Rediscovering the Constitutional Origins of Copyright

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copyright infringement is piracy!

“Sudoku saves photographers from copyright theft”

“Illegal downloading is ‘moral squalor’”
(Philip Pullman)

“reaching into someone’s pocket and taking their wallet” (Philip Pullman)

“Textbook piracy is on the rise”

… on the other hand:

“Two Cups of Tea for Textbook Piracy”

“copyright strangulation”

“witchfinder general for copyright”

“Sita sings the copyright blues”

reclaiming (“Pirate Party”, Pirate Bay)
“fixed in any tangible medium of expression …”

books, manuscripts, doodles, shopping lists, shorthand notes, emails, snapshots ... cheese-toast portraits?

Wholesale Revisions:
1790, 1831, 1870, 1909, 1976

Major Treaties & Revisions:
1954, 1977 (Univ. Copyright Convention); 1988 (Berne);
1992 (renewal requirements); 1994 (URAA);
1998 (CTEA), 1998 (DMCA)

Scores of other revisions,
totaling about a hundred in
the 20th century.
Growth in Copyright Term, Wikipedia
“People in Hats, with Sun”, by Ada Quilter (2013), used by permission
formalities be gone!

- notice - 1976
- registration - 1976


1906 ad for copyright registration company
1790: Books, Maps, Charts

2013: Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures & other audiovisual works; (7) sound recordings; and (8) architectural works. (17 USC 102)
growth of substantive rights

“print, reprint, publish and vend” (1790 Copyright Act)

Section 106, 1976 Copyright Act

17 USC § 106 - Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
costs of infringement

The Inquirer and Rabble.CA articles from 2013.

costs of infringement

1790 Act: forfeiting illegal copies, + 50c per copy

2013:
  Actual damages
  Statutory damages: $30K, up to $150K for willful
  * CRIMINAL penalties.

* Educators get a special discount! Down to zero in many cases.
... but wait, there’s more!!!

- **scope of infringement:**
  - strict liability
  - secondary liability
- **judicial review,** drastically reduced by costs of litigation, DMCA 512 notice-and-takedowns; Copyright Office considering “small claims court”
- **paracopyright:** DMCA anti-circumvention; anti-bootlegging statutes; Computer Fraud & Abuse Act (CFAA); etc.
- **web of international treaties,** freezing new standards into place and reducing democratic evaluation
- **extension of copyright through licensing & software,** and growth of “clickwrap law”
back to basics

Article 1, section 8, cl. 8
The Congress shall have the Power …
To promote the Progress of Science and useful Arts,
by securing for limited Times

to Authors and Inventors
the exclusive Right
to their respective
Writings and Discoveries;

Article 1, sec. 8, cl. 8, United States Constitution
Copyright Clause in the courts

- Belle Époque cases
  - *The Trade-Mark Cases* (1879)
  - *Burrow-Giles Lithographic v. Sarony* (1884)
The Trade-Mark Cases, 100 US 82 (11 U.S. 53 (1879) - Three consolidated cases on champagne and whiskey trademarks, challenging the constitutionality of the 1876 Trademark Act. The Supreme Court invalidated the Act, finding it outside the Copyright Clause. (Congress passed Commerce Clause-based legislation two years later.)
Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) - B-G lost a constitutional challenge to § 4952 of the Copyright Act of 1870, granting copyright to photographs. B-G had argued that “writings” did not include images. The Court held that the first Congress, comprised of many of the Framers, added maps and charts to the very first Copyright Act of 1790.

“Oscar Wilde No. 18”, by Napoleon Sarony (1882), held at the Metropolitan Museum of Art
Constitutional Copyright, Rediscovered !!
Copyright Clause in the courts

- Belle Époque cases
  - *Burrow-Giles Lithographic v. Sarony*
  - *The Trade-Mark Cases*

- 1960s
  - Nimmer on First Amendment & Copyright (1970)
Copyright Clause in the courts

- **Belle Époque cases**
  - *Burrow-Giles Lithographic v. Sarony*
  - *The Trade-Mark Cases*

- **1960s**
  - Nimmer on First Amendment & Copyright (1970)

- **1990s to present**
  - fair use homilies
  - DMCA: *US v. Elcom*, *321 Studios v. MGM*
  - Bootlegging Statute cases
    - Jammie Rasset-Thomas & Joel Tenenbaum
Feist v. Rural (1991)

- “originality” has some teeth!
- cited Constitution at least 13 times in the decision
- cited Constitutional purpose
- picking up on Graham v. John Deere (1966)
**Eldred (2003), Golan (2012)**

- limited Times - limited in theory, not so limited in fact
- purpose clause - not so much a specific limitation as a type of ceremonial deism
- First Amendment - Applicable. (but when?)

**Golan**: “Public domain” doesn’t really vest in the public. First Amendment reliance users can seek remedies elsewhere (Congress, maybe).


Hearkening back to the *Trade-Mark Cases*, J. Scalia said rightsholders can’t

“create a species of mutant copyright law that limits the public's 'federal right to "copy and to use"' expired copyrights”

Appellate Court Action

- 11th Amendment state liability (*Chaves v. Arte Public Press*, *Natl Assn of Boards of Pharmacy v. Univ of Georgia*)

District Court Dabblings

- DMCA: *US v. Elcom*, *321 Studios v. MGM*
- Damages: Jammie Rasset-Thomas & Joel Tenenbaum
Copyright Clause internal limits

- "Authors"
  - originality (not sweat-of-the-brow compilations)
  - expression (not facts or ideas)
- "Writings"
  - fixation
- "limited Times"
- purpose

Intra-Constitutional limits

- First Amendment
- Commerce Clause
- Takings Clause
now what?  *internal limits*

- is the purpose clause totally dead?
- limited Times?

still lively:

- **fixation and originality**
  - bootlegging cases?
  - database legislation, compilations
  - fixation - lawns? cheese toast? DNA?

- subject matter questions & Patent Clause boundaries
now what? intraConstitutional limits

● First Amendment
  ○ First Amendment
  ○ prior restraints doctrine & DMCA 512
  ○ antitrust
  ○ DMCA anticircumvention
  ○ moral rights
  ○ fair use

● Commerce Clause
  ○ antitrust. Trademark.

● Due Process & damages
But what’s it all about?

- Economic incentives?
- Authors’ rights? (property law… Takings Cl.)
- Communications (First Amendment)
- Anti-authoritarian individual rights?
other issues raising their heads

- damages: can statutory damages (growth in damages chart) raise a constitutional issue under 8th or 5th/14th due process? the JTs: Jammie Thomas, Joel Tenenbaum
  - BMW v. Gore (1996) - $4k compensatory, $4M punitive damages … State Farm v. Campbell, actual damages $1M, punitive damages $145M …
  - statutory damages follow St Louis IM & S Ry Co v. Williams test
other issues raising their heads

fundamental rationale: economic, per the preamble? or property rights, per rhetoric and takings Clause litigation?

- if economic, how do we reconcile the varying incentives from academic authors to musicians? how do we figure out the roles of intermediaries (publishers) in apportioning alienable rights in the bundle of rights?
- if property, how can we truly reconcile with 1A? how is fair use compatible with takings Clause?
- if communications, why not a 1A-compatible analysis, public utility?
- oddities: 35-year termination rights
other issues raising their heads

modern IP law is in a time of change -- extreme commercialization in all areas (™ TS © ® P) … who are the “owners” and interested parties? … rhetoric … economic drivers … tech shifts …

law is shifting : IP interests are driving shifts in law outside of traditional contours of © … trade policy, criminal law (CFAA), ISP law … privacy/etc.: NSA etc rules can be thwarted or driven by economic interests of © industries