

The Arts and Humanities in Public Life

COPYRIGHT PROTECTION AND APPROPRIATION ART

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I want to examine the relationship between copyright law, borrowed images and appropriation art. As the term suggests, appropriation art borrows common images from advertising, the mass media and elsewhere, places them in new contexts and, thereby, aims to change the way we think about these images. Some appropriation art, such as Duchamp's use of found objects, doesn't implicate copyright at all. But when the borrowed image is copyrighted, appropriation art risks infringing the rights of the copyright owner.

I. SOME EXAMPLES OF THE PROBLEM

To see how copyright problems arise, consider the following examples.

1. *A* creates a unique collage that includes a copyrighted photograph taken by *B*.
2. *A* creates a limited edition series of prints that incorporates *B*'s copyrighted photograph.
3. *A* constructs several identical sculptural works based on *B*'s copyrighted photograph or comic book character.
4. *A* makes copies of *B*'s reproduction of a painting in the public domain.
5. *A* purchases *B*'s copyrighted note cards, affixes them to tiles, and sells them as decorative objects.
6. A museum reproduces an image in digital format of a copyrighted work in its collection. It places the reproduction on its website. Other individuals download the image and distribute it over the Internet.

The first three examples are based upon actual lawsuits involving artist

defendants. Photographers have sued, among others, Robert Rauschenberg and Andy Warhol for using copyrighted photographs in their works. Example "3" comes from several recent lawsuits brought against the artist Jeff Koons for making sculptures based on popular copyrighted images. Examples "4" through "6" raise questions about borrowing images outside the category of appropriation art. Example "5" is taken from a lawsuit against a firm for making unauthorized copies of an engraver's reproductions of old master paintings. Example "6" describes a lawsuit against a firm for affixing note cards to tiles and reselling them at retail. The final example comes from material in a recent proposal for educational fair use guidelines for digital images. I have added the last three examples to illustrate the main theme of my paper; namely, that appropriation art poses no special problems for copyright law. The current statute is sufficiently adaptable to resolve conflicts over borrowed images in a socially efficient way and without adopting special rules for artists.

II. THE LAW AND ECONOMICS OF COPYRIGHT

To begin, let me set out briefly the rationale for copyright protection and the basic structure of the law. Copyright protects original works of authorship that are fixed in a tangible form. "Original" does mean novel, nonobvious or unique but simply that the work originates with the author. Originality is a threshold question. Its purpose is to save administrative and other costs by screening out works that would be created even without copyright protection.

Original works include, among others, books, photographs, paintings, sculpture, musical compositions, computer software, sitcoms, movies, maps and business directories. These works all have in common what economists call a public goods aspect to them. Once they have been created, additional users can be added at roughly no additional cost. So, for example, the cost of letting 10 people or 10 million people use a new software program is essentially the same aside from the negligible cost of making additional copies. Similarly, the cost of making 50 or 500 copies of a print are roughly the same once the plate or negative has been created. From this it follows that in the absence of copyright protection, unauthorized copying will drive the price of copies down to the cost of making copies. But this means that the party who expended the time, money and effort (sometimes called the "cost of expression") to create the work initially will not be able to recover his costs. Hence, the incentive to create the work will be significantly undermined without protection against copying.

To be sure, some original works will still be created even in the absence of copyright protection. There may be substantial benefits from being recognized as the creator or from being first in the market or the copies are of inferior quality. Moreover, creators may use contract law or other private enforcement

means to discourage copying. But given the speed, low cost of copying and the difficulty of employing private measures for widely distributed works, the number of new works created will be significantly reduced in the absence of any copyright protection.

On the other hand, there are offsetting social costs to copyright protection. Aside from administrative and enforcement costs, copyright protection generates access costs related to the public goods aspect of copyrighted works. One type of access cost falls on consumers who value the work by more than the cost of making a copy but less than the price being charged. The other falls on creators who are deterred from borrowing and building upon prior works because they are unwilling to pay the price the copyright holder demands. This, in turn, can raise the cost of creating new works and, paradoxically, reduce the number of new works created.

Optimal copyright protection strives to balance the incentive benefits against access costs in a way that promotes economic efficiency or, equivalently, social welfare. Just as too little protection can be harmful so can too much protection. Many copyright doctrines can be understood as efforts to promote efficiency by striking the right balance between incentives and access. Consider the following.

1. Copyright protects expression but not ideas. Protecting ideas would involve substantial administrative costs in defining and staking out the boundaries between original and old ideas. Drawing boundaries and erecting fences is much more costly for intangible than tangible property. In addition, most original ideas in copyrighted works are trivial and involve small expenditures relative to the cost of expressing them. Hence, the added incentive benefits from protecting ideas are likely to be swamped by the resulting access costs.

2. Copyright protects against copying but not independent duplication. Here the element of free riding is missing so independent duplication will not significantly undermine the incentives to create new works. Plus if independent duplication were actionable, authors might spend too much time checking whether their works might infringe earlier works rather than spending that time creating new works.

3. Copyright also gives the creator rights over derivative works based on his work. The rationale depends, in part, on incentive effects but also on the savings in transaction and enforcement costs from assigning property rights in the many possible derivative works to a single party.

4. My final example is the fair use doctrine. Fair use limits the rights of the copyright holder by allowing unauthorized copying in circumstances that are roughly consistent with promoting economic efficiency. One such circumstance involves high transaction costs. For example, copying a few pages from a book

probably does not harm the copyright holder because the copier would not have bought the book. But if copying were prohibited, transactions costs would prevent an otherwise beneficial exchange from taking place. Here fair use creates a net social gain. The copier benefits and the copyright holder is not harmed.

Another circumstance that justifies fair use may be termed implied consent. For example, a book or movie review that borrows some copyrighted material will provide useful information to consumers. On average this will tend to expand the demand for the underlying works. Here, fair use can produce beneficial incentive effects and reduces access cost as well.

A third category of fair use involves harm to the copyright holder that is more than offset by lower access costs and possibly benefits to third parties. Here courts treat more favorably productive than reproductive uses of a borrowed work. The former transforms the original work and creates a new work that doesn't substitute for the original work. A reproductive use, on the other hand, is more likely to substitute for the original work and, therefore, have significant negative effects on the incentives to create that work in the first place.

Parody may also be protected as a fair use. Parody can involve high transaction costs because of the difficulty of negotiating with someone you want to poke fun at. It provides information or comment like a critical review. And finally it can be a productive use of the original work. Still calling something a parody is not a blanket license to copy. Parody as fair use is limited in two ways. One is that the parody can only take what is necessary to conjure up the original work. It can't take so much that it effectively substitutes for that work. The other is that the parody must target the work it parodies. Here the reason may be that a voluntary transaction is less likely when the parody attacks a particular work than when it uses the work to comment on or criticize society at large.

III. APPLYING THE THEORY TO THE CASES

Consider first the examples outside the area of appropriation art. In *Alfred Bell v. Catalda Fine Arts* the defendant produced and sold copies of the plaintiff's engravings of 18th and 19th century paintings in the public domain.^[1] The plaintiff's engravings were realistic reproductions requiring great patience and skill. The defendant had argued that since the engravings were merely copies of works in the public domain, they failed the originality requirement. In short, the defendant claimed he was doing nothing more than he was entitled to do—copying a public domain image albeit by copying from a copy. The defendant lost the case, as he should have. Originality lay in the art of copying, which required significant expenditures of time, effort and skill. Since these

expenditures are subject to free riding by the defendant, the plaintiff's incentives would be undermined in the absence of copyright protection. Moreover, copyright protection doesn't prevent the defendant from making copies of these same paintings. Protection protects against free riding so access costs are minimal.

In another case, the defendant purchased note cards from the plaintiff, affixed them to tiles and resold them in the retail market. [2] The plaintiff claimed that the defendant had infringed its derivative work right. In theory, the right is very broad for it includes "any other form in which a work may be recast, transformed or adapted." These rights, however, are subject to another provision of the statute called the first sale doctrine which entitles the owner of lawful copy to sell or otherwise dispose of it without the copyright owner's consent.[3] So the question posed was whether the defendant transformed the copy to bring it under the derivative work provision or whether he merely placed the equivalent of a "frame" on a copy of a work he purchased and resold it. To be sure, arguments can be mustered on both sides of the issue. But there is a simple way to dispose of this case consistent with the social purpose of copyright law. The court reasoned that the defendant's activity benefited the plaintiff. The more tiled note cards the defendant sells the greater the number of cards he will purchase from the plaintiff. Hence a finding of no liability will reduce access costs without harming incentives.[4]

This analysis helps to resolve, at least in theory, the problems set out in the proposal for educational fair use guidelines for digital images. Consider first the museum or educational institution that wishes to create and distribute digital images of works in its collection. Clearly, if the works are in the public domain or the institution holds the copyright, it may make and distribute copies without risking copyright liability. On the other hand, if it doesn't own the copyrights, it must make reasonable efforts to obtain permission, and in the interim may be entitled to make reproductions for use on a secure network. The desirability of these rules depends on the usual trade-off between incentives and access. If one is skeptical that reproduction rights have much impact on the incentives to create works of art, then limiting the ability of educational institutions to make and distribute copies in digital format imposes access costs without offsetting benefits.[5] Alternatively, if one believes that reproduction rights may well have beneficial incentive effects, then the "reasonable efforts" requirement is probably an efficient compromise. Moreover, the rule itself will lead to the development of third party clearinghouses to facilitate transactions between copyright holders and educational institutions.

A museum or educational institution also faces the problem of protecting the copies it lawfully makes. This is simply a variation of the question posed in the *Alfred Bell* case: does the copy satisfy the originality requirement? For copies, that standard demands a nontrivial variation from the original work which should (but may not) be satisfied if the time, effort and money involved in

creating copies in digital format is subject to free riding by subsequent copiers. That is, if it is significantly cheaper to copy from the copy than to copy from the original as in *Alfred Bell*, the incentive to make copies of original works will be undermined in the absence of copyright protection. Moreover, copyright protection will not deny access to persons seeking to make copies. Rather they will have to pay the host institution for permission. On the other hand, if creating a digital image is like making a copy using a photocopy machine, then copying from a copy costs about the same as copying from the original. Then free riding is minimal and allowing unlimited copying will not undermine the incentives to create copies in digital format.

Let me turn now to the examples involving appropriation art. Incorporating a copyrighted photograph into a unique collage should be an easy case. Since the photographer has been paid for his print, allowing appropriation would produce minimal incentive benefits but potentially large access and administrative costs. Like the case involving pictures affixed to tiles, the socially efficient outcome is probably to allow the artist to use the image without the copyright holder's permission. The case might come out the other way, however, a court might find that the derivative works right trumps the first sale doctrine.

One is more sympathetic to the claims brought by commercial photographers against Rauschenberg and Warhol for making prints based on copyrighted photographs. Commercial photographers are in the business of licensing their photographs. Allowing artists or others to make unauthorized copies—copies they haven't paid for—could significantly effect the incentives of photographers to create their works in the first place. But that is not the end of the story. In the language of fair use, the prints created by Rauschenberg and Warhol are clearly productive not reproductive uses. They add substantial original expression to the original image and are unlikely to substitute for it. These cases were settled so we don't know for certain how they would have come out. I suspect, however, that a court would have rejected the claim of fair use because transaction costs were low enough to make a negotiated license the likely outcome.

My final example is appropriation of mass media images by the artist Jeff Koons who was the defendant in three similar copyright cases in the 2nd Circuit. In the best-known case, *Rogers v. Koons*, the defendant purchased a note card displaying a photograph of a group of puppies with their owners, tore off the copyright notice from the card, and hired an Italian foundry to make four sculptures based on the photograph.^[6] Since Koons admitted copying, the only issue on appeal was if his copying was a fair use.

Counting against fair use is that Koons added little to the original image except for changing the medium and adding color. Indeed, altering the image would have defeated his purpose of changing the meaning of the image by putting it in a different context. On the other hand, Koon's sculpture is not likely to

damage the market for the copyrighted photograph. The products are in different markets and won't compete for sales. Yet the plaintiff's business was licensing photographs so upholding Koon's fair use defense could potentially eliminate an important source of revenue to photographers and result in adverse incentive effects.

Koons' principle argument for fair use was that his work should be privileged as a satirical comment or parody. By appropriating an everyday image, he claimed that his work commented critically on a political and economic system that places too much value on mass produced commodities and media images. Not surprisingly, the court rejected his defense because his work did not comment directly on the appropriated image. As noted earlier, fair use requires that the parody be directed at least in part at the original work. When the parody comments on society at large, the defendant should be able to license the copyrighted work.

IV. CONCLUDING REMARKS

In short, conventional copyright principles designed to promote social welfare provide little reason to uphold Koons' fair use claim or similar claims by other appropriation artists. Since there are no market impediments to licensing copyrighted images, fair use would save some transaction costs but would give rise to substantial other costs. It would weaken incentives to create new images and add uncertainty to the already uncertain question whether or not something can be lawfully copied. Moreover, if calling a work "art" shields it from copyright liability, we can be sure that such claims would multiply putting judges in the ill-suited position of having to decide what is art.

NOTES

1. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.* 191 f.2d 99 (2d Cir. 1951).

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2. See *Lee v. A.R.T. Co.* 125 F.3d 580 (7th Cir. 1997). In a similar case (see *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)) the defendant obtained copies by cutting them out of an art book he purchased.

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3. See Sec. 109(a) of the 1976 Copyright Act. The first sale doctrine contains exceptions for renting and leasing of sound recordings (CDs, tapes) and computer programs without the copyright owner's authorization. [\[back\]](#)

4. One might ask, therefore, why the plaintiff would sue in circumstances where

the defendant's activities benefit him. The answer is that the plaintiff hopes to charge higher prices to parties who affix copies to tiles than to other purchasers. Because of arbitrage opportunities, such price discrimination is only feasible if the law requires the defendant to obtain permission for its activities. I add that in the earlier case (*Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)) the court found that the defendant's activity had infringed the copyright holder's derivative work right. [\[back\]](#)

5. I add that access costs may be particularly large for some works because it is not always easy to figure out if a work is in the public domain or to track down the copyright holder. This is made more difficult because under the 1976 Act the earliest date that previously unpublished works enter the public domain is 2002. And since the meaning of the term "publication" for a work of art is not entirely clear, it is possible that works created a 100 or even 200 years ago may still be protected by copyright. [\[back\]](#)

6. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) [\[back\]](#)

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