Author Unfriendly

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Copyright law is intended to establish an ecology in which authorship can flourish. One of the strategies copyright law adopts for doing that is to give authors control over the making of copies of their works. (That’s why we call it “copyright.”) The idea is that authors can sell copies, or the right to make copies, and with the money they earn they can quit their day jobs and sit down and churn out lots of works of authorship.

There’s a rich literature discussing how well copyright law has ever succeeded, as a historical matter, in creating an ecology hospitable to authorship. (Lessig 53-61, 95-107; Patterson 219-29; Ginsburg, 1065-69) Copyright has a variety of features that are arguably pretty author-unfriendly. Since this anthology focuses particularly on originality and plagiarism, I would like to consider some of the author-unfriendly aspects embedded in copyright law’s notion of originality.1

One of the things I tell my first year law students is that the study of law will introduce them to terms of art. Most of those terms of art look, sound and are spelled exactly the same as familiar English words, but will mean different things. “Originality” is one of those terms of art that means something very different in copyright law from its meaning in ordinary English.

In copyright law, originality is a binary concept: something is either original or it is copied from another source. If it is original (which is to say that it isn’t copied from another source), then it is automatically protected by copyright. If it is copied from another source, then, by definition, it isn’t original, and it may well be infringing.2

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2 In Picket v. Prince, 207 F. 3d 402 (7th Cir. 2000), Pickett designed a guitar in the shape of the symbol adopted by the artist formerly known as Prince to designate his new, unpronounceable name. He showed the guitar to Prince, and later discovered that Prince had begun performing with a guitar very similar to the one he designed. Pickett sued Prince for copyright infringement. The court held that Pickett’s guitar design was based on Prince’s copyrighted symbol but created without Prince’s permission; the design was therefore unlawful and unprotected by copyright. In Three Boys Music v. Bolton, 212 F.3d 447 (9th Cir. 2000), cert denied, 531 U.S. 1126 (2001), the Isley Brothers sued Michael Bolton, claiming that his 1991 song, “Love Is a Wonderful Thing,” was copied from the 1966 Isley Brothers’ song of the same name. Bolton testified that he had no conscious recollection of ever having heard the Isley Brothers’ recording, but the court upheld a jury verdict against Bolton on a theory of subconscious copying: The Isley Brothers’ song, released only as a 45 rpm single when Bolton was 13 years old, had played on the radio in the town
Those of you who are learning this for the first time are probably thinking that that’s one of the silliest things you’ve ever run into. I agree with you. Defining “original” as the opposite of “copied” is ridiculous. Everything is copied from another source. I don’t mean merely that everything has antecedents, but that everything is made up of bits and pieces of stuff we find around us and glue together in our minds in interesting ways to create works of authorship. Copyright law, in contrast, pretends that authors create stuff out of the ether. If they want to make use of material that’s already there, law-abiding authors will know that they need to get permission. Copyright law protects works that authors create out of nothing, and it protects works that have antecedents and a license to use them. If you take this view seriously, though, that means that all the other stuff authors write is, well, not to put too fine a point on it, illegal.

You may have noticed that the usage I’m describing conflates two different senses of the word “copy” -- one is a mechanical reproduction, and the other is what we might call an overly similar imitation. It surprises my students that copyright law tends to treat the two different sorts of copies as if they were the same. The reason is largely historical – we’re looking at rules that courts crafted in the 19th and 20th centuries when the difference between a verbatim reproduction and an excessively similar imitation was more a matter of skill than of technology. But the people who write copyright laws have been stubbornly reluctant to revisit this set of rules in a networked digital era.

With a rule like that at its core, why didn’t copyright law stop the progress of civilization centuries ago? Again, the reason is chiefly historical. The standard crept into the law when the only works copyright protected were maps, charts, books, paintings and musical compositions. (Patterson 215-21) In that realm, it actually captured something important about what works were entitled to copyright protection. Then as the years passed, and more and more things become subject to copyright protection, the copyright-affected industries remained a cozy little club of people who understood each others’ business models. People who belonged to the club didn’t get sued very often for the sort of stuff other members recognized as legitimate, although perhaps derivative, authorship. Copyright owners, though, kept persuading Congress to make copyright law broader, longer and deeper. Eventually, we expanded copyright far beyond its classic origins. Copyright law now affects and protects a slew of stuff that doesn’t fit the old models, and it isn’t limited to members of any club.³

Even if that weren’t the case, a standard of authorship that makes copying illegal is pretty destructive for the authors of works that, by their nature, incorporate, combine, riff on, or imitate stuff that’s already out there. Copyright law doesn’t prevent authors from creating such works. Before they can let anyone else see them, though, they need to make sure they have copyright lawyers at their elbow to keep them from getting into serious legal trouble. (Lessig 184-207)

That has bad implications for the sort of authorship we get to see and the sort of authors who get to rely on copyright law to earn a living. Most obviously, if you need

in which Bolton lived, on stations to which he had listened regularly. It was therefore likely that he had heard the song, and subconsciously copied it from memory 24 years later.

³ I have told this story in depth in Jessica Litman, Digital Copyright (2001).
lawyers to track down and get permission from the owners of all of the antecedents of your work, you need to rely on some publisher, record label, motion picture studio or other corporation for legal support. Usually those folks make you assign your copyrights to them in advance. Usually, they have somewhat constrained, or at least backward-looking, views of the sort authorship likely to be profitable.

So, we have this stupid, outdated, even destructive legal standard. Why don’t we just change it? That’s an excellent but impractical idea. The people and organizations that control the making of copyright legislation would be unwilling to make a change like that because they, and we, are caught up in a copyright war in which the sanctity of the copyright owner’s right to control copying has been elevated to the status of theological dogma. This is just not the right time to try to tell people that we need to take the “copy” out of copyright.

This copyright war pits the copyright owners at the top of the copyright food chain against the businesses that traffic in new technology and many of the consumers who are enjoying copyright works in new, innovative and sometimes illegal ways. Copyright law gives copyright owners control over who can make copies of their works as one strategy to support authorship. The development and rapid deployment of networked digital technology poses some basic challenges to this particular strategy.

If you look at how the Internet and other examples of networked digital technology work, you see that they involve the promiscuous creation and transmission of digital copies. That made some copyright owners very nervous. If the essence of copyright protection is control over copies, they felt, they needed to assert control over every single copy created by digital technology. If a single digital copy were ever to escape into the wild, they feared, it could generate millions of wild copies, which would make their rights to control copies essentially worthless. Publishers and record labels and movie studios went to Congress and insisted they needed stronger copyright laws to shore up their control; libraries and high tech businesses and consumer groups and the folks who make VCRs and computers suggested that copyright law was plenty strong already, and it went downhill from there.

If you look at the history of how copyright laws have gotten written in this country, you will find that most of the time, the people and organizations and businesses who think of themselves as affected by copyright law have managed to sit down with each other and work out some kind of reasonable compromise that they were all willing to support. This time, though, representatives of some groups accused representatives of other groups of bargaining in bad faith, or lying to Congress, or seeking to implement a radical secret agenda. One guy threatened another guy with grievous bodily harm. Everybody called everybody else a bunch of bad names, and soon the atmosphere was so badly poisoned that people didn’t trust each other to be reasonable, or even honest. They couldn’t agree with each other on anything.

That was ten years ago. You started seeing folks referring to the situation as a “copyright war” to capture the intensity of vitriol that infected the conversations. They were, I think, being ironic. Pretty soon though, folks on both sides of the conflict were insisting that they were in the midst of a copyright war without any irony at all – this was a battle for the survival of all that was good and true against all that was bad and evil.
Now, in the middle of all this, the United States goes off and picks a real war with the nation of Iraq, and that reminds all us of the myriad reasons wars are rarely a good choice. Without in any way intending to trivialize the war in Iraq, moreover, I can say that the digital copyright war shares more characteristics than one would think with what one might want to call a “real war.”

Like real wars, the copyright war has been very expensive. The litigation and lobbying budgets of major copyright-affected industries have gone through the roof. We’ve built whole series of costly, poorly designed, and ill-thought out legal fortifications. Congress has passed copyright amendments loaded with language designed to defend copyright owners against multiple imagined threats. Those new laws haven’t performed as advertised, but they have snarled folks up in a host of new technicalities.

Like conventional wars, the copyright war has been intensely polarizing. The conflict has been protracted and venomous. The middle ground seems to have disappeared entirely. One is either “one of us” or “one of them.”

In the midst of this particular war, the needs and concerns of ordinary authors have gotten lost. There are a slew of places where the law not only doesn’t encourage an authorship-friendly ecology, but it is positively hostile to authorship. For example, the law doesn’t facilitate paying authors very well for the work they do. Traditional copyright intermediaries -- publishers, record labels, movie studios (the folks who pay individual authors for their work and market it to the rest of us) -- have not yet passed on the potential cost savings of digital technology to the writers, composers, musicians and filmmakers they deal with. Indeed, they are insisting that creative contributors sign over more and more of their rights for less and less profit participation. This enhances authors’ dependence on publishers and other intermediaries, many of whom can’t afford to pay them much money.

In the context of that system, there are lots of legal rules that most people would agree are author-unfriendly. The originality rule I’ve been describing is just one of them. That is, a rule that one can’t copy anything without getting permission first is an impossible rule not only for the folks who make mashups and anime music videos, but also for documentary filmmakers, hip hop recording artists, and historians whose subjects are less than a century old. Even worse, when we (which is to say, the United States Congress) revised the copyright law in the 1970s and 1980s, we kept the rule requiring authors to ask permission before copying anything, but we got rid of all the mechanisms

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What is problematic is that some American commentators who are prone to hyperbole about what they see as an imbalance in the U.S. Copyright Act are providing arguments and rationalizations that foreign governments use to defend their failure to address this type of organized crime. The confusion wrought by the imprecision and lack of clarity in these commentators’ statements is not helpful to our achieving the goal for which there is no credible opposition: dramatic reduction in organized piracy of U.S. copyrighted works abroad.
the law used to have for helping people find out from whom they need to ask that permission. (Lessig 135, 287-91)

Because we’re in the middle of this copyright war, though, it becomes very hard to complain that the current copyright system is not really very good for authors. People who raise these issues are perceived as apologists for piracy who insist that information and entertainment want to be free. (I told you things had gotten mean. It’s mutual. The defenders of the old order get described as corrupt fat cats who are misusing copyright law to shield their antiquated business models from competition.)

People get understandably insecure in wartime and they cling to things, sometimes irrationally, that make them feel less insecure. Folks agree that a variety of provisions of the copyright law have simply become unworkable in a digital age, but they can’t begin to agree on ways to fix them because they are looking at all copyright problems with a wartime mentality, and they are afraid to give up anything that might turn out to be useful later. (Gleick, 667)

In the midst of all this insecurity and conflict, copyright owners are holding especially hard to this mantra: anyone needs permission before copying any work in any way. Now, that’s never actually been the law. There are and have always been significant exceptions. But, copyright owner groups insist, that it’s the essence of the law, the law at its best, the fundamental principle on which the law is based.

In this sort of atmosphere, any unauthorized copying becomes dangerous because it threatens the principle that the copyright owner gets to control the making of all copies. When Google announced that it was going to index the contents of university libraries, but would refrain from making even an index copy of any book whose author or publisher objected, the Association of American Publishers complained that Google had turned “every principle of copyright law on its ear.” In September, a group of authors filed a copyright infringement suit against Google for making index copies of works in the University of Michigan library without first tracking down authors and publishers and securing their permission.

As a practical matter, what Google did looks pretty author-friendly. There’s no central registry of who owns the copyright in what, so if Google had had to first ask permission from the copyright owner of every book in the University of Michigan library system, there’s no way for it to find out who those owners were or where they lived. So Google announced that it would not copy any book that someone asked it not to. That may be practical and it may be author friendly, but it enraged a lot of authors and publishers because it violated the cardinal principle that you may not copy anything at all unless you get permission first.

Google wasn’t proposing to sell digital versions of books in competition with publishers. It wasn’t proposing to give away free looks at the insides of books. It wanted to make copies so it could create an index. If offered to give a free digital copy to any publisher who wanted one. It promised that it wouldn’t make a copy of any book whose copyright owner asked it not to. But it wasn’t willing to track down the copyright owner of every single book in the University of Michigan library and ask first. Authors are clinging to the talisman that nobody should ever copy their works for any purpose without asking permission. They feel as if they have already had to give their publishers
permission to make too many kinds of copies for too few royalties. They feel that if, on top of that, Google can make its index without asking their permission, then that means that anyone will be able to come along and make money distributing their works over the Internet without having to ask. Google, meanwhile, worries that if indexing the books in a library without first getting permission is copyright infringement, then indexing the World Wide Web would be analyzed exactly the same way, and everything it is doing (and that authors rely on it to do) as a search engine is similarly illegal.

Here’s the bottom line: Copyright owners are upset, and they’re primed to see theft of their property and invasion of their prerogatives around every corner. They have elevated the notion that copyright means you get to control copying into the central article of their religious faith. In that atmosphere, you just can’t get away with saying, “look, why don’t we sit down and try to figure out whether there’s some way to secure authors’ ability to make a living, and publishers’ opportunities to make a profit, without giving them control of who makes copies?” The only person who would ask a question like that is a copyright-hating communist, and we all know we can’t trust them.

At the end of the day, though, finding a way to rethink author compensation so that it isn’t pegged solely or even primarily to controlling the making of copies seems like the most viable solution to the threat that digital technology seems to pose. A number of important scholars have made serious proposals for ways to do that. (Fisher, 199-258; Gervais, 55-73; Ku, 311-24; Lunney, 911-20; Netanel 37-74; Stallman). None of those proposals is perfect, but the current system isn’t working either.
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