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## Copyright Policy and the Problem of Generalizing

Eva E. Subotnik\*

### INTRODUCTION

Today we have heard a variety of concerns expressed by professional authors, artists and performers. But one of the toughest aspects of determining how to make the copyright system work better is generalizing about what is and is not working. In these brief remarks, I would like to identify three areas that demonstrate this difficulty.

At the outset, a disclaimer: I took the animating theme of this Symposium to be the improvement of the financial stake of individual authors in some kind of direct way. This mode of analysis should be distinguished from other approaches, equally valid, that would seek out ways of benefitting individual creators by improving the financial position of Hollywood studios, record labels, publishers and the like. With that assumption stated, here are the three contexts that reflect the difficulty in generalizing: (1) the issue of identifying the kinds of creative activity that should properly be the focus of the copyright system; (2) the issue of evaluating copyright law's application to the Internet, which is both a catalyst for and detractor from profitable authorship; and (3) the issue of framing the costs of enforcing copyright interests.

### I. GENERALIZING ABOUT "AUTHORSHIP"

Situations arise from time to time that raise the question of who is an "author" to begin with—a term that the Copyright Act does not define.<sup>1</sup> There has been much fanfare over whether monkeys can be authors.<sup>2</sup> But leaving that issue aside, there is arguably some inconsistency over who is an "author" and, by extension, who should benefit financially from the copyright system. So, for example, one appellate court refused to find authorship in a wildflower display created by an artist, Chapman Kelley, in Chicago's Grant Park.<sup>3</sup> Acknowledging that Kelley had selected his species of flowers for "aesthetic" reasons, that the defendant had actually marketed the display as "living landscape art," and that Kelley's garden could be classified "as a work of postmodern conceptual art,"<sup>4</sup> the court nevertheless found the garden to be too much a product of natural forces—which

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1. 17 U.S.C. § 101 (2012).

2. See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 306, 313.2 (3d ed. 2014).

3. Kelley v. Chicago Park Dist., 635 F.3d 290 (7th Cir. 2011).

4. *Id.* at 293, 304.

distinguished it, the court suggested, from a work like Jeff Koons' *Puppy*.<sup>5</sup>

Now perhaps this one failed authorship bid need not trouble us; indeed, the thrust of the case seemed to be about artistic control of the garden's future rather than securing financial rewards for the artist. Furthermore, it would be wrong to infer a trend toward denying authorship claims. Another appellate court, for example, recently found likely protectable authorship in a brief acting performance by an aspiring actress, Cindy Lee Garcia.<sup>6</sup> Her actor-ly rendering of four pages of script was at least a minimal "creative contribution" to the underlying film.<sup>7</sup> Accordingly, the *Garcia* decision might make those in favor of ensuring financial rewards sanguine by signaling a broad opening for a new class of viable authorship claims.

And yet, such an open-ended, capacious approach to authorship is not necessarily a victory for the interests of professional authors. The *Garcia* case had nothing to do with the enforcement of copyright as a legal tool to ensure a creative livelihood. Furthermore, the *Garcia* court fell into the same formalistic approach to assessing authorship as did the *Kelley* court—both avoiding the question of whether these plaintiffs were creative professionals who were likely to have been motivated by the copyright regime in undertaking their respective creative activities. Moreover, the court in the *Garcia* case did not fully appreciate the practical consequences of expanding authorship: that in the future, such expansion may come at the particular expense of small-budget directors and producers—that is, those who *do* typically rely on copyright—who must now be concerned about preventing fractured copyright claims to their films.<sup>8</sup>

In short, when the questions of "Who is an author?" or "What is an act of authorship?" become untethered from the overarching goals of copyright, it becomes harder to shape law and policy toward assisting that subset of creators who actually rely on copyright to make—or to supplement—a living.<sup>9</sup>

## II. GENERALIZING ABOUT COPYRIGHT LAW'S APPLICATION TO THE INTERNET

Congress established the Digital Millennium Copyright Act (DMCA), in part, to encourage the architecture that would permit the robust growth of online-

5. *Id.* at 305–06.

6. *Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014). The Ninth Circuit granted an en banc rehearing on November 12, 2014. *Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014). The oral argument took place on December 15, 2014, and the decision was pending at the time this Article went to print. See *Status of En Banc Cases*, U.S. COURTS FOR THE NINTH CIRCUIT (Mar. 27, 2015), <http://perma.cc/5J8R-LNB6>.

7. See *Garcia*, 766 F.3d at 933–34.

8. See, e.g., Brief for Professors of Intellectual Property Law as Amici Curiae Supporting Appellees' Petition for Rehearing En Banc at 9–10, *Garcia*, 766 F.3d 929 (No. 12-57302).

9. Analogous concerns about protecting the relevant class of creators have led to the development of heightened judicial scrutiny—above what the statute itself requires—of those claiming co-author status. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998).

distributed content.<sup>10</sup> And, in point of fact, many creators today clearly benefit a great deal from the visibility and word-of-mouth publicity they can achieve that would not have been possible in an earlier day. In particular, it means that individual authors can market themselves without the help of a gatekeeping distributor who would otherwise be exerting creative control as well as taking a portion of the profits.<sup>11</sup>

And yet, it is clear that the role of the Internet as a business platform for individual authors is a mixed blessing—a lesson that is frequently lost amidst the prominent cases that have litigated the DMCA’s provisions. Many of those cases involve corporate copyright owners suing Internet service providers (ISPs) of various sizes.<sup>12</sup> Thus, the kinds of assumptions that emerge—such as the expectation that copyright owners can readily file thousands upon thousands of takedown notices with ISPs—may reflect the most efficient arrangement in view of the resources that larger copyright owners have to monitor their works. Likewise, judicial interpretations that have gained traction, such as the requirement that ISPs know or be aware of “specific instances of infringement” before they become disqualified from safe harbor protection,<sup>13</sup> are understandable where the aggrieved party has the resources to regularly notify the ISP of specific infringement.

But the burden allocation among authors, ISPs and users starts to look a little different when the relevant copyright owner is an individual author. For smaller-operation creators, the ability to spend hours per day submitting takedown notices is simply not feasible.<sup>14</sup> Moreover, there is a tipping point: such a use of time becomes counter-productive with respect to copyright policy when it deprives the author of resources he would otherwise be using to create new works, which is of course the point of the copyright system in the first place.<sup>15</sup>

Furthermore, it is tempting—but often imprecise—to generalize about the main types of uses that copyright owners are unhappy about: either *direct commercialization* by the service provider itself (driving ad revenues from which it benefits, for example), or *non-commercial uses* by those who merely want to consume media on a personal level or express their tastes and creative remixes with members of the community.

10. See S. REP. NO. 105-190, at 8 (1998); H.R. REP. NO. 105-551, pt. 2, at 49–50 (1998).

11. See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 152 (2008) (“Any studio, label, publisher, or, most important, individual author can make a work available to a global audience simply by posting it on a Web site or releasing it onto a peer-to-peer network. . . . The economics of digital distribution, in short, would seem to dictate a highly competitive, decentralized sector for producing and disseminating creative works.”).

12. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

13. *Viacom*, 676 F.3d at 30–31; see also *UMG Recordings*, 718 F.3d at 1021.

14. See, e.g., DEP’T OF COMMERCE, INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 56 (2013) [hereinafter INTERNET POLICY TASK FORCE GREEN PAPER].

15. U.S. CONST. art. I, § 8, cl. 8 (granting Congress 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”).

This is because authors have found that uses of their works fall into yet a third category: *commercial uses* by corporate entities that discover the authors' works on the Internet and proceed to *exploit them out in the brick-and-mortar world*. As one photographer, who specializes in high-quality photographs of insects, recently put it:

[L]et me indulge in a list of recent venues where commercial interests have used my work without permission, payment, or even a simple credit: Billboards, YouTube commercials, pesticide spray labels, website banners, exterminator trucks, t-shirts, iPhone cases, stickers, company logos, eBook covers, trading cards, board games, video game graphics, children's books, novel covers, app graphics, alt[er]native]-med[ic]ine dietary supplement labels, press releases, pest control advertisements, crowdfunding promo videos, coupons, fliers, newspaper articles, postage stamps, advertisements for pet ants (yes, that's a thing), canned food packaging, ant bait product labels, stock photography libraries, and greeting cards.<sup>16</sup>

At a deeper level, attempts to generalize about the role of the Internet in supporting, and hampering, creative livelihoods touch on larger problems of generalizing about the nature of infringement today. In a number of instances, high-profile lawsuits by individual creators have been directed at uses of their works by other individual creators—cases such as *Cariou v. Prince*<sup>17</sup> or *Salinger v. Colting*.<sup>18</sup> These cases get much press, in part, because the facts are easy to describe and the cases raise colorful and important questions about how the copyright system should apply when the issue is the creative needs of *author v. author*. But those high-profile contests can mask the fact that much litigation by individual authors is, in fact, directed squarely at straightforward commercial use—often bread and butter stuff, such as use beyond the terms of a license.<sup>19</sup>

### III. GENERALIZING ABOUT THE COSTS OF ENFORCEMENT

There is a real imbalance in perceptions about the costs of enforcing copyrights. Those genuinely and rightly concerned about the expansion of copyright point out how unpredictable it can be to gauge the sorts of uses that will elicit a cease-and-desist letter from an aggrieved copyright owner.<sup>20</sup> From another perspective, most individual authors cannot credibly threaten a lawsuit: indeed, the Copyright Office has recently cited statistics estimating that “the median cost for a party to litigate a copyright infringement lawsuit with less than \$1 million at stake through appeal is \$350,000.”<sup>21</sup> So, in a sense we find ourselves at a standstill in which it is once

16. Alex Wild, *Bugging Out: How Rampant Online Piracy Squashed One Insect Photographer*, ARS TECHNICA (Sept. 24, 2014), <http://perma.cc/D974-LBZ2>.

17. 714 F.3d 694 (2d Cir. 2013).

18. 607 F.3d 68 (2d Cir. 2010).

19. See, e.g., *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120 (2d Cir. 2014); *Beasley v. John Wiley & Sons, Inc.*, No. 12 C 8715, 2014 WL 3600519 (N.D. Ill. July 21, 2014).

20. See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 108 (2008).

21. REGISTER OF COPYRIGHTS, COPYRIGHT SMALL CLAIMS 25 (2013), available at

again difficult to generalize—copyright litigation is, on the one hand, ready to leap out and crush expressive reuse at any moment and, on the other hand, totally out of reach for the ordinary author.

From either perspective, current enforcement mechanisms are hardly acting as an optimal tool for ensuring reasonable compensation for authors. Furthermore, the notion that one can parlay litigation, at the very least, into profitable name recognition within the wider artistic community (as Patrick Cariou likely did by the end<sup>22</sup>), is for most authors wishful thinking.

#### IV. WHAT LESSONS CAN WE DRAW?

Unfortunately, I am afraid that I have primarily succeeded in raising questions about, rather than law-driven solutions to, how to help professional authors monetize their creative works. But the main thing I have tried to underscore is that a one-size-fits-all approach to copyright does not seem to serve the cause of individual professional authors. In that regard, legal initiatives that assist in differentiating among categories of authors and owners may be useful.

One example of this is the possibility of a small claims tribunal, as the Copyright Office has recently proposed.<sup>23</sup> Additional examples are the tailoring of burden allocations under the DMCA,<sup>24</sup> or the elimination of the requirement of timely registration for eligibility for statutory damages,<sup>25</sup> with respect to certain kinds of authors or owners. It is to these sorts of initiatives that we should turn our attention if we want to help professional authors going forward.

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<http://perma.cc/M8CZ-RGAL> [hereinafter COPYRIGHT OFFICE REPORT].

22. See generally *Cariou*, 714 F.3d 694.

23. See generally COPYRIGHT OFFICE REPORT, *supra* note 21.

24. See, e.g., INTERNET POLICY TASK FORCE GREEN PAPER, *supra* note 14, at 58.

25. See, e.g., COPYRIGHT OFFICE REPORT, *supra* note 21, at 112; see also *id.* at 22; Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 454 (2009) (“Because individual authors and small firms do not typically register their copyrights within three months of publication, they rarely qualify for statutory damages or attorney’s fee awards.”).