

Copyright and Metaphysics

Professor John Kidwell



John Kidwell, whose reflective essay on American copyright law appears below these introductory remarks, produced this piece at the request of the GARGOYLE. What we'd asked him for was a kind of view from Olympus into this esoteric body of law and policy and what he has turned out fits the bill—in our view, at least—graciously and well indeed.

Since 1972, John has been a member of the Wisconsin law faculty, having come from two years in private practice at Denver following his graduation from the Harvard Law School in 1970. As a hobbyist, he has become a skilled cabinet maker and, in more recent time, has developed into a considerable computer buff. Small wonder that the challenges of copyright law have attracted him.

John Kidwell's essay on copyright law follows.

In 1841 Justice Story wrote that copyrights and patents "...approach, nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent." *Folsom v. Marsh*, 9 Fed. Cas. 342, 344, No. 4901 [C.C.D. Mass. 1841].

I suspect that many modern lawyers and students of copyright law, confronted with this observation, might add, "Right on!" And, although the revision of the federal copyright laws in 1976 has eliminated some of the confusion and "modernized" the law, I would guess that most people familiar with copyright law would still endorse Story's observation. But, I hasten to add, it is this very quality that makes copyright law so interesting—or at least I find it so. That is, I find copyright law fascinating simply BECAUSE it seems to test the very limits of what law can be made to do (and sometimes, it could be argued, to exceed those limits).

What I would like to offer are some examples of the kinds of questions now troubling Congress and the courts in copyright cases, as well as some of my thoughts on what it is about the copyright law that makes Story's observation apt. I think that we will discover that copyright law is uncertain in its application (for that is what I take Story to mean) not only because it is, or approaches, the evanescent, but for a host of other reasons as well.

An Overview of Copyright Law

As most of you may already know, copyright is a creature of federal law. The Constitution authorized Congress to create a copyright system, which it did in 1790. The statute was amended from time to time, usually with the effect of increasing the scope of copyright by adding new kinds of subject matter, or new rights.

Until the most recent revision the states had substantial authority to protect unpublished copyrightable material by means of so-called "common law copyright." One of the most significant changes introduced in the 1976 statute was the pre-emption of the authority of states to offer such protection; unpub-

lished works were brought under the federal umbrella and the states were prohibited from enforcing rights equivalent to those granted under the federal statute.

The core purpose of federal copyright is to provide protection to the writings of authors. "Writings" has been expansively defined to include not only books, but paintings, motion pictures, sculpture, maps, speeches and computer programs. In order to qualify for protection a work must possess the attribute of "originality" and be "fixed" in a tangible form. The degree of originality has generally been thought to be very modest, so that telephone books and art reproductions have qualified for copyright protection but there has been some recent controversy about the meaning of even this most venerable, and one might assume settled, substantive requirement.

Copyright protection does not extend to protect ideas or processes, but only to the particular expression of an idea, or the description of a process. Copyright protection is similarly unavailable for utilitarian devices, though it may extend to the description of the utilitarian item, or to separable decorative features of the item.

Contrary to what some people seem to expect, there are almost no formalities associated with obtaining copyright protection. The copyright arises when the work is fixed (written down, for example) and a notice is required only when it is published. This represents another significant change introduced by the 1976 Act; prior to that time the federal copyright interest was created by publishing the work with the prescribed notice. Registration of the work with the Copyright Office and deposit of copies is necessary only to obtain certain advantages in enforcing rights, and not to preserve the right itself.

The rights secured by the copyright are enumerated in the statute, and

include rights to reproduce the work, to distribute it, to display it, to perform it publicly, and to utilize it in the creation of new works. All of these exclusive rights are subject to a general privilege of "fair use" and a series of quite specific limitations that vary by kind of subject matter; while the copyright owner of a "musical work" has the exclusive right to perform a song publicly, for example, the copyright owner of a "sound recording" does not have such a right. What this means is that the heirs of Hoagy Carmichael must be paid when Willie Nelson's rendition of *Stardust* is played on the radio, but that Willie himself, the author of the "fixed", and hence copyrighted, rendition need not be paid. (Until 1972 Willie would have had no copyright at all—but that is another story.)

The foregoing is, of course, only a crude description of the structure of a copyright system that is the subject of a four-volume treatise and innumerable journal articles. But it may be sufficient for my purpose, which is merely to provide a background for some more pointed observations.

A Taxonomy of Legal Uncertainty

In the course of another project (not yet quite ready for publication) I have been working on a taxonomy of legal uncertainty. I have taken as a starting point the suggestion by Professor Danzig that most legal problems arise from uncertainty about the facts, uncertainty about the values that bear on the interpretation of rules, or from the limitations on the capability of courts. To this I have added uncertainty that comes out of the nature of language. There isn't room here to fully develop this structure, but I can sketch its outline in a metaphor, and this should be sufficient to allow me to use the structure as a way of organizing the balance of the discussion.

I would ask you to imagine that Sam owned a new kind of watch with which he was unhappy, and which he wished to repair. He took it to a watchmaker, who indicated a willingness to attempt the job. The watchmaker, after commenting on the novelty of the timepiece, noted that he needed some time to figure out how the watch works. He had, in my taxonomy of difficulty, a FACT problem. In any event, after careful examination, he at least believed he knew how it worked. He then asked Sam what he meant by "repair." What degree of accuracy was required? Because even after he knew how it worked, to make it accurate to within a minute a month is a very different matter than to make it accurate to within a minute a day; in terms of my model, both he and Sam had a VALUE

problem. They discussed the advantages of more, as opposed to less, accuracy, and balanced the degree of accuracy against the cost of the corresponding repairs. Knowing how the watch works really implies relatively little about the desired degree of accuracy, though it does constrain the range of choice. They agreed on a minute a month. At this point the watchmaker faced a CAPABILITY problem. He knew how the watch worked and understood what needed to be done in order to make it accurate to within one minute a month but lacked the tools that such a repair required; even a skilled watchmaker cannot repair a watch with a hammer and chisel.

The use of the watch-repair metaphor to exemplify the LANGUAGE problems is more difficult, though the very fact of difficulty may be revealing; a problem is no less real by being hard to describe. But imagine that the watchmaker, after having understood the problem, and decided what the repair's objective should be, and having acquired the necessary tools, explained to Sam, or better yet, his apprentice, what to do. "Now as you know, this is a new kind of timepiece. Most watches have a mainspring and a balance wheel. Now this doesn't have a mainspring. Instead it appears to have a magnetic gizmo that moves the hands by nudging up against this thingamabob. Now in a regular watch, we would adjust the tension on the mainspring. Here, I've discovered that if you just jiggle with the gizmo, it appears to nudge against the thingamabob a little more slowly—rather the same effect as tightening the mainspring—and the timepiece goes a little faster. Understood?" Two days later Sam picked up the watch, repaired. On the repair slip the watchmaker had written, "Adjust tension on the mainspring—\$25."

This brings me, finally, to a partial catalogue of hard questions in copyright law, organized according to the categories explored in my metaphor.

Trouble With the Facts

Only a moment's thought is required to confirm that copyright law disputes involve many problems of fact, and that these factual problems exist at two levels. The first level is what I call the micro-factual; we often don't know who did what, for example. The other level of uncertainty—the macro-factual—results from our ignorance about how the world works. First of all the very nature of the subject matter of copyright means that we constantly confront hard micro-factual problems. It is often difficult to adequately describe the subject matter of the copyright itself, for example. The copy-

right is said to extend to the "expression of the idea". Remember that anyone is free to borrow the idea itself, but no one may copy the particular expression. But where does idea end, and expression begin? Copyright clearly protects against non-literal as well as literal copying; protection for the expression of the idea prevents paraphrases or recastings of a script, or work of art, as well as preventing verbatim duplication of the work. Judge Learned Hand indicated that ". . . as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large, so that. . . the decisions cannot help much in a new case." Later in the same opinion, speaking of the boundary between idea and expression, he noted, "Nobody has ever been able to fix that boundary, and nobody ever can." *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930). The intangibility of the subject matter means, then, that the very description of the "facts" of a copyright dispute may attain the evanescent character suggested by Story.

Another factual problem centers on the difficulty of determining the genealogy of ideas and their expressions. Because copyright law, unlike patent law, protects only against copying and protects only against copying material that was original with the copyright claimant, it is often necessary to investigate the genealogy of the works of both the plaintiff and the defendant; given their intangible character this is no mean feat. The cases are filled with controversy concerning the maternity and paternity of plays, and poems, and songs, and scenarios. A jury or judge is often asked to draw an inference as to the genealogy of a work based on a degree of similarity which falls short of being literal, but which appears to go beyond the coincidental. The Bee Gees were recently defendants in a suit by a person who claimed they had copied his song and, though the Bee Gees prevailed, the degree of similarity between the two works was apparently quite striking. It has been held, by the way, that conscious borrowing is not required—the famous songwriter Jerome Kern was once found to have infringed another's composition even though the court was willing to believe the copying had been unconscious.

Macro-factual uncertainty abounds in copyright law. For example, how does the marginal interpretation of copyright law affect the incentives for production and dissemination and utilization of copyrightable material? If we increase the incentive for creators by strengthening, or deepening the copyright monopoly, do we discourage creative borrowing and the production of derivative works? This is a point that is often overlooked in

arguments about copyright policy. Copyright law prevents not only the reproduction of the original, but also the use of the original to create a derivative work. And so, were Shakespeare alive today, the copyright monopoly would likely have prevented Leonard Bernstein from producing "West Side Story" without the Bard's permission since it would probably infringe "Romeo and Juliet". But one needn't use hypotheticals to demonstrate the application of copyright law to chill creative efforts. Howard Hughes at one point bought the copyrights to all of the magazine articles that had been written about him and then attempted (unsuccessfully, as it turned out) to prevent the publication of a biography that relied on those articles as sources. The Walt Disney Studios have been quite aggressive, and more successful, in attempting to prevent the utilization of their characters in the context of parodies of mainstream values. Other contributors to the popular culture have been similarly hostile to borrowing; a campus newspaper in Wisconsin was sued for printing an ad showing a pregnant Lucy warning that "It can happen to anyone," and counseling awareness of birth control. Does the use of copyright law in these cases impoverish us by chilling references to popular culture that enrich our capacity to communicate to our fellow citizens about issues of contemporary concern? This is first a factual, and then a value, question. Will standard A reduce bad behavior B, and at what cost to good behavior C? And then, is it worth it?

Both micro- and macro-factual problems arise in the application of the copyright law to the computer. First of all, judges and lawyers are presently struggling to understand distinctions between RAM and ROM and between DOS and MOS. Recent decisions have, for example, confirmed that a software author is entitled to copyright protection even if the program is embodied in a computer chip which is essentially illegible to a human being. The courts and scholars have argued about what metaphor to use when bringing copyright to computers. Is a computer program in fact like a machine—and so unprotectible—or like the plans for a machine—and so protectible? In the course of this same debate the contending interests disagreed about the macro-facts. Would software borrowing destroy incentives to produce quality software? Or were those incentives so powerful that software production would continue, the only result of strong software protection being to retard the kind of progressive borrowing that contributes to rapid progress in a new field?

But there is not really room here for a complete catalogue of all the kinds of

SUPREME COURT OF THE UNITED STATES

Syllabus

SONY CORPORATION OF AMERICA ET AL. v. UNIVERSAL CITY STUDIOS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1687. Argued January 18, 1983—Reargued October 3, 1983—Decided January 17, 1984

Petitioner Sony Corp. manufactures home video tape recorders (VTR's), and markets them through retail establishments, some of which are also petitioners. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Respondents brought an action against petitioners in Federal District Court, alleging that VTR consumers had been recording some of respondents' copyrighted works that had been exhibited on commercially sponsored television and thereby infringed respondents' copyrights, and further that petitioners were liable for such copyright infringement because of their marketing of the VTR's. Respondents sought money damages, an equitable accounting of profits, and an injunction against the manufacture and marketing of the VTR's. The District Court denied respondents all relief, holding that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement, and that petitioners could not be held liable as contributory infringers even if the home use of a VTR was considered an infringing use. The Court of Appeals reversed, holding petitioners liable for contributory infringement and ordering the District Court to fashion appropriate relief.

Held: The sale of the VTR's to the general public does not constitute contributory infringement of respondents' copyrights. Pp. 10-36.

(a) The protection given to copyrights is wholly statutory, and, in a case like this, in which Congress has not plainly marked the course to be followed by the judiciary, this Court must be circumspect in construing the scope of rights created by a statute that never contemplated such a calculus of interests. Any individual may reproduce a copyrighted work

factual uncertainty that beset legislators, judges, juries, and lawyers as they consider copyright controversies. I hope that the few examples I have offered are sufficient to justify my assertion that factual problems are ubiquitous, and that this explains some of the uncertainty so typical of copyright cases.

The law relating to photocopying certainly exemplifies the problem I am describing. Rarely does a week pass without a call from someone in the university who wants to know how much they can photocopy; I find I can rarely give them a very helpful answer. There is relatively little case-law, and what there is seems always to appear idiosyncratic. The "guidelines" that appear in the House Report to the Revision Bill appear to be most appropriate in the context of primary and secondary schools, and can be seen as unduly protective of the interests of authors and publishers. But quite apart from the lack of clearly articulated rules (which are probably impossible) I think that one of the sources of difficulty here is the lack of any very strong sense, in ordinary life, of right and wrong when it comes to photocopying. That is, contrast our sense of right and wrong about infringement by photocopying with our attitudes with respect to shoplifting. Publisher and authors constantly characterize copying as stealing, and yet the

characterization strikes many as hyperbole. Home taping of phonograph records, the use of VCR's to duplicate copyrighted movies or television programs and the copying of copyrighted computer programs and games present similar problems. The computer magazines are filled with articles and letters debating the ethics of copying software complete with lots of finger-pointing, name-calling, and self-justification on both sides. I would suggest that this "on the street" difference of opinion about the rightness or wrongness of the behavior is necessarily reflected in our legal norms, which ends up leaving more than the usual amount of room for arguments on both sides.

A Question of Capacity

Even in the cases where the facts are relatively clear, and the objectives similarly uncontroversial, we face capability problems. How capable are our existing judicial institutions of deciding whether a computer program written in COBOL is substantially similar to a program written in FORTRAN, or of making that same determination when the subject of comparison is a gospel tune and the refrain for a rock and roll song? How reliably can we make decisions about the economic effects of borrowings of

copyrighted material, either for the purposes of deciding whether the borrowing was a "fair use", or to decide what the damages should be? Or what contribution does a copyrighted story make to a successful movie if the story has been reworked by a screenwriter, and the movie made by a famous director utilizing the services of talented actors and actresses? Since I needn't "prove" anything here let me suggest that it may be that, generally, law is most predictable when acting to support economic activity in the context of relatively monotonic economic goals. Copyright poses special capability problems because the values it serves are aesthetic as well as economic, and the norms are articulated in an effort to combine both value structures.

The Shifting Sands of Language

Language-based uncertainty different from the inevitable vagueness or ambiguity common to all rules is also present in copyright problems. First of all, the law of copyright has been confronted on a number of occasions with changes in technology which required the interpretation of language in situations not within the contemplation of the rule framers. Probably the most famous example of this was a case shortly after the turn of the century involving the question of whether a piano roll was a copy of a musical composition. The Supreme Court ruled that it was not, since it was not a visually perceptible embodiment of the work. The interpretation of the word "copy" to include the storage-medium of punched paper simply exceeded the imagination of the majority. The courts have faced analogous problems with the development of photography, motion pictures, the phonograph, television, cable television, the photocopy machine, and the computer. In each situation there has been an inevitable uncertainty.

A second variety of language-based uncertainty seems to have arisen at least once in copyright law. I have argued at some length elsewhere that one of the problems with the generation of rules for the computer software industry is that the language of the industry itself is so new and relatively undeveloped that it has failed to provide stable linguistic raw material for the articulation of legal norms. An example is the use in developing legal doctrine of the words "hardware" and "software." As computer technology developed, the function of those words seemed to change. There may have been a time when it was

thought that the distinction between hardware and software was stable, and critical. As both software and hardware changed computer scientists began to speak of "firmware"—and it became clear that the distinction in some cases was relatively unimportant, if not irrelevant; a particular algorithm may be embodied in either software or hardware. And so the legal norms mirror the instability of distinctions, real and linguistic, in the technology.

Getting Used to Uncertainty

What I am trying to suggest is that copyright is interesting because it is difficult. And it is difficult not because of inadequacies in our analytic effort, but because of structural difficulties largely beyond the control of the lawyers, judges, and legislators who are charged with forming the law. It is not as if there is a legal Rubik's Cube that has a solution if only we are clever enough to find it, but rather that there are some relatively permanent conditions which simply make the law of copyright uncertain both for the present, and the foreseeable future.

Balancing Conflicting Values

Even if we set aside the uncertainty that results from fact problems, we quickly confront our apparent uncertainty about the values we wish to promote. One of the most fundamental tensions in the law of intellectual property is between the "natural right" and "public benefit" theories of copyright law. Is a copyright owner entitled to reap all of the fruits of exploitation, or only enough to encourage appropriate investment in production and distribution?

A recent example of this tension can be seen in the "Betamax" case in which the Supreme Court held that the owners of copyrights in movies shown on television had no claim for copyright infringement against the manufacturers of equipment (VCR's) that allows people to make copies of those movies in their own homes, for later viewing. Although the reasoning of the case is complex, the Court did ultimately reassert that the question was NOT whether the copyright proprietor had wrung the maximum reward from his creation, but whether, in this difficult and new case, the protection of the copyright law was necessary to achieve the benefit to the public of stimulating creation and distribution of the writings of authors. Score 1 for the public benefit theory!

But even though the Supreme Court has frequently asserted that the copyright law's justification must be found in the public benefits of extending the privilege of a limited monopoly to authors, the power of an explicit or implicit appeal to the natural right of a creator to control the exploitation of a work is evident again and again in the arguments made to courts and the Congress, and at the margin of decision. The Betamax battle is not over even now; while it appears that efforts by the movie industry to place a "tax" on blank videotape have gone nowhere, in what could be seen as a related development Congress has outlawed the commercial rental of phonograph records which was believed to be facilitating massive copying by consumer on home equipment, to the injury of the record industry; efforts to outlaw rental of videocassettes and computer software are apparently underway.

I would suggest that the difficulty that we have been having with some of these cases is attributable to a diffidence in our commitment to the copyright proprietor's interests—a diffidence which I share, by the way. This ambivalence, I assert, is evident in the substantial substantive complexity of the Copyright Statute. Not since the heyday of the great Wallendas have we seen so much balancing! Section 106 lists the exclusive rights of authors, boldly, and decisively, in half a page. Sections 108 through 118 (25 pages in my copy of the statute) catalogue the limitations on those exclusive rights. Many of these limitations bear the fingerprints of the many interests that were represented while the statute was hammered out over the years; what else could explain, for example, the exemption for the performance of non-dramatic musical works by non-profit agricultural organizations in the course of an annual agricultural fair! (17 U.S.C. 110(6)) While it could be argued that these sections don't really represent a lack of commitment, but rather define the compromise between the authors and the users—a compromise to which we are wholeheartedly and enthusiastically committed—I remain unconvinced. I say its diffidence, or if you prefer, ambivalence. Section 107—the "black hole" of the law of copyright, which grants the privilege of "fair use" notwithstanding the grant of exclusive rights in Section 106—provides further evidence that the statute mirrors our indecision about the substantive objectives, since it is becoming ever more clear that the provision goes well beyond merely exempting de minimis copying.