

# RECALIBRATING COPYRIGHT: CONTINUITY, CONTEMPORARY CULTURE, AND CHANGE

## INTRODUCTION

*Craig Joyce\**

Each year, the University of Houston Law Center's Institute for Intellectual Property & Information Law (IPIL) brings together in Santa Fe, New Mexico, for the IPIL/HOUSTON National Conference, internationally recognized scholars to explore critical issues in the fascinating bodies of law that are copyright, patent, trademark, trade secret, and information law.

The goal of the conference is to provide a small-group, seminar-style discussion of a handful of papers by distinguished

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\* Andrews Kurth Professor of Law, University of Houston Law Center (UHLC); Co-Director, Institute for Intellectual Property & Information Law (IPIL); and Organizer/Co-Moderator (with Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeal for the Ninth Circuit), 2014 IPIL/Houston National Conference. This annual conference, as well as IPIL's many other scholarly and service projects throughout the year, are made possible by the continuing commitment of UHLC Dean Leonard M. Baynes; the support of my IPIL colleagues, Paul Janicke, Sapna Kumar, Jacqueline Lipton, Raymond Nimmer, and Greg Vetter; the hard work of IPIL's capable program director, Sinee Bielamowicz; IPIL's continuing partnership with *Houston Law Review* (whose editors-in-chief have attended each of the conferences since their founding); and the decades-long support of the international law firms and corporations represented on the Institute's distinguished Advisory Council. The conference also is the beneficiary of a generous gift from the Yokubaitis Family, including Ron Yokubaitis, University of Houston Law Center Class of 1968, his partner and spouse, Carolyn, their son, Sunday, UHLC Class of 2001, and their companies, Data Foundry (server colocation facilities), Giganews (the world's largest usenet network), and Golden Frog (Global Encrypted VPN service). To all of these, I express IPIL's deep appreciation.

scholars in a physical setting that is both inspirational and enjoyable. Where better than Santa Fe? The participants' in-depth conversations regarding the scholarship under consideration has proven over the years to be uniquely intimate and productive. In the present Symposium issue, *Houston Law Review* continues its highly productive collaboration with IPIL by publishing the fruits of the Institute's 2014 proceedings, "RECALIBRATING COPYRIGHT: CONTINUITY, CONTEMPORARY CULTURE, AND CHANGE," held on May 30–June 1, 2014.

While today copyright is much in the news owing to its importance to the American and world economies in the post-industrial era,<sup>1</sup> this year's conference focused primarily on copyright's yesterday, today, and tomorrow—specifically, the ways in which a body of law more than 300 years of age<sup>2</sup> somehow manages, in the face of rapidly evolving challenges, to engage with contemporary culture and yet, at the same time, both retain its fundamental character and adapt itself to new times and new technologies through a process of constant change.

The Presenters at the 2014 Conference represented the top tier of present-day scholars in U.S. and international copyright law: Olufunmilayo B. Arewa, University of California – Irvine School of Law; Wendy Jane Gordon, Boston University School of

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1. The numbers are staggering, as a report issued in late 2013 (covering data from 2009 through 2012) demonstrates. See STEPHEN E. SIWEK, ECONOMISTS, INC., COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT (2013) (prepared for the International Intellectual Property Alliance), available at [www.iipa.com](http://www.iipa.com). In 2012, the core U.S. copyright industries—those industries whose primary purpose is to create, produce, distribute, or exhibit copyrighted materials, including computer software, videogames, books, newspapers, periodicals and journals, motion pictures, recorded music, and radio and television broadcasting—counted for 6.48% of the U.S. Gross Domestic Product or, for the first time, more than one trillion dollars (\$1,015.6 billion). *Id.* at 2. Between 2009 and 2012, the core copyright industries achieved actual growth in excess of 4.73%, more than twice as fast as the rest of the U.S. economy. *Id.* The increase in their share of American trade has been similarly dramatic. In 2012, the U.S. core copyright industries achieved estimated foreign sales and exports of \$142 billion, leading such major export industry sectors as aerospace, agriculture, food, and pharmaceuticals and medicines. *Id.* It seems safe to predict that, having withstood the general recession that began in 2008, the importance of copyright to the U.S. economy will only grow in the years to come.

2. Copyright law began as a by-product of the newly invented printing press, which allowed large-scale reproductions of books for the first time, in 15th and 16th century England. Following a period of private-law monopoly benefitting the proprietors of the presses, Parliament enacted the first copyright legislation anywhere, the Statute of Anne, 8 Anne ch. 19, in 1710—hence, the reference in the text above to three centuries of Anglo-American copyright law. In the United States, Congress was empowered (but not required) by the Constitution in 1787 “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .” U.S. CONST. art. I, § 8, cl. 8. The first federal copyright act was passed, pursuant to the new constitutional authority, three years later. Act of May 31, 1790, 1 Stat. 124. For further detail, see, e.g., CRAIG JOYCE ET AL., COPYRIGHT LAW 16–28 (9th ed. 2013) (“History of Anglo-American Copyright Law”); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

Law; Jacqueline D. Lipton, University of Houston Law Center; Lydia Pallas Loren, Lewis & Clark Law School; and Thomas B. Nachbar, University of Virginia School of Law.

Serving as Conference Fellows were several rising stars in the field: Aaron Perzanowski, Case Western Reserve University School of Law; Jessica Silbey, Suffolk University Law School; and Marketa Trimble, UNLV William S. Boyd School of Law.

The workshop discussions at the 2014 Conference benefitted greatly from the expert guidance of the Honorable Alex Kozinski, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, as Co-Moderator, aided and abetted (to the degree possible) by the present author.

Jacqui Lipton leads off the proceedings with *Copyright and the Commercialization of Fanfiction*, an article that deftly combines all three threads of the conference theme, entertainingly exploring the ins-and-outs of traditional copyright doctrine in dealing with the cultural phenomenon of fanfiction, particularly in the age of new-online platforms for the creation of such works.

Funmi Arewa follows with *A Musical Work Is a Set of Instructions*, like Lipton examining the past, present and future of copyright, but this time in the context of music copyright infringement analysis, which Arewa contends seriously misconstrues the history, uses, and functions of music notation.

Lydia Loren continues the musical theme in *The Dual Narratives in the Landscape of Music Copyright*, limning the consequences of different regulatory approaches to the music industry adopted by agencies, private actors, and the courts, in the process offering insights into the costs and benefits of each approach while describing the shifting landscape of music licensing.

Next, in *Rules and Standards in Copyright*, Tom Nachbar redirects our attention from specific industries and practices to more general and normative considerations concerning attempts to recalibrate copyright law over time, and to how current and future reform proposals should be judged regarding their utility to the copyright system overall.

Finally, Wendy Gordon essays in *The Core of Copyright: Authors, Not Publishers* to pull copyright back from the brink posed for it by recent judicial decisions and to restore to our understanding of this body of law the centrality of its constitutional core: not as an unwieldy system of potentially limitless rewards for dissemination, standing alone, but rather as a sound programme designed to further “Progress . . . for limited Times” through the incentivization of creativity as the core of copyright.

The banquet is prepared. Here, before you begin its consumption in earnest, are impressionistic summaries of the articles to whet your appetite.<sup>3</sup>

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#### COPYRIGHT AND THE COMMERCIALIZATION OF FANFICTION

*Jacqueline D. Lipton*

While fanfiction communities existed before the advent of digital technologies, the rise of the Internet created a space for the explosion of fanfiction based on popular television shows, movies, and books. Courts have not yet been asked to rule on copyright questions related to fanfiction communities, although social norms and the attitude of market players suggest that these activities should be classified as fair use, provided they are noncommercial. Even some commercialized works that originated as fanfiction have been tolerated by copyright holders without threats of legal action. The various commercial derivative works that originated as *Twilight* fanfiction are good examples of this: for instance, the bestselling *Fifty Shades of Grey* and *Gabriel's Inferno* trilogies. Recently, Amazon.com has released a new platform for fanfiction authors to commercialize their works and sell them via its Kindle Worlds program. Kindle Worlds relies on licenses with copyright holders to create derivative works based on their protected content. This article examines the commercialization of fanfiction generally and its implications for the derivative works right and the fair use defense under copyright law, with particular reference to Amazon's new fanfiction initiatives.

#### A MUSICAL WORK IS A SET OF INSTRUCTIONS

*Olufunmilayo B. Arewa*

A musical work is a set of instructions that typically consists of music notation, which includes notes, and in some instances, musical lyrics. Music copyright infringement cases do not appropriately take account of the nature of music notation as a set of instructions. This leads to analysis in infringement cases that seriously misconstrues the history, uses, and functions of music notation. This misreading is an historical relic of the ways in which copyright has been applied to music. Copyright was first applied to words and was initially visual and textual in

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3. Following the five articles, readers will find a special bonus from the Fellows, a dialogue among them titled "Afterword: Conferring About the Conference."

orientation. Since the earliest copyright laws, copyright subject matter has progressively expanded from granting rights to protect written expression to other artistic arenas. Copyright law has, however, consistently undervalued the art of performance while favoring the written expression of music. This has had a profound impact on varied musical forms, particularly as traditional European art music has been progressively displaced by syncretic African-based music as a key influence in the realm of popular music. The emphasis on writings has disfavored some plaintiffs who have sought greater protection for their own performance practice, while at the same time disfavoring some defendants whose creative, non-notated performance practice should be allowed a greater scope for their borrowings from others. The author suggests that, going forward, courts interpreting infringement in music cases must look beyond visual-textual aspects and take better account, contextually, of how contemporary music actually is perceived and practiced.

#### THE DUAL NARRATIVES IN THE LANDSCAPE OF MUSIC COPYRIGHT

*Lydia Pallas Loren*

Music is an integral part of culture in the United States. Not only do individuals enjoy both listening to and performing music created by others; increasingly, individuals use music created by others to express themselves, their moods, and their emotions. Whether by selecting cellphone ringtones to identify their own personality or by creating playlists to share with friends, individuals use music created by others to communicate about themselves and their relationships. Much, however, has changed in the music industry over the past two decades. While combatting the meteoric rise of the peer-to-peer filing sharing networks, a multitude of music industry players fought vigorously to capture revenue streams as new business models emerged, offering consumers multiple new ways to experience and use music. As a result, the fragmented copyright rights that characterize the music industry have taken on new layers of complexity. While some of this new complexity stems from acts adopted by Congress, a more significant source of the regulatory complexity arises from: (1) new lengthy administrative rules issued by the Copyright Office relating to a variety of aspects of the music industry, (2) model licensing agreements established by private actors and then sanctioned by the Copyright Office, and (3) court rulings concerning impermissible private licensing arrangements under the antitrust decrees that govern the two major private performing

rights societies, ASCAP and BMI. This article seeks to explore the consequences of these different regulatory approaches in the music industry, offering insights into the costs and benefits of each approach while describing the shifting landscape of music licensing.

#### RULES AND STANDARDS IN COPYRIGHT

*Thomas B. Nachbar*

In the last decade, calls to recalibrate the copyright system's mix of incentives have become nearly ubiquitous in copyright scholarship. Most such proposals start from the point of identifying a failure (systemic or market) and then offer a reform that compensates (and, hopefully, remedies) that specific failure. But, starting from the principle that copyright should provide optimal incentives to create and ending with a particular failure (and its cure), most reform proposals fail to distinguish between the purposes of copyright writ large and the purposes of the legal system that implements copyright. While copyright encourages creative work, the copyright system does so through the limited means of allocation, both by providing a rule for initially allocating copyrights and by facilitating reallocation of those rights. By focusing on the purposes of copyright rather than the purposes of the copyright system, many reform proponents underestimate the systemic cost of their proposals. This paper examines the problem in the context of the copyright system's use of rules and standards to effectuate its purpose. As the paper demonstrates, rules and standards have varying utility both for making initial allocations of copyrights and for facilitating reallocations of those rights. A better understanding of how the copyright system uses rules and standards—and honestly confronting the limits of both—can inform present and future reform proposals.

#### THE CORE OF COPYRIGHT: AUTHORS, NOT PUBLISHERS

*Wendy Jane Gordon*

Gordon argues that copyright statutes can be justified only by reference to their ability to further “Progress” through incentivizing (or, perhaps, rewarding) the creation of new works of authorship, and that, therefore, a contested copyright provision should not be justifiable by reference to any encouragement the provision would offer to noncreative dissemination, standing alone. Despite the Supreme Court's recent decisions in *Eldred v. Ashcroft* and *Golan v. Holder*, this contention still matters. First,

the Supreme Court in those decisions did not fully cut off its line of retreat, and retreat may be necessary because ever-more-outrageous statutes may be enacted now that creativity has been de-centered. Second, our top-heavy, absurdly complex statute needs an overhaul; policymakers might make good uses of a gyroscope with some clear direction and simplicity. Common-law tort models are an option for providing such guidance. Common-law models suggest that noncreative dissemination, standing alone, cannot justify imposing on the public a duty-not-to-copy. That is because of the constitutional requirement that a copyright (and its correlative duties) can last only for “limited Times.” If the rights for a work begin once and once only, those rights will be limited in duration by the common-law logic of proximate cause. Proximate cause, in turn, has links to an economic logic of decreasing incentives, and to a moral logic of attenuated responsibility. By contrast with creation, which for any particular version of any particular work can happen only once, dissemination can recur continually. If the rights can be restarted whenever a category of disseminator requires incentives, copyright could last forever. But because “limited Times” is a central feature of copyright, the rights attached to a creative work must have reference to a nonrecurring behavior. Given copyright’s history, that nonrecurring behavior must be the act of creation—the core of copyright.

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There is, of course, much more to say. But the contributors to this year’s Symposium already have said it. For detailed, thoughtful and, yes, fascinating consideration of the foregoing issues, read on!