

Identity, Accession and the Law of Copyright
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Abstract

The most pervasive and intractable problems in copyright law revolve around identifying the proper scope of the object of ownership. What gives a “work of authorship” its specific identity as an object of ownership? How much of it, and at what level of abstraction, must be embodied in an object in order for that object to count as a “copy” of the work? How should we distinguish between transformations that result in a “derivative work,” and those that result in a “transformative fair use”?

We can identify two ways of approaching these questions. One is what I will call the “internal” approach, by which I mean internal to copyright doctrine and the concepts in which it is expressed. Thinking in this vein means taking seriously the idea that such terms as “work of authorship,” “derivative work,” and “transformative use” can be made meaningful enough to let us look at phenomena in the real world and figure out with tolerable consistency which box they belong in, without resorting decisively to policy views about the broader consequences of which box we choose. The other approach I will call the “external” approach, by which I mean one that focuses primarily on judgments about whether the practical consequences of a particular ruling serve the broad policy purposes of copyright law—as cabined by whatever competing policy concerns we think relevant—and treats the assigning of doctrinal labels as merely the means we use to announce the results of these judgments.

When we approach problems of copyright from the external viewpoint, they tend to break down to the question of how to optimize the amount of value society derives from works of authorship. Copyright law’s asserted purpose is to ensure that resources whose highest-valued use would lie in the creation of works of authorship are not allocated elsewhere simply because the value of those works cannot be captured by their authors. Copyright therefore seeks to enable authors to capture the value of their works, by granting them exclusive rights to engage in certain types of activity through which that value tends to be realized. Even assuming agreement as to the broad desirability of this approach, properly calibrating these exclusive rights is extremely difficult and controversial at the margins. Copyrights prevent many valuable uses of extant works from being made, both designedly and because of transaction costs associated with their enforcement. Among these precluded valuable uses are creations of new works that somehow use extant works as raw materials in the act of creation. It is extremely difficult either to measure the costs of these foregone uses or to identify and measure the countervailing value of any works whose creation should be credited to a given marginal increment of exclusivity granted to authors.

If the external approach to copyright reaches an empirical impasse, the internal approach looks like sheer quicksand. Judges have had difficulty even deciding when something constitutes a “copy” of a given “work of authorship,” let alone pinning down the different ways in which such a work can be transformed. A “work of authorship” is an intangible entity, undefined by the statute, and capable of description on an indefinite number of levels of abstraction. The character of such a work can be altered by degrees along numerous dimensions, with resulting incremental and cumulative effects offering no clear points of demarcation by

which to distinguish when one “work” becomes a *different* “work.” Finally, people create and use works of authorship for highly varied purposes, and the enterprise of deciding which “purposes” of a work are its “real” ones seems unlikely to generate objective consensus.

Despite the problems described in the preceding paragraph, I want to suggest that the internal approach to copyright is not as hopeless as it might seem. I do not claim that it will ever suffice to answer all the hard questions in fully satisfactory ways or obviate the resort to external reasoning. My claim is more modest—that we can do a better job than we currently do of giving consistent meaning to the basic concepts of copyright doctrine, and that doing so can make some questions less hard than they seem now. The reason I think this is that all the problems of indeterminacy described in the above paragraph *apply equally to tangible objects*. Philosophers have quibbled for centuries over the meaning of identity in a world where matter and form are in constant flux. More importantly for our purposes, so have lawyers. The traditional property law dealing with mundane objects has faced the same problems of ineffable essence plaguing us in copyright, and has addressed them through what is called the doctrine of *accession*.

Understanding accession doctrine correctly can help us improve copyright doctrine in important ways. For substantial similarity, derivative works, and transformative fair use to work together as coherent doctrines, they need to be based on a coherent account of the nature of the “work” being protected. Our current neglect of this crucial problem is exemplified by the treatment of the second fair use “factor”—the nature of the copyrighted work—which is usually assigned some meaningless makeweight value “weighing” either for or against fair use and then largely ignored. In fact, identifying the nature of the copyrighted work is the crucial issue underlying all the others. It is meaningless to ask whether something has been “transformed,” or whether the “market” for it has been affected, without first positing what it was *originally*, and what sort of market the right to exclude is supposed to protect. This in turn requires us to disaggregate and distinguish between three types of value: value created by authors and embodied in original works; secondary value properly swept within the right to exclude even though it was not directly created by the author; and value that should *not* be swept within the author’s right to exclude.