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Copyright and Intermediate Users' Rights

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Essay: Copyright and Intermediate Users' Rights

by Jane C. Ginsburg*

The impending "Digital Millennium" has amplified the assertion of users' rights in U.S. copyright law. Copyright has been reimagined as a "law of users' rights"[1] whose acolytes caution copyright owners not to stand as piggish impediments to the progress of learning and culture in the Digital Age.[2] Proponents advance a variety of arguments in support of a user rights construct of copyright law, from the historical to the philosophical to the pragmatic. I propose to address some of these. But first it is important to specify what I mean by "users' rights" in U.S. copyright law today.

User rights in fact come in several guises, some of them sheltering commercial self-interest. In the past, I have analyzed "consumptive" end-user claims to personal enjoyment and convenience through private copying.[3] In this essay, I would instead like to consider some examples of intermediate entrepreneurs' claims of right to free exploitation of copyrighted works. One concerns intermediaries that redisseminate copyrighted works without their authors' or proprietors' permission, notably remote radio broadcasts, and articles on events of current news interest. Another concerns works that spin off from a prior work's popularity. What underlies these claims and, for me, binds them to consumptive user rights demands, is their common invocation of a public interest in access to information and culture. In the former instance, the third party, by enlarging the works' audience, arguably is stimulating public debate on matters of public concern. In the latter case, the unauthorized user is offering new items of popular culture to a public whose demand for new variations on tried and true works is increasingly insatiable. So far, U.S. courts have not proved especially hospitable to assertions of the rights of intermediate users, but it is conceivable that the rhetoric employed to advance the cause of end-users may come to erode authors' protections against intermediaries as well.

Let us start with the asserted public interest in access to learning and culture. Were I to state that it appears to be an interest that users demand that authors subsidize, I would be betraying an author-centric view of copyright. After all, one might advance the opposite contention, that authors' rights take a bite out of the public's pie, and that the size of the author's slice should be shaped by the public's claims. In other words, users' rights are not an exception to copyright; copyright is the exception to the public's general right to enjoy works of authorship.

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1. *See* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991).

2. *See, e.g.*, Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134; James Boyle, *Overregulating the Internet*, WASH. TIMES, Nov. 14, 1995, at A-17; Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway*, 13 CARDOZO ARTS & ENT. L.J. 345 (1995).

3. *See* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997).

This is not a new notion in Anglo-American copyright law. Lord Macaulay once pronounced copyright a "tax on readers for the benefit of authors," and therefore "exceedingly bad."[4] (He also, however, acknowledged the need to "liberally remunerate" authors in order to ensure a "supply of good books," and conceded that copyright was the "least objectionable" means to this goal.[5])

This brings me to the historical articulation of the author-user relationship in copyright. Let us suppose that "in the beginning was the Reader." And the Reader, in a Pirandello-esque flash of insight, went in search of an Author, for the Reader realized that without an Author, there could be no Readers. But when the Reader met an Author, the Author, anticipating Dr. Johnson, retorted, "No man but a blockhead ever wrote except for money."[6]

And the Reader calculated the worth of a free supply of blockhead-written works against the value of recognizing the Author's economic self-interest. She concluded that the author's interest is also her interest, that the "public interest" encompasses *both* that of authors and of readers. So she looked upon copyright, and saw that it was good.

This, in essence, is the philosophy that informs the 1787 U.S. Constitution's copyright clause: "Congress shall have Power . . . to promote the Progress of Science by securing to Authors . . . for limited Times the exclusive Right to their Writings . . . ."[7] The means to advance learning is by *securing* authors' exclusive rights. Note the word "securing": it implies reinforcement of a preexisting right, not creation of a new one. James Madison's endorsement in the Federalist Papers of the Constitutional copyright clause confirms this understanding, for he adverted to copyright's status as a right at common law – the closest thing in U.S. jurisprudence to an enforceable natural right. Madison also declared that "the public good fully coincides . . . with the claims of individuals."[8] Many pre-constitutional laws of the thirteen new states also stressed the natural justice of authors' claims, and equated the public benefit with enforcement of authors' rights.[9]

This is not to deny the existence of a strong streak of copyright skepticism in U.S. jurisprudence. Indeed, the incentive rationale for copyright invites its own rebuttal. For one thing, we may have an ample supply of "blockheads" – poets who burn with inner fire, for whom creation is its own reward, or for whom other gainful employment permits authorial altruism. These creators do not need the incentive of exclusive rights in order to produce works of authorship. As to this group of authors, then, copyright is a wasteful windfall. Moreover, even if the incentive rationale justified *some* copyright protection, we may be allowing *too much*. That is, the scope of copyright protection – particularly the derivative works right – may be more generous than is needed to spur initial creativity.

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4. Thomas B. Macaulay, Speech before the House of Commons (Feb. 5, 1841), *in* T.B. MACAULAY, PROSE AND POETRY 733-34 (G.M. Young ed., 1952).

5. *Id.*

6 Samuel Johnson, *in* BARTLETT'S FAMILIAR QUOTATIONS 316 (Justin Kaplan ed., 16th ed. 1992).

7. U.S. CONST. art. I, § 8, cl. 8.

8. *See* THE FEDERALIST NO. 43 (James Madison).

9. *See, e.g.*, Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y 11 (1975).

In the abstract, this approach may have some appeal, but it also has considerable practical disadvantages. For example, the scope of a work's protection could not be known *ex ante* (thus permitting predictability in licensing), but would only be discovered in the course of an infringement proceeding, in which the court would address the question whether *this* incentive was necessary to create *this* work. Obviously, it also is rather difficult to project how one would show whether or not copyright was a necessary incentive in a given case. Then-Professor (now Justice) Stephen Breyer famously wrote that the case *for* the copyright incentive rationale has not really been made[10] – but neither, I would suggest, has the case *against* it. It depends who has the burden of proof: authors to justify copyright, or users to justify non-protection.

If the incentive rationale fails to persuade, let us consider supplemental rationales for authors' rights. A principal alternative, the misappropriation or unjust enrichment rationale, also has shortcomings. Here the argument would be: Regardless of the incentive that copyright may or may not have provided this author, this *user* is getting something for nothing, and therefore has misappropriated something of value. The problem here, as before, is the argument's circularity. Getting something for nothing is wrongful only if the "something" was subject to claims of private right. In effect, this contention "proves" the existence of the property right by pointing to third parties' desire to "steal" it.[11] But, of course, there's no theft if there's no property.

What's left? The original common law basis of copyright, rooted in the author's natural right to the fruits of her intellectual labor. This basis justifies authors' moral claims as well as economic rights – at least up to a point. That point may be where second authors add *their* intellectual labor to the first author's contribution. This is one source of the claims of "transformative" users – users who copy from other works in order to build on them in the creation of an independent work, notably one of criticism or of commentary. In U.S. "fair use" doctrine, "transformative" uses hold a strong claim to exemption from liability for infringement.[12]

Arguably, transformative user claims should sweep more broadly, to exempt all third party derivative works, such as dramatizations of literary works. After all, to adapt the novel to a play or a film, the adapting author would have had to invest considerable intellectual labor and other resources. Moreover, referring back to the "supply of good books" rationale, the public will have more works to enjoy or to learn from if more authors may expand on their predecessors' works.

The response to this kind of contention, in positive law, is that the novelist's copyright includes the right to make derivative works;[13] that the adaptation invades the market for the derivative works the novelist could create or license, thereby undermining the package of incentives the copyright affords; the adapting author

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10. *See* Stephen Breyer, *The Uneasy Case For Copyright*, 84 HARV. L. REV. 281 (1970).

11. *Cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903) (Holmes, J.) ("That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.").

12. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

13. *See* 17 U.S.C. § 106(2) (1997).

would be getting the benefit of a derivative works license, without paying the price. Admittedly, one might say the same thing about transformative uses that criticize or comment on the novel, but there, the U.S. Supreme Court has indicated that there is "no market" for critical comment.[14] If the first author's property right is coextensive with the market for her works, and if in this case there is "no market," then the adapting author has not invaded any right of control that the author enjoys. Where the transformation does not comment or criticize, however, we are back in the realm of the author's direct and derivative markets; then the addition of a second author's labor does not suffice to justify the unlicensed derivative work.

This brings me to the second of the user rights examples I mentioned – the unlicensed creation of a work that "spins off" and capitalizes on the popularity of a prior work. In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*,[15] the producers of the television show *Seinfeld* brought an infringement claim against the publisher of the "Seinfeld Aptitude Test," a trivia quiz book about the phenomenally popular show. The publisher asserted a fair use defense, raising two principal grounds. First, the publisher asserted that the quiz book was a work of commentary that enabled readers to participate in and deconstruct television culture. Defendant touted the quiz book "as a work 'decod[ing] the obsession with . . . and mystique that surround[s] 'Seinfeld',' by 'critically restructur[ing] [*Seinfeld's* mystique] into a system complete with varying levels of 'mastery' that relate the reader's control of the show's trivia to knowledge of and identification with their hero, Jerry Seinfeld.'"[16] Defendant further contended that the quiz book "'is a quintessential example of critical text of the TV environment . . . expos[ing] all of the show's nothingness to articulate its true motive forces and its social and moral dimensions.'"[17] Second, the defendant stressed that Jerry Seinfeld had repeatedly declined to create or authorize a trivia quiz book: since he was not exploiting this submarket, defendant contended that there could be no market harm to plaintiff if someone else did.

The court rejected both grounds. Dispensing with the claim that the quiz book was a transformative commentary, the court found that the quiz book's purpose "is to repackage *Seinfeld* to entertain *Seinfeld* viewers . . . not to expose *Seinfeld*'s 'nothingness', but to satiate *Seinfeld* fans' passion for the 'nothingness' that *Seinfeld* has elevated into the realm of protectable creative expression."[18] In other words, the defendant's use was more parasitic than transformative; defendant did not contribute sufficient intellectual labor. The court suggested that had the quiz questions and answers attempted to parody the show, the fair use defense might have been on firmer ground.

This feature of the *Castle Rock* decision illustrates the delicacy of a court's task in cases alleging unlicensed spin offs from a plaintiff's popular work; how does one tell the difference between an unexcused commercial exploitation that violates the derivative works right, on the one hand, and a fair-use qualifying commentary on the

14. *See Campbell*, 510 U.S. 569.
15. 150 F.3d 132 (2d Cir. 1998).
16. *Id.* at 142 (alterations in original).
17. *Id.* (alteration in original).
18. *Id.* at 142-43.

other? The situation may have seemed clear in the *Seinfeld* case, but consider another claim involving the same defendant, currently pending before the Second Circuit Court of Appeals.[19] There, the work at issue is a guide to the television show *Star Trek*, promoted as containing everything the uninitiate needs to know about the show before taking a "trekkie" out for a date. The book summarizes plot lines and exposes characters, often in a bantering tone, with ironic asides. Is the sarcasm of its presentation sufficient to range the work as a commentary with a strong claim to fair use? On the one hand, ponderous academic tomes on high art are not the only beneficiaries of the fair use exception; humorous analysis of popular culture may also qualify. On the other hand, we should be leery of a rule that all a second-comer need do is lace its version with a few jokes, to turn an infringing derivative work into a fair use.

Now let us turn to the *Seinfeld* defendant's second ground for a finding of fair use: Where the author has refused to exploit a particular market niche, third parties should be permitted to occupy that market, since there is no market harm to the author, and the public will benefit from the availability of a new work that the author would not supply. This contention might seem attractive under the "supply of books" rationale, especially since the third party is not competing with the author for that market niche. In fact, however, the argument is quite pernicious, and the Second Circuit was correct to reject it.

First, Jerry Seinfeld testified that he had repeatedly declined to create or license a trivia quiz book because he wished to devote his creative efforts to the television show; he feared that the writing or supervision of a quiz book that met his standards of quality would distract him from his principal artistic goal.[20] Copyright entitles authors to make the creative choices regarding what additional, related, works to undertake, but the *Seinfeld* defendant's argument would have had the perverse effect of forcing authors to fill every conceivable market niche in order to forestall unsupervised third parties' preparation and dissemination of the very kinds of works the authors feared would not meet their artistic standards. Second, not only does this result disfavor authors, it also ultimately frustrates the "supply of *good* books" goal: an ample supply of books to which the author could not properly attend is not a happy substitute for a smaller supply of books that earn their author's approval.

Finally, let us take up the first example posed at the outset of this article: the user rights claims of third parties who increase the audience for a copyrighted work by redisseminating it to a new or larger subset of the public. These claims are not new to digital media; for example, radio broadcasters once resisted paying public performance royalties on the ground that the broadcasts served as free advertising promoting the purchase of phonorecords of the musical composition.[21] In the past,

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19. Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998), *appeal pending*.

20. *See* Castle Rock Entertainment v. Carol Publ'g Group, Inc., 955 F. Supp. 260, 263 (S.D.N.Y. 1997).

21. *See* M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923); *see generally* Bernard Korman & I. Fred Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y U.S.A. 332, 334-48 (1986) (discussing the development and protection of performing rights in music).

however, the defense that "I did you a favor by bringing your work before so many more people" has not rallied the support of the courts.[22] Does the protest become more appealing when the media of redissemination is digital? Certainly this media has the capacity to publicize the work most effectively. Nonetheless, because the author is not being compensated for the redissemination, one might conclude that the "favor" of redissemination is not to be fervently wished for.

In a recent decision relating to this problem, the Second Circuit rejected the fair use defense advanced by the operator of a "Dial Up" service.[23] The service allows subscribers to listen in real time by telephone to remote radio broadcasts. The court found no transformative value added by the service to the broadcasts; rather, the service simply transported the remote radio programming to the local user via telephone lines.[24]

In making the programs available to remote users, the service may have created a new market for the programs, since, previously, the programs' market was purely local. Thus, the service was not competing with the copyright owner's traditional markets. The remote market was arguably a windfall, whose presence could not have entered into the copyright owners' calculus of economic incentives. In addition to the arguable irrelevance of the incentive rationale in this case, the supply of good books argument might favor the service, since it is making the programming available to more people. Moreover, the authorial integrity problem in the *Seinfeld* case is not present here; the defendant is capturing the programs in their entirety, without changes; it is not seeking to make a new and different work that builds on the programs.

But if fair use exempts nontransformative redissemination of copyrighted works to new audiences generated by new modes of exploitation, then what is left of copyright when the new modes of exploitation rival the old? Here one can appreciate the importance of the doctrine that technology-driven new markets nonetheless come within the author's exclusive right. We can also anticipate that the persistence of this doctrine, already challenged in some quarters (and weakened by the Supreme Court in the "Betamax" case[25]), will determine the fate of authors' rights in a world of increasingly clamorous user rights claims.

I will conclude with a hypothetical, based on a case recently filed in federal district court in California. Defendant website operator posts, without authorization, hundreds of articles from the *Los Angeles Times* and the *Washington Post*, and invites websurfers to comment on the posted articles. Plaintiff newspapers contend that

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22. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

23. *See* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998).

24. "Webcasting," through which local radio programming is retransmitted via the Internet, achieves a similar, albeit more widespread, result. Webcasts are not exempt from liability under section 111(a), although they may benefit from a statutory license for transmission of performances of phonograms under new section 114(d)(2). There is no similarly specific exemption for webcast transmissions of the musical compositions recorded on the phonograms.

25. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (majority held time-shifting of free broadcast television programs to be fair use because this home taping did not harm the copyright owners' market for the work; the dissent stressed that the majority did not adequately consider the impact of time-shifting on the video recorder's creation of *new* markets for broadcast works).

defendant's site competes with theirs for web advertising and for readership. Defendant responds that the fair use doctrine and the First Amendment protect his postings because he is not only bringing the articles to a broader public, he is contributing to public debate by encouraging readers to respond to the postings.[26]

Under traditional fair use principles, the defense should not prevail here: the website operator is posting the entire text of the articles on a commercial website,[27] and is adding no commentary of its own, although it is inviting that of others. Moreover, if defendant is seeking to be a forum for third-party commentary on the articles, it is not necessary to reproduce the articles; in the digital environment, a hyperlink to the *Los Angeles Times* and the *Washington Post*'s webpages should suffice. It will be most interesting, therefore, to see whether the court condemns the defendant's enterprise as contrary to copyright, or whether the court entertains the fair use defense. The latter event would herald a shift in copyright analysis from enforcement of exclusive rights, to promotion of "access" to works of authorship, regardless of (or despite) the author's own plans for the dissemination of the works.

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26. *See Newspapers File Copyright-Infringement Suit Against Web Site* (visited Nov. 30, 1998) <http://www.freedomforum.org/technology/1998/10/7copyright.asp> .

27. Although Free Republic, the website involved in this copyright infringement action, claims that it is a noncommercial website, it is, nevertheless, willing to post ads and banners for other websites (and indeed contains several such banners). *See Free Republic* (visited Oct. 22, 1998) <http://www.freerepublic.com/about.htm>.