible to the rest of us, typically the law's "contradictions" and real determinations that lawyers and the legal system hide. The book is organised around "theoretical developments".[23] At every step, Gaines' reflex is philosophical: "The legal problem posed by the look-alike returns us to the epistemological issues raised by the iconic sign".[24] As for the right of privacy, its emergence "coincided with an evolving notion of what it means to be a person in mass society. The ideal of privacy, as Raymond Williams has discussed it, is 'a record of legitimation of a bourgeois view of life: the ultimate generalized privilege".[25] We are told that for "a comprehensive theory of the way in which 'internal contradictions' within the law relate to contradictions elsewhere, we need to rethink the model of textual contradiction that we already have from aesthetic theory".[26] And we are instructed on "the [sic] relationship operative in both the law and the wider culture, between the sign and its referent".[27]

The key instruments of this critique include a theory of ideology – juridical discourse is treated "as ideology" – and a theory of the subject. The role of the latter is crucial. Knowing about "the subject" lets Gaines postulate a general relation between law and culture. It might not yet have been found but, in true normative style, it is assumed the relation must be there:

> Now the most difficult question of all: To what degree does this category of legal subjectivity impinge upon other categories of subject construction outside the law?.[28]

Anything is better than admitting that interchanges between law and culture are historically rare and cluster around the man-



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agement of definite social and commercial problems regulating pornography, maintaining an orderly market in books. This faith in uncovering the common theoretical foundation to all the different spheres of modern life, including those of law and culture, is a moral (for Gaines, "political") commitment, but it has its epistemological charge. For all the talk of "the reality of material conditions"[29] and "history", the model of knowledge is profoundly Kantian – the momentous theoretical breakthrough that grounds the object of enquiry in a revelation of its fundamental conditions. No matter that the "breakthrough" occurred in linguistics but is here applied to law, because at last we get to "the shared root structure",[30] rather than being misled by mere surface phenomena such as the historical facts of copyright. The revelation owed to "contemporary theories of meaning in linguistics and literature"[31] throws light on law by moving past it (and ideology) into the dawn of knowledge (and true politics). The whole project rests on a philosophical confidence in the "possibility of moving from a consideration of the subject as inscribed in literature to the subject as inscribed in legal discourse".[32] This article of faith is not innocent; it embodies all the arrogance of a style of intellectual conduct – that of the literary and now cultural critic – which, with no examination of its own historical peculiarity, routinely adjudicates on all other spheres of existence.

Theory thus subordinates law to culture – but only if we stay with that tenacious habit of mind which adds up law and culture as parts of the ideal (if only potential) whole known as "culture". It is this "whole" that literary and now cultural studies think they know in a way that eludes the narrow technicality of law and legal training. Viewing things in this light, the cultural critic treats as an incomplete project or even as a moral ("political") shortcoming the complex historical achievement of intellectual property law in furnishing the legal attributes and statuses that allow individuals to engage in specific commercial relationships. Gaines thus assumes the licence to depict intellectual property law as the mere instrument of the "reckless extraction of labor power".[33]

Cultural studies scholars, labour, women and gays – together with Roy Rogers (and Trigger) when he asserted his cultural freedom from the studio system – are among Gaines' good subjects of history, prophetically pointing the right road ahead. This is a work explicitly guided by "Marxist theory" and "cultural theory", the common ground being aesthetics.[34] The authorities cited – but seldom questioned – have the familiar names of Adorno and Jameson, Althusser and Macherey, Bakhtin and Barthes. And, as often in such work, analysis and description are impoverished by the fact that everything is so quickly reduced to the quintessential con-

frontation of capital and labour. Without staging a defence of advertising, we can question the crude reductivism that defines "publicity" as the "summary of the capitalist mode of engagement with the world".[35] Here I come to the third problem with *Contested Culture*: the dialectical reasoning that – itself left unquestioned – organises the whole argument.

The problem is the dialectical press-ganging that ultimately liquidates the distinctive juridical features of U. S. entertainment law and the historical particularity of culture. Both lose their highly specified characters when clamped into the timeless counterpoint of the dialectic. Each local difference becomes a structural "contradiction". The contingent scatter of historical circumstances is sprung shut, fixed into the familiar relation of exemplary antinomy by the dialectician's thirst for reordering all relations into symmetries and contradictions – recurrent terms in Gaines – and reconciliatory syntheses. We read that "[c]apital and literary form appear as competing interests in Superman as in no other popular figure".[36] It is impossible to list all the formulations that convey this dialectical habit of mind, but the following illustrate the constant reduction of positive legal arrangements to dialectical relations, Gaines' "interpretation of the dichotomous structure of copyright law"[37] being in fact a philosophical orchestration of contingent differences. Thus "in U. S. intellectual property law, the intervention of the subject in the photographic work also marked the point of exclusion of the subject".[38] The dialectician cannot resist conducting the whole band according to the one rhythm. Any two different phenomena risk becoming the "poles" of an ideal antithesis – routinely equated with the alleged fragmentation of life under late capitalism – which culture (or, now, cultural theory) will duly resolve into the new synthesis.

Copyright is subjected to this "deepening" treatment. Gaines "dialecticises" the two rationales or justifications of copyright protection – one based on a notion of originality as the expression of authorial personality and the other, in fact the older of the two, based on a notion of originality as origination through labour and investment (others have termed this the "sweat copyright"). Ever the cultural theorist, Gaines has these two rationales "grow out of the same philosophical root".[39] The metaphor gives the game away: philosophy becomes a plant whose root provides the apparently organic common source for the two rationales of copyright. Compressed into the dialectical schema, these rationales assume the exemplary polarity of the human (personality and subject) and the technical (investment and capital). This is not all the cultural critic sees: "While the two 'originalities' are still connected at the root, the apparent similarity that this produces in the two discourses has an ideo-



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logical function: to mask the threat that each conception of originality poses to the opposite discourse".[40] There is no space here for the pragmatic possibility that the two types of copyright protection emerged as need arose, in response to historical exigency.[41] This closure is sealed when the rationales are depicted as "the positive [personality] and the negative [investment] sides of 'originality'".[42] When we get to this degree of reduction, where the dialectic of positive and negative signifies little more than yes and no, it is not difficult to see how disabling for the purpose of historical description this dialectical ordering is. But what if its purpose is not description? Perhaps the historical social purpose of the dialectic is to show the critical finesse, balance and elusivity of the dialectician. Whatever is placed before her, she will divide it into opposing drives (and, with a brilliant synthesis, sometimes proceed to reconcile the division she herself has made). Nothing is immune: "in the Clark Kent-Superman dichotomy, we find something like an allegory for the tensions between copyright and trademark".[43] Is it a bird? Is it a plane? Yes and no, it's the dialectician!

Similar comments could be made concerning the Hollywood "star actor ... split into its basic duality".[44] Even when the mix of determinations is recognised, as in the case of the photographic portrait, the intellectual habit prevails: "... the uneven relation between the photographer and the photographed ... is paralleled by the economic relation that obtained between them".[45] Or again when "political, social, economic, legal and cultural forms" are conceived as "connected yet disconnected".[46] In fact, the law does not divide and reconcile, antithesize and synthesize; the law decides, with a high measure of social finality, disputes of a sort susceptible to settlement by the relative formality of legal procedures. The dialectician's urge is to impose a schema that arranges the parties to litigation as if they stood in a relation of perfect opposition, one to the other. This exemplary antinomy does not describe the relations between most litigants. Moreover, when a court decides a case, it is not a synthesis of opposites that is achieved; rather, one party wins and the other loses.

For all its revolutionary pretensions, Gaines' study is finally a faithful and quite conservative relay of literary-marxist humanism into law via cultural studies. *Contested Culture* remains content with the word of Raymond Williams and Stuart Hall, the "fathers" of English Cultural Studies, rather than seeking out that of specialist historians. Williams is cited on the Renaissance notion of the artist as creator but there is no reference to a philologist such as Kantorowicz who has treated the question at some length (not, of course, within the dialectical framework to which Gaines adheres).[47] The cultural studies approach frus-

trates the positive historian of law (or of culture) who wants to see historical evidence used to sharpen our sense of detail and particularity, not to prop up great conceptual schemas that sweep across time and cultural milieus. This is not a novel complaint of historians confronted by cultural studies,[48] but it is one that students of cultural property might note before being carried away with enthusiasm for a book that finally treats copyright, trademarks and the other regimes of intellectual property law not as positive cultural artefacts with their own procedures and purposes but as the condensed outcome of dominant social forces which the author does not like. There is also a lesson here as to what we can reasonably ask of law.

In sum, then, less an advance than yet another demonstration of dialectical skill by a literary critic, dividing, balancing the perfectly opposed parts and proclaiming a new synthesis. "Synthesis" looms large in the foreword by Alan Trachtenberg, editor of the series (Cultural Studies of the United States). He writes that Gaines "holds to a resolutely historical method in the sense that each instance, each case, is treated in its particularity and its appropriate context".[49] In fact, as we can expect in this way of studying culture, any "particularity" is immediately subsumed into a deeper movement: "Each case becomes a cultural text in its own right, a text in which issues of law and culture appear locked in conflict but in which resolutions negotiate new conditions and produce new forms. The book translates the language of case law into the drama of cultural contestation". The law is swallowed up by dialectic. Thus, as if historical particularity had not been mentioned, we are then told that "[n]ot least among the intellectual exercise and pleasures of *Contested Culture* is the work of synthesis performed by the book", now termed "a breakthrough to a new coordinated study of popular cultural themes". For as long as she takes the time simply to describe the unpredictable complexities of U. S. entertainment law without immediately plunging into "negotiation" and "reconciliation", we are in Gaines' debt. But given that the dialectic will always have the last word as it has the first, geohistorical circumstances and even chronology – the first principle of historical research – count for little once in its philosophic grip.

## Notes

1 Gaines, J. M. *Contested Culture. The Image. the Voice, and the Law* (1991), p. 191.
2 Ibid., p. 209.
3 Ibid., p. 228.
4 Ibid., pp. 235–6.
5 Ibid., p. 9.
6 Ibid., p. 239.
7 Ibid., p. 253, note 15.
8 Ibid., p. 45.
9 Ibid., p. 28.
10 Gaines depends exclusively on the 1979 English translation – *Ownership of the Image. El-*

*ements for a Marxist Theory of Law* – itself a delayed version of the 1973 original, *Le droit saisi par la photographie.*

11 Gaines, p. 62.
12 Edelman, B. (1987) "Une loi substantiellement internationale. La loi du 3 juillet sur les droits d'auteur et droits voisins", *Journal du droit international* 114: 567–8.
13 Gaines, p. 203.
14 Ibid., p. 67
15 Ibid., pp. 122–3.
16 Ibid., pp. 130–1.
17 Ibid., p. 88 et seq.
18 Ibid., p. 175 et seq.
19 Ibid., p. 142.
20 Ibid., p. 29.
21 Ibid., p. 230
22 Ibid., p. 117. There is no need to dwell on the teleological nature of such a statement.
23 Ibid., p. 42.
24 Ibid., p. 91.
25 Ibid., p. 179.
26 Ibid., p. 182.
27 Ibid., p. 229.
28 Ibid., p. 83.
29 Ibid., p. 35.
30 Ibid., p. 61.
31 Ibid., p. 22.
32 Ibid., pp. 22–3.
33 Ibid., p. 41.
34 Presumably "class irritation", ibid., p. 184, should read "class situation". The necessary determination of law by class structure is maintained, albeit in a mediated form. Otherwise we could not be told to view the Hollywood "star as microcosm of capitalism", ibid., p. 191.
35 Ibid., p. 41.
36 Ibid., p. 218.
37 Ibid., p. 8.
38 Ibid., p. 56.
39 Ibid., p. 58.
40 Ibid.
41 For a proper historical and jurisprudential account, see Ginsburg, J. C. (1990) "Creation and commercial value: copyright protection of works of information", *Columbia Law Review* 90: 1865–1938. See also the important decision of the U. S. Supreme Court in *Rural* v. *Feist*. Given such evidence, it is hard to credit Gaines' sweeping statement that "the coexistence of the two overlapping concepts of 'originality' is denied in legal discourse", Gaines, p. 64.
42 Gaines, p. 64.
43 Ibid., p. 220.
44 Ibid., p. 37.
45 Ibid., p. 76.
46 Ibid., p. 17.
47 See Kantorowicz, E. H. (1961) "The sovereignty of the artist. A note on legal maxims and Renaissance theories of art", in M. Meiss (ed.) *Essays in Honour of Erwin Panofsky*, New York: New York University Press.
48 See, for instance, Carolyn Steedman (1991) in "Culture, cultural Studies and the historian", L. Grossberg et al. (eds) *Cultural Studies*, New York: Routledge.
49 Gaines, p. x.



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