

The Drama of Copyright Law

By Corey Field

Sometimes experiencing history first hand makes it come alive and informs our present-day experiences. As I was pondering what could possibly be the “most important” issue in copyright today, I went out for my usual weekend five-mile run, through one of L.A.’s beautiful canyon roads, to help clear the mind and answer the question. As I neared the end of that physically challenging yet meditative routine, two unexpected things happened that suggested an answer.

First, and most unexpectedly, as I ran up the canyon some fire engines went by, sirens blaring. I could see that there was no fire, but they were dealing with a medical emergency. Further up the road, around a bend, a woman was standing in front of her house looking down the canyon,

LAST IN A TWO PART SERIES

This article continues part one of “Drama in Copyright Law,” which appeared on May 24.

it turned out, she was one of the most famous actresses of the 1960s and 1970s, still radiantly beautiful, and absolutely not someone whom I would have expected to be anxious to speak with me, especially in my then sweaty “end of the marathon” condition.

After assuring her there was no fire, and blurting out “I love your films,” I continued the run, and came across a garage sale. Still star-struck, I decided to end the run and investigate the items for sale. Then, the second surprise of the day revealed itself as if an answer were calling to me from the distant past: in a wicker basket were several small paper scrolls, turned brown with age and brittle. They were antique piano rolls from a player piano, over 100 years old, labeled as having been manufactured at some distant past time by the Apollo Co. A look of astonishment took over my face, more so than even the encounter with the glamorous star.

To a copyright lawyer, these modest, frail, dusty paper scrolls were a piece of important copyright history. The purveyors of the garage sale must have thought I was deranged to react so visibly to these modest artifacts, which they were selling off for \$1 each. But in 1908, these very piano rolls, manufactured by the Apollo Co., were the very beginning of the century-long battle between copyright and new technology that still rages today, as described in the Supreme Court case *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

In *Apollo*, the issue was whether the holes punched in paper on the piano rolls were an infringement of the songwriter’s copyright. At that time, a musical composition’s format was the usual music notation and words on paper, and of course anyone who copied that notation without permission would be a copyright infringer. But what about the piano rolls, which contained no musical notation, but only rectangular holes in a paper roll? When that piano roll was used in a player piano, the music of the song could be heard, but did the holes in a paper roll constitute an unauthorized copy of the sheet music? In 1908, this was a knotty question of copyright law and new technology. The Supreme Court (including Oliver Wendell Holmes) decided that the piano rolls did not infringe copyright in the songs themselves, concluding that the piano rolls were “part of a machine” but not “copies” within the meaning of the Copyright Act. But the Court also strongly stated that any change in the contours of copyright law that would encompass this new technology must come from the legislature, not the courts.

By 1909, Congress took action, and the 1909 Copyright Act included provisions for “mechanical licensing” of songs that are still fundamentally in effect today, acknowledging that a machine can embody (and potentially infringe) a copyright, and beginning copyright law’s new

technology journey that continues today.

So the fragile, crumbling-into-dust piano roll I held in my sweaty hands, and unfurled to view its early form of “digitization,” was the granddaddy of the copyright and new technology battle that dominates the headlines today. And its forgotten, fragile, crumbling nature was a reminder that today’s new technology is always destined to be superseded, either winding up in landfills or in the forgotten corners of garage sales.

Having just “lived through” a century of copyright law versus new technology at the garage sale, I asked myself again: what is the most important copyright issue “today?” For the first time, the answer seemed clear: it’s not the new technology and its effect on copyright law; that’s an old issue. What’s new today is that the public is changing copyright law first hand. They are not reacting to the modern equivalent of a piano roll as some sort of third party who passively consumes products produced by a publisher. Instead, with new technology, the public themselves are engaged in the modern equivalent of making their own piano rolls. They are making their own digital copies, and distributions, and publishing, and derivative works, and adaptations. They are inventing new forms of “piano rolls” on a daily basis. Their love of creativity, and the boundaries that have been unleashed by new technology, make every computer in every home the equivalent of *White-Smith v. Apollo*.

Copyright law today is like having a Supreme Court case in every home, because the public is directly involved with copyright law without any intermediaries. The public “is” copyright law. And if that’s true, the most important issue in copyright law today is whether the hearts and minds of the copyright-using public are pro-copyright, or not. The most important thing a copyright lawyer can do today is to stand for the proposition that copyright law is a good thing because it fosters and encourages creativity, and it does that by giving creators ownership of their work, and the right to be paid for it.

But how to communicate a “pro-copyright” message to the public? How can the message that copyright law is a fundamentally good thing be communicated, and how could I distill that message into something as esoteric as an article for a scholarly journal?

This is where the actress returns to our story. Actors excel at communicating not only information, but emotions. If I wanted to communicate the love of creativity and protection and fostering of creative talent that lies at the heart of copyright law, would it be possible to make copyright law itself come alive, to be personified as a living, breathing person who has hopes, aspirations, fears, and above all, a love of creativity? A living person whose purpose is passionate and clear and whom the public could love, and want to protect? Could such a personification of copy-

right law adequately, and entertainingly, communicate the importance of copyright law to the general public, my “target audience?”

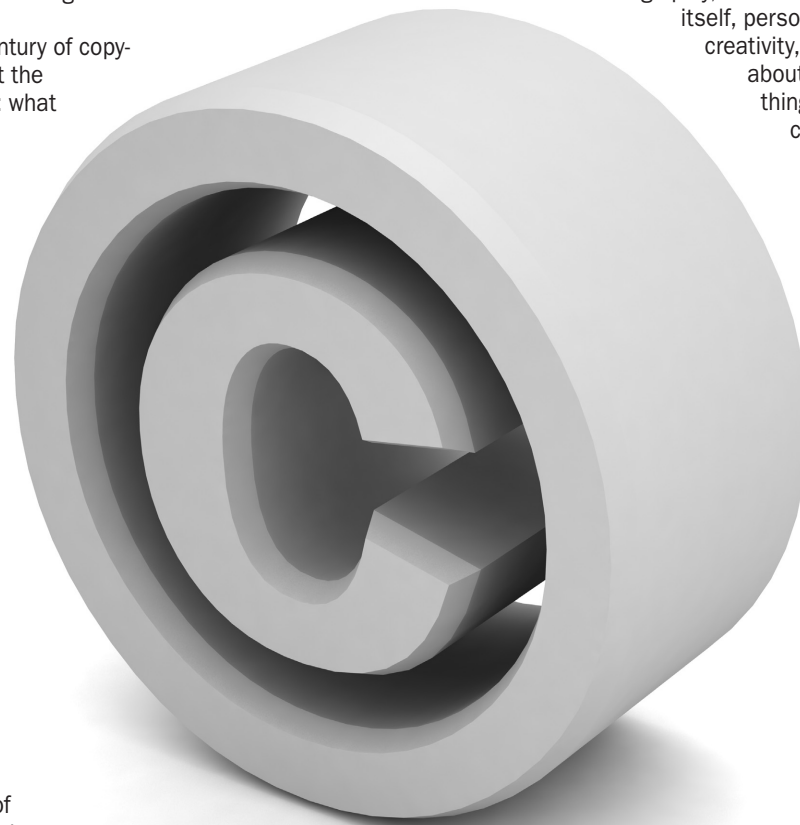
Since this is L.A., I decided to finally write my “screenplay,” or in this case, a stage play. I phoned the *Journal*, and said “Look, I have a crazy idea about what is the most important thing in copyright law today, and how to express that. I would like to write a one-woman stage play, in which the only character is copyright itself, personified as an eternal ‘goddess of creativity,’ who tries to tell the audience

about her love of creativity, and everything she tries to do in order to help creativity come alive. But she would be conflicted, too; she, too, would love to download music and films, yet at the same time nothing is more important to her than protecting those who create. She would live through this dilemma, and attempt to come to terms with it. She would make us laugh, and make us cry, and it would be better than ‘Cats!’ And, it would be a play whose (hopefully) dramatic and comedic arc had a hidden plot as well: the Copyright Act’s basic provisions covering creativity, ownership, and fair use, including footnotes showing where developments on stage were based on the ‘plot’ of copyright law itself. Interested?”

To their eternal credit, the intrepid editors of the *Journal of Intellectual Property Law*, and their faculty advisors, decided to indulge me. The result was published in in January under

the title “*Copyright — My Story: A One Woman Play*” (17 J. Intell. Prop. L. 35). Possibly, it’s the first play published in a scholarly legal journal, and with footnotes, and it’s even available on Westlaw.

I invite you to enjoy “*Copyright — My Story*,” and to judge for yourself whether the “glamorous goddess of creativity” depicted therein communicates the importance of copyright law to the general public, in an entertaining way. Feel free to e-mail me for a copy, and of course if you know a producer, even better.



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