Copyright Law's Delicate Balancing Act

Alan E Garfield
stolen works by Picasso. Mr. Hall forfeited and returned to Iraq a collection of Mesopotamian artifacts and effected the return to Peru of a gold Moche monkey head (circa 300 A.D.) that had been looted from the royal tombs of Sipan.

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Legislators and judges have long grappled with the challenge of protecting creators, benefiting the public and encouraging new works.

Copyright is all about balance. We want to reward authors for creating new works but we don’t want this reward to be so large that it drives up the cost of public access to works or unduly inhibits subsequent authors. The challenge is to find the sweet spot between author rights and public access.

This tension between rewarding authors and advancing the public welfare is built into the constitutional clause empowering Congress to enact copyright laws. On the one hand, the clause allows Congress to reward authors by giving them an “exclusive Right to their respective Writings.” On the other hand, Congress is given this power for the broader public purpose of promoting “the Progress of Science and useful Arts.”

As the Supreme Court later explained, the “economic philosophy” behind this clause is “the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors.”

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Of course, the twin goals of rewarding authors and benefitting the public are often compatible. By giving authors an incentive to create new works, copyright law both rewards authors and encourages the creation of works for the public to enjoy.

But any monopoly Congress gives to authors also increases the cost of public access. Justice Stephen Breyer detailed these costs in a recent Supreme Court decision about the copyrightability of designs on cheerleader uniforms. These costs, he said, include the “higher prices” naturally associated with any monopoly, as well as the increased administrative costs of “discovering whether there are previous copyrights, of contacting copyright holders, and of securing permission to copy.” Breyer quoted Thomas Jefferson for the proposition that costs can sometimes “outweigh ‘the benefit even of limited monopolies.’”

In short, the challenge for lawmakers in Congress and the judges who interpret copyright laws is to craft a monopoly that incentivizes the creation and distribution of works but does not unduly drive up the cost of public access or impede the work of future creators.

That’s easier said than done. But here are some examples of how policymakers have tried to strike this balance.
Copyright may give authors a monopoly over their creations, but that doesn’t mean authors have a monopoly over every aspect of their works.

Moreover, the real beneficiaries of longer terms will often be corporations who acquired the rights to works and not the authors and their families. Indeed, a major force behind the most recent congressional extension of copyright duration was Disney, concerned that its treasured copyright in Mickey Mouse would soon fall into the public domain. The irony, as many commentators pointed out, was that many of Disney’s own animated classics are themselves based upon public domain works (e.g., Snow White, Sleeping Beauty, Aladdin, Pinocchio, The Jungle Book, Alice in Wonderland, Beauty and the Beast, The Hunchback of Notre Dame).

The vastness of current copyright durations might be explained by the copyright industries’ lobbying power in Washington. But it’s worth pointing out that our durations are comparable to those in the European Union and the premier international copyright treaty, the Berne Convention, requires member states to provide most works with protection for the life of authors plus 50 years.

To date, the Supreme Court has not found any copyright duration to be unconstitutionally excessive. A Monopoly Over Expression But Not Ideas

Copyright may give authors a monopoly over their creations but that doesn’t mean authors have a monopoly over the note “middle C.” These examples illustrate the principle that copyright protects only the expression of ideas but not the ideas themselves.

Those unfamiliar with copyright law might think this phrase means that copyright law stops others only from using an author’s exact words (or, with a pictorial work, an artist’s precise rendering of an image). But copyright protects authors against more than just literal copying. As Judge Learned Hand famously explained, it is essential that “the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.”

So, for example, while it would obviously violate J.K. Rowling’s rights in Harry Potter and the Sorcerer’s Stone to reproduce the book in its entirety, it would also violate her rights to reproduce the detailed plot, even if the plot were told in different words. Indeed, a movie based on the book might have few direct quotes from the book. But the filmmakers would be liable if they used the book’s plot without permission.

At the same time, Rowling would not have a monopoly on every aspect of her book. Surely no one would think she could stop future authors from writing about a boy wizard, the experiences of children in an English boarding school or a battle between the protagonist and his archenemy. These are merely Rowling’s “ideas” that are free for others to use, just as Rowling borrowed ideas from earlier authors.

Defining the line between protected expression and unprotected ideas is a policy decision. As the Ninth Circuit once observed, “[w]hat is basically at stake is the extent of the copyright owner’s monopoly — from how large an area of activity did Congress intend to allow the copyright owner to exclude others.” But, as Judge Learned Hand candidly admitted, the precise location of this line will inevitably be ad hoc.

Imagine, for example, if Shakespeare’s Romeo and Juliet had been protected by copyright when the musical West Side Story was created. Would the makers of West Side Story have needed to get Shakespeare’s permission to make their musical?

There are no Jets or Sharks in Shakespeare’s work, just Montagues and Capulets, and no one in Shakespeare’s play...
sings “Gee, Officer Krupke, krup you!” But Professor Melville Nimmer, who wrote the leading treatise on copyright law, pointed out that the plot of West Side Story methodically tracks the plot of Romeo and Juliet and contended that the makers of West Side Story would have needed a license from Shakespeare.

On the other hand, the makers of The Cohens and The Kellys, a movie about a Jewish girl and Catholic boy falling in love and the hostile reaction from their families, would not have needed Shakespeare’s permission to use the general idea of star-crossed lovers from warring clans. Nor would the creators of Meet the Parents, who paired a woman from a straight-laced family with a man from a new-age hippie family.

It’s often difficult to know where to draw the line between unprotected ideas and protected expression. We don’t want subsequent authors unfairly profiting from the efforts of earlier authors. But we also don’t want earlier authors to have a stranglehold over the creation of new but similar works.

Should the first cubist painter be able to stop other artists from painting in the cubist style? After Saul Steinberg created his famous New Yorker magazine cover of a “A New Yorker’s View of the World,” which showed New York drawn in large scale and the rest of the world drawn as insignificant specks, did he have a right to stop other artists from creating similar depictions of Paris, London or Rome?

These are the difficult issues that are frequently at the heart of copyright litigations, whether they’re about the taking of non-literal elements from a computer program or Robin Thicke’s use in Blurred Lines of elements from Marvin Gaye’s Got to Give It Up.

**Fair and Foul Uses of Another’s Work**

Even when a subsequent user takes an author’s expression, she will not necessarily violate copyright law. The use might be insubstantial and therefore not actionable. But even if it’s not, the use might still considered be a “fair use.”

The fair use doctrine allows for the taking of another’s expression in certain limited contexts. The Copyright Act spells out four somewhat murky factors to apply. But the heart of the analysis tends to focus on two larger concerns: (1) the extent to which the new use benefits society; and (2) the extent to which the new use harms the legitimate economic expectations of the copyright owner.

A few examples can illustrate these principles. If a law professor spots a single article in The New York Times that is relevant to his class and copies it to hand out to students, his use is almost certainly fair. The use is beneficial to society in that it fosters education. And the harm to The New York Times’ legitimate copyright interests is de minimis. The use will not substitute for people subscribing to the newspaper or even buying a single day’s copy.

By contrast, if the same law professor copied three chapters out of a study aid that was designed to be sold to law students, his use would certainly be foul. He took a substantial amount of the earlier work and his use cuts directly into the very market that the copyright owner is seeking to exploit.

Contrary to what many people might think, a use is not automatically fair simply because the user does not intend to make money from it. Illegally downloading music is not a fair use even if the downloader intends to use the music solely for private use. There is no social benefit from the use and it amounts to stealing the copyright owner’s work instead of paying for it.

Likewise, a use is not automatically unfair simply because it is large. For example, courts found Google’s scanning and digitizing of millions of books to be a fair use because it provided the substantial public benefit of making the books digitally searchable, and posed little threat to the sale of the books because Google search results reveal only small snippets from the books.

**Rights Without a Remedy?**

As noted above, copyright provides incentives for creating and disseminating works of authorship by giving copyright owners the right to control the reproduction, distribution, performance and adaptation of works.

But what happens when the digitization of works makes it possible to produce unlimited copies without a diminishment in quality and the Internet provides a free, global distribution vehicle that almost anyone can use?

Might we be entering a world where copyrights exist in theory but are unenforceable in practice? Can the genie of uncontrollable piracy be put back in the bottle by using technological measures to control access to and use of works?

Or is it time to start rethinking the model we use for incentivizing the creation of works and the way we balance author rights with public access?

It’s probably too soon to tell. ♦

**NOTES**

1. U.S. CONST., art. 1, sec. 8, cl. 8.
2. Id.
5. Id.

See Copyright Law continued on page 26
In 1966, at one of the early bluegrass festivals in Berryville, Virginia, Carl spoke with a gentleman handing out fliers announcing the imminent publication of a magazine all about bluegrass music. Once the man discovered he was speaking with a lawyer from Delaware, he invited Carl to attend the magazine’s first board meeting. Carl took him up on the offer and ended up incorporating Bluegrass Unlimited, still considered by many to be “the bible of bluegrass music.”

Also in attendance was Bill Monroe, generally regarded as the creator of bluegrass. During lulls in the meeting, Monroe and his band, The Bluegrass Boys, would break into song. “This was always my notion of an ideal board meeting,” Carl observes. “After that, all others have paled in comparison.”

In 1971, Carl received a phone call from bluegrass star Ralph Stanley, whom he had befriended over the years after Ralph’s brother Carter died in 1966. “Carl, Bill and I are thinking of starting a festival in the northeast. Would you be interested in helping out?” After a few seconds he realized “Bill” was Bill Monroe. Carl jumped at the offer.

Carl, Shel and their late friend Mike Hudak, a renowned autoharp player whose home in Christiana had been a meeting place for area folk musicians, decided they needed a legal entity to put on a music festival and formed the Brandywine Friends of Old Time Music early in 1972. The rest of that year was spent planning for the first Delaware Bluegrass Festival, held on Labor Day weekend at the old KOA campground in Bear.

It was a dream lineup: Monroe and Stanley and their bands, Lester Flatt & the Nashville Grass, Jim & Jesse, and more. Only a few hundred people showed up that day at the muddy campground, but the Friends were undaunted. The festival celebrated its 46th anniversary this year at the Salem County Fairgrounds near Woodstown, New Jersey, the festival’s home since 1990 when it became known as the Delaware Valley Bluegrass Festival.

15. Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (noting that a “key factor” behind Congress’ most recent copyright term extension was a 1993 European Union directive that extended copyright terms for most works to life of the author plus 70 years).
17. Eldred, 537 U.S. at 788-79 (noting how copyright law “distinguishes between ideas and expression and makes only the latter eligible for copyright protection”). See also 17 U.S.C. §102(b) (2017).
18. Nichols v. Universal Pictures Corp. 45 F.2d 119, 121 (2nd Cir. 1930).