

In the Trenches of Copyright Law: Challenges and Remedies

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- *Should I send my copyright to myself via certified and registered mail? It’s protected as long as it’s sent certified and registered, right?*
- *I registered my music with BMI or ASCAP, so my work should be protected, right?*
- *What is an underlying work? I am a musician and have all my work on an MP3 file and registered it as a sound recording. Doesn’t that count?*
- *Work for hire? I just pay the session musicians, and I hold their copyright. That’s what everyone does. I don’t need a work for hire. It amounts to unnecessary paperwork, and no one will sign it, because they don’t know what it means.*
- *Wait ... so, you’re saying that my architectural renderings are copyrightable but my building is not? What’s the difference?*

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- *What about my furniture designs? Sure, you can sit on the chair, but it is more of a sculpture. I can climb and sit on all the sculptures at the Museum of Art. What gives?*
- *I think my song is worth way more than 9.1 cents. Why does Congress get to decide the rate? I'm a renowned songwriter and get the same rate as the new girl with the sparkles and fringe? That doesn't seem fair.*
- *I know that song is traditional and in the public domain. I don't care if someone else swindled it by claiming it when it wasn't theirs to claim. Heck, my great-great-grandfather wrote it, and here are the lyrics to prove it. It's been passed down from generation to generation. Why does that greedy corporation get to claim it just because they paid the fee decades ago without anyone finding out about it?*
- *Copyright? Ha! Copyrights are for rich people who steal artwork from the poor. Copyright law is rocket science, and poor people can't afford attorneys. I hear it takes two years to get a registration anyway.*
- *Yea, the dude stole my catalogue and forged my name onto a contract. He told me that he's got more money than I do, good lawyers and I'll die before the case is settled anyway. He's selling my music and not giving me a penny!*

The copyright practitioner faces the aforementioned questions and concerns all too often. In fact, rarely does a practitioner meet an author or claimant who actually understands the rights afforded by the 1976 Copyright Act, much less how to enforce those rights. The future challenges to the effective practice of copyright law are at least twofold. They lie in: (1) construction and perhaps revision of existing legislation, including the 1976 Copyright Act, and acknowledging its challenges; and (2) the development of remedies to existing challenges, including accessibility of those rights and protections afforded by the Act to its constituents, the rights-holders, and their works.

For the Copyright Act to function in a way that benefits the true rights-holders, there must be reconciliation between existing legislation protecting the works and the general understanding of the constituents for which the legislation was drafted. As scholars study the law and its impacts, a legal and financial system must be created that distributes justice and recognizes fairness in transactions. The time has come to

recognize inherent flaws in the Copyright Act, which can cause abuse to those individuals it is intended to protect. As such, scholars and practitioners should acknowledge their duty to help pave the new way for interpreting and applying the Copyright Act, to recommend changes to existing legislation, and to propose legal remedies for seeking justice when abuses occur.

This brief Article illustrates, through real world application and while protecting confidentiality, weaknesses in the Copyright Act and its practical execution in both the courts and marketplace, which must be acknowledged and addressed so that justice prevails for the artistic community.

I. THE COPYRIGHT ACT: EXISTING CHALLENGES

The United States Constitution empowers Congress “[t]o 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.”¹ In 1790, 1802, and then most notably in 1831, Congress refined the rights secured to authors and creators of original works by recognizing print, cut or engraving, book, map, chart, or musical composition as works. As technology developed, subsequent acts were passed to include new forms of media and expression.

Currently, rather than continue to handle exceptions, the Copyright Act merely provides that “[c]opyright 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 machine or device.”² These original works of authorship are contemplated as follows: “(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 and other audiovisual works; (7) sound recordings; and (8) architectural works.”³

A. “Work”

The Copyright Act’s existing definition of a “work” restricts protection to certain forms of art, inadvertently defining what is and what

1. U.S. CONST. art. I, § 8.
2. 17 U.S.C. § 102 (2006).
3. *Id.*

is not a work of art.⁴ Applied against the definitions provided by the Act and interpreted via jurisprudence, the manner and extent of protection afforded to various works and their authors/claimants is distinguished across a wide spectrum. To the daily practitioner, the protection afforded by the Act is simultaneously restrictive and overinclusive, depending on the nature, or “subject matter,” of the work under scrutiny and the means of its creation.⁵ Congress’s interference with copyright via unqualified and unnecessary regulation, in addition to the widespread influence by the private sector and its various agendas, has caused the protections afforded by the Act to become unbalanced over time.

To illustrate, musical works have been subject to a statutory rate (discussed in detail below), whereas the use of sound recordings embodying those works is subject to free market forces. Building designs (architectural works) are copyrightable, yet fashion designs are not. Through the political process, for decades legislators have been vested with the decision as to what constitutes a work of art and how it should run its course in commerce.

Should this model for conferring rights upon the arts continue to flow? The question as to whether any given work is afforded a certain degree of protection will be of less concern than the question of who gets to decide what is a work of art and how that impacts the role of art, the free market, and the idea/access paradigm. In the following paragraphs, we illustrate some of the frustrations the practitioner experiences from these deficiencies in copyright law.

B. “Fixed in a Tangible Medium”

An underlying provision of the Copyright Act is that an artistic composition cannot be reproduced unless it is first fixed in a tangible form or medium. “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁶ The Copyright Act provides that

[a] work is ‘created’ when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time,

4. *Id.*

5. *Id.*

6. *Id.* § 101.

and where the work has been prepared in different versions, each version constitutes a separate work.⁷

Nevertheless, to varying degrees, art is intangible—that is, one cannot “touch” a lyric and melody being sung. Only when an artistic composition has been fixed in a tangible medium (i.e., a lyric and melody are placed onto a recording device) can it be “copied” by another individual, who generally must have the permission of the owner of the tangible medium to reproduce. In practice, this provision leads to unarguable theft of artistic work by unscrupulous operators who prey on unaware or ill-advised authors.

Two examples illustrate such abuse. First, indigenous tribes such as the New Orleans Mardi Gras Indians pass their traditions through generations by means of oral history, often in the form of song. The notion that a song can be property is completely foreign (literally) to those who never held title to tangible land, much less intangible art. Executives from record companies and curators from prestigious libraries have made sound recordings of these indigenous chants and songs, and then they often file for copyright registration, not only of the sound recording, but also of the underlying work. This conduct results in misappropriating works and stripping from the original authors any rights or legal recourse, all because these works were not previously “fixed.”⁸ As a result, these acts of injustice acknowledge to the public that the individuals who obtained the copyright had absolutely nothing to do with the composition of the underlying work, and the true authors are never recognized, much less compensated.

Unfortunately, the Copyright Act provides protection for these acts of injustice, and in a case of pathetic irony, Mardi Gras Indian tribes often find themselves having to pay mechanical royalties to individuals and institutions so that they may make a sound recording of chants and songs that have been passed from their own ancestors for centuries. These indigenous people literally have to license from publishers the very work that they created. Moreover, they are powerless to overturn the theft, as the self-proclaimed “authors” or claimants of the copyright are protected by the Act, as well as well-stocked treasuries.

The second case of abuse arises from work by young rap and hip-hop artists, who, much like the beat poets of the 1950s, use improvisation while on stage to create their art. In some cases, a club owner or sound technician hired by the club makes a sound recording of the artist’s beats,

7. *Id.*

8. *Id.*

files for copyright registration of both the master recording and written work, and then sells the work to another artist or record company, who assumes ownership of the copyright via copyright assignment. In many cases, the author of the beat subsequently obtains a producer to record the aforementioned song and is sued by the club owner or sound technician, now copyright owners, for infringement. The young artist is practically powerless to overturn the theft, and the owners of the copyright are protected by the Act, because the artist had not fixed the beats in a tangible form of medium at the time it was created.

C. "A Work Consisting of Sounds, Images, or Both"

Ambiguity surrounding what constitutes a "work" under the Copyright Act is another area that opens opportunities for abuse.⁹ While a single-color painted canvas mounted on a frame qualifies as art under the law,¹⁰ fashion merchandise does not. A sculpture certainly qualifies as work,¹¹ but buildings often do not, depending on the functionality test among other considerations. So, what works are protected by the Act and what works are excluded?

"A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission."¹² "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."¹³

Let us, again, take the case of indigenous Mardi Gras Indian tribes whose regalia are photographed and sold by photographers without the permission of the Indian tribes. Members of Mardi Gras Indian tribes customarily spend an entire year sewing these elaborate suits and crowns to be worn in ceremonial festivities, traditions, and other cultural events. Photographers swarm through the crowds at these events taking photographs and then sell these photographs, including the likeness of the individual, without permission from the individual or author of the work photographed. Photographers often contend that the regalia are not works of art pursuant to the Copyright Act and therefore their photographs do not qualify as derivative works.

9. *Id.*

10. *Id.* § 102(a)(5).

11. *Id.*

12. *Id.*

13. *Id.*

Are the regalia works of art as contemplated by the Copyright Act? Why would these suits and crowns not constitute a work of art, any more than a sculpture would? Photographs depicting a sculpture cannot be sold without permission of the artist, insofar as they constitute derivative works. So, why should photographers be able to make photographic copies of a ceremonial suit without compensating the author? Clearly, each suit worn is a unique work created through demonstrable artistic inspiration, using sewing and engineering among other skills. Regalia is often mistaken for mere costume because it is worn. As such, it is commonly mistaken for failing the copyright functionality test. However, the regalia can be and is separated from the actual clothing worn by the Mardi Gras Indians. The Mardi Gras Indians sew their beads, tapestries, and designs onto canvas or similar materials, which they wear over their existing clothing as ornamental features. Many of these suits and crowns are on display at museums around the country, including the Smithsonian. The regalia are highly sophisticated sculptures that are simply developed in the form of a human body, as opposed to, for example, a vase, and which can be exhibited on humans as opposed to tapestry wall-hangings or glass display boxes at a museum.

Further, are the regalia *published* when the Mardi Gras Indians “lend” these works of art to the public for the first time?

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.¹⁴

Insofar as publishing, the regalia are arguably published as a matter of loan to the public. If one construes showcasing in the Smithsonian as publication, then one could certainly construe exhibition of these suits and crowns at a public event as publication.

D. Copyright as Property “by Sale or Other Transfer of Ownership, or by Rental, Lease or Lending”

Another common source of abuse is the notion that a copyright registration affixes property rights that can be sold, rented, or leased, essentially just as any other piece of property. Then, in the case of music composition through the Compulsory Licensing provisions of the Act, the government removes most of those property rights, forcing the

14. *Id.* § 101.

copyright holder to sell his/her rights for a prenegotiated fee outside the control of the market mechanisms.¹⁵

The most notable of these provisions is the mechanical royalty rates paid for use of copyright in underlying work in sound recordings, or song “covers.” The rate, which is negotiated periodically by representatives of the recording industry (principally, Recording Industry Association of America) and performance rights organizations (principally, BMI, ASCAP, and SESAC), is forced onto a writer/author. Because the collection and administration of these mechanical royalties is conducted by a third party, almost exclusively the Harry Fox Agency,¹⁶ the composer essentially loses control to negotiate the value of the song once it enters into the public sphere. Horrible songs and great songs are paid the same rate because market forces are not allowed to operate. Although beyond the scope here, record companies cleverly reduce the mechanical royalty rates paid in many cases, especially if the artist is the composer. In practice, the current rate of 9.1 cents per song per copy has effectively become the *maximum* rate that can be obtained, even if the song is guaranteed to make millions of dollars for the record company and recording artist.

Those defending compulsory licensing argue that a free market for royalties would be burdensome. However, sampling licenses and synchronization licenses are negotiated every day using market forces. Therefore, the Compulsory Licensing provisions of the Copyright Act inhibit commerce and rob talented composers of fees that could be extracted in a free marketplace.

II. REMEDIES AND ACCESSIBILITY

Outlined herein are just a few of the many abuses often inflicted onto rights holders and their works by the Copyright Act. Clearly, revisions are needed to reflect modern socioeconomic trends, the marketplace, and principles of justice and fairness to those individuals the Act purports to protect. Scholars and practitioners can help lead the way in pinpointing effective remedies and solutions to these problems.

The first and foremost remedy would be to have the copyright applicant certify that he/she is the author of the underlying composition, or has obtained ownership from the true author, through fair negotiations, certified by documentation. Currently, certification amounts to a mere

15. See *id.* § 115.

16. About HFA, <http://www.harryfox.com/public/HFAHome.jsp> (last visited Oct. 19, 2009).

signature in the registration process. The Copyright Office does not even want to see the actual documentation warranting the author and claimant have entered into agreement. Provisions should be instituted for harsh punishment when violations and fraud are uncovered in this process. In addition, an online, inexpensive, and open appeals process should be instituted to support challenges to authorship, much like that of the Trademark Trial and Appeal Board.

Second, the definition of “work” should be revised so that protection can be extended to qualifying works of art, thereby mitigating against exploitation and conversion of certain works, particularly works of indigenous peoples. The Copyright Act should be reconciled against the Lanham Act so that notions of fairness are consistent.

Third, the government should not interfere with market mechanisms by expropriating property rights without cause. A close examination will reveal that composers and their representatives are forced into accepting fees imposed by government bureaucrats and industry insiders with vested interests. Such abuse of property rights would not be tolerated, if the property were someone’s home. Why then should a composer be forced to sell his/her music for a rate determined by someone else? In this light, the Copyright Act seems to contradict or undermine principles of property ownership provided by the United States Constitution, and the Compulsory License provision serves as nothing more than a prenegotiated takings clause.

Fourth, rightsholders need access to education and counsel as to their rights in order for the Copyright Act to fully extend protection to works. Commonly, the creators of those very works that the Act seeks to protect are often unable to avail themselves of the rights afforded to them because the Act gives rise to too much confusion and rarely makes sense to anyone other than scholars, practitioners, and industry giants. In order for protection to be extended fairly and equally among rightsholders and the works contemplated in section 102 of the Act, practitioners and scholars will have to play a vital role in reshaping the Act so that the rights extended to each work and author/claimant are fair across the board. Otherwise, copyright will continue to have disparate meaning to different authors, claimants, and their corollary works.

While scholars and jurists study the Copyright Act, many composers and artists live in poverty, while thieves live in prosperity, exploiting their work. These thieves and their immoral operations are often inadvertently supported by the Copyright Act and its supporters. Those of us supporting and representing artists in the trenches need

additional armament, so that justice and fairness can reign. Doing less is equally immoral.

The music communities of each major city in the United States should organize *pro bono* clinics for musicians and artists for access to intellectual property assistance. Tulane University has partnered with the Entertainment Law Legal Assistance (ELLA) Project to provide such legal services to this underserved community. Without vigorous advocacy, the abuse of artists perpetrated by provisions of the Copyright Act and unethical operators will continue because artists seldom know their rights and are often unable to defend themselves against those abusing the privileges of the Copyright Act.