

Copyright Law in America: The Danger of Blurred Boundaries in the Modern Era

Introduction

The influx of technology in modern society has blurred the limits of copyright law in America. Protecting copyrighted property seemingly “incapable of confinement or exclusive appropriation” has been a difficult task since the birth of this nation.¹ However, to control the increased access to information that the Internet provides and the increased ability to transfer that file-sharing software provides, “new rules will emerge to govern a wide range of phenomena that have no clear parallel in the nonvirtual world.”² While courts engage in redrawing the lines that will restrain copyright law in the modern age, confusion proliferates. The boundaries blurred by technology enable people to protect property in ways that undermine the goal of copyright law.³

Original purpose of copyright law

Copyright law was originally intended 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.”⁴ Copyright protection is traditionally justified by the assumption “that more protection for authors and media entrepreneurs increases their market incentives to bring us more creations.”⁵ Locke similarly justified copyright protection with the thesis that when

¹ Jefferson, *Letter to Isaac McPherson*, at 71, col. 1.

² Johnson & Post, *Law and Borders: The Rise of Law in Cyberspace*, at 75, col. 1.

³ See Complaint, *Warner Bros. Entertainment v. RDR Books*, at 65, col. 2.

⁴ U.S. CONST. art. 1, § 8; e.g., Geller, *Beyond the Copyright Crisis: Principles for Change*, at 120, col. 1 (“Copyright is supposed to protect cultural creations that are hard to fence and easy to share.”).

⁵ Geller, *Beyond the Copyright Crisis: Principles for Change*, at 121, col. 1.

someone “mixes his labour with, and join[s] to it something that is his own . . . [it] thereby [becomes] his property.”⁶

However, this protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁷ The limits on copyright protection were created to stabilize the delicate balance between encouraging creation by allowing original artists, authors, and inventors to reap the benefits of their labor while not excessively restricting other artists, authors, and inventors from engaging in the same innovation. However, grappling with modern technology the U.S. government has tipped these scales with the weight of too much protection, which suppresses people who might otherwise create new material inspired by copyrighted works.⁸

Modern use of copyright law that promotes its original purpose

The rapidly rising popularity of free file-sharing software programs, such as Napster, Grokster, Swaptor, and StreamCast, that blatantly encourage the infringing use of music, movies, software, and other copyrighted works presents a major challenge to modern copyright law.⁹ In *MGM Studios v. Grokster*, the United States Supreme Court took an important step towards establishing distinct boundaries in the modern era of copyright protection.¹⁰ In this case, the

⁶ Locke, *SECOND TREATISE ON GOVERNMENT*, at 78, col. 1.

⁷ 17 U.S.C. § 102, at 4, col. 1; e.g., *Online Policy Group v. Diebold, Inc.*, at 61, col. 2 (explaining that an idea is not copyrightable).

⁸ See U.S. Copyright Office, *How Long Copyright Protection Endures*, at 127, col. 2; Complaint, *Warner Bros. Entertainment v. RDR Books*, at 65, col. 2; Nocera, *A Tight Grip Can Choke Creativity*, at 79, col. 2.

⁹ *MGM Studios v. Grokster*, at 43, col. 1; McKenna, *Where Digital Music and Law Collide*, at 118, col. 2.

¹⁰ *MGM Studios v. Grokster*, at 44, col. 2.

Court determined that a software company can be held liable for the copyright infringement of its users, if the Court finds “an affirmative intent that the product be used to infringe . . . [that] overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.”¹¹

Yet, the decision in *MGM Studios v. Grokster* clarified the boundaries of copyright law in the modern era less than many bystanders believe.¹² Grokster and StreamCast not only knew that “users employ[ed] their software primarily to download copyrighted files” but also “clearly voiced the objective that recipients use [these programs] to download copyrighted works.”¹³ StreamCast even flaunted its goal: “to get in trouble with the law and get sued [in order to] get in the news.”¹⁴ The overwhelming evidence against these companies made it difficult for them to hide beneath the fog of the modern technology that they used to accomplish their offenses.

If the Court ruled differently in this case, copyright law’s goal of encouraging creation through copyright protection would have been completely undermined. Without copyright protection against free file-sharing software programs invention would be discouraged, because an artist’s work would not generate a profit. Starving artists would not be able to afford food or additionally pay for expensive recording equipment. Artists, like Radiohead, that have already earned enough money to fund their creations allowing them to tell fans to pay what they want for their album are the minority.¹⁵ Further, pursuing copyright enforcement against individual users

¹¹ *Id.* at 42, col. 2.

¹² *Contra* Recording Industry of America, *Piracy Online*, at 125, col. 1 (arguing that *MGM Studios v. Grokster* established “legal and moral clarity” concerning copyrighted music in the modern era).

¹³ *MGM Studios v. Grokster*, at 37, col. 2.

¹⁴ *Id.* at 38, col. 2 (quoting Interview with Chief Technology Officer of StreamCast).

¹⁵ Pareles, *Pay What You Want for This Article*, at 134, col. 1; Radiohead, *Shopping Cart*, at 129, col. 2.

would be time consuming and not entirely effective.¹⁶ While *MGM Studios v. Grokster* clarified a segment of the boundaries of copyright protection in the modern era, it was an uncomplicated enforcement of the traditional goal of copyright law.

Judiciary's role in extending copyright law beyond of its original purpose

Cases without evidence of a blatant goal of copyright infringement present a more difficult dilemma for courts attempting to delineate the murky boundaries of copyright law in the digital millennium. In *Warner Bros. Entertainment Inc. v. RDR Books*, Rowling, the author of the popular *Harry Potter* books, accused the defendant of infringing on her copyright for attempting to publish a book entitled "*Harry Potter Lexicon*."¹⁷ However, the *Harry Potter Lexicon* was "merely a print version of the free-of-charge *Harry Potter* fan website located at www.hp-lexicon.com."¹⁸

Warner Bros. Entertainment and Rowling's impression that the website that posted the same content that would appear in the *Harry Potter Lexicon* did not infringe their copyright reveals the uncertainty that technology has cast upon modern copyright law. Warner Bros. Entertainment and Rowling were misguided in distinguishing the print version of the *Harry Potter Lexicon* and "the free-of-charge *Harry Potter* fan website" from which the material for this book was taken.¹⁹ Their confusion resulted from their misplaced focus on the ability of fans to freely access the website. Yet, the publisher of the website still received compensation for advertising similar to the compensation RDR Books will receive for publishing the print version,

¹⁶ See Freed, *Brainerd Woman Loses Music Download Case*, at 126, col. 1 (discussing award of \$220,000 in damages to record companies for Thomas's illegal download of twenty-four songs).

¹⁷ Complaint, *Warner Bros. Entertainment Inc. v. RDR Books*, at 65, col. 1-2.

¹⁸ *Id.*, at 65, col. 2.

¹⁹ *Id.*

Harry Potter Lexicon.²⁰ The potential for higher profit from the print version should not distinguish it from the virtual version of the lexicon.

Despite the confusion about the application of copyright law to the Internet, neither the website nor RDR's book version constitute a copyright infringement. Copyright law "absolutely allows anyone to create something new based on someone else's art" through the doctrine of fair use.²¹ Whether these works are fair use depends on "the purpose and character of the use, . . . the nature of the copyrighted work, . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole, . . . and the effect of the use upon the potential market for or value of the copyrighted work."²² The purpose of publishing *Harry Potter Lexicon* was most likely commercial, since profit motivates publishers that want to stay in business. However, the nature of RDR's book diminishes this factor. *Harry Potter Lexicon* was created as a supplement not a replacement to the original novels. Therefore, RDR's accompaniment would not diminish the market for the original *Harry Potter* series. In fact, publication of a lexicon accompaniment could bestow a greater understanding to fans of the *Harry Potter* books, which would excite them for the future release of more books written by Rowling.²³ RDR's book also does not use a substantial portion of the original *Harry Potter* series since "the book . . . will dispense with the lengthy quotations, illustrations and screen shots that have been running on the website."²⁴ Therefore, *Harry Potter Lexicon* does not infringe on Warner Bros. Entertainment and Rowling's copyright.

²⁰ *Rowling's Right to Sue for Potter*, at 96, col. 2.

²¹ Nocera, *A Tight Grip Can Choke Creativity*, at 79, col. 2-80, col. 1; *accord.* 17 U.S.C. § 107, at 4, col. 2.

²² 17 U.S.C. § 107, at 4, col. 2.

²³ *Rowling's Right to Sue for Potter*, at 96, col. 2.

²⁴ *Id.*

Preventing RDR from publishing *Harry Potter Lexicon* would extend the scope of copyright law beyond its purpose. Copyright was originally intended to promote creation, but the protection given to Warner Bros. Entertainment and Rowling only hinders the legitimate innovation of other authors. Rowling's copyright should not be expanded to prevent fair use just because she had the intention to create a similar companion book in the future.²⁵ If however, Rowling had created her own accompaniment to the *Harry Potter* series, a separate copyright for that accompaniment would have protected her from RDR's allegedly infringing *Harry Potter Lexicon*.

Congress's role in extending copyright law beyond its original purpose

The extension of the duration of copyrights has also destabilized the balance of copyright protection in favor of protecting artists which stifles the invention of others. Before 1978, copyright protection survived only twenty-eight years from the date it was registered with an option to renew during the last year of protection.²⁶ However, encouraged by the lobbying of billion-dollar corporations, such as Disney, which wanted to continue reaping profits from Mickey Mouse for another century, copyright protection now endures for seventy years after the author's death.²⁷ Legislation tripling the duration of copyright protection burdens "creators of derivative works [that once had] the greatest latitude . . . where the works that they would employ [were] in the public domain."²⁸ Since it takes longer for copyrighted works to enter the public domain, artists that want to reinvent old material have less opportunity. This inhibits the very creation that copyright law was intended to foster.

²⁵ Complaint, *Warner Bros. Entertainment Inc. v. RDR Books*, at 65, col. 1.

²⁶ U.S. Copyright Office, *How Long Copyright Protection Endures*, at 127, col. 2.

²⁷ *Id.*, at 127, col. 1-2; Nocera, *A Tight Grip Can Choke Creativity*, at 79, col. 2.

²⁸ Leibowitz & Margolis, *Seventeen Famous Economists Weigh in on Copyright*, at 132, col. 2.

Conclusion

Uncertainty regarding copyright law in the modern era has resulted in a need for the government to set focused boundaries. The judiciary and Congress should resist the temptation of extending copyright protection beyond its original goal of encouraging creation while not stifling invention at the same time. Courts should take decisive action through decisions such as *MGM Studios v. Grokster* to show that the boundaries of copyright law remain static despite modern advances. In addition, Congress should resist the siren's call of lobbyists who want to lengthen the duration of copyright protection. Until the government clarifies copyright law in the modern era, people like Warner Bros. Entertainment and Rowling will use blurred boundaries to their advantage to achieve protection not encompassed by the goal of copyright law endorsed by the Constitution.