Exceptional Authorship: The Role of Copyright Exceptions in Promoting Creativity

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Jane C. Ginsburg
Columbia University School of Law

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Abstract

It has been suggested that today’s authors need copyright exceptions and limitations more than they need exclusive rights. I will first test the proposition by examining what one might call authorship-oriented exceptions, from ‘fair abridgement’ in early English cases to the original meaning of ‘transformative use’ in the U.S. fair use doctrine. All of these exceptions trained on the promotion of creativity by allowing authors to make reasonable borrowings from old works in the creation of new ones. I conclude that both today’s assemblers of ‘remixes’ and yesterday’s traditional creators of works of entertainment or scholarship have needed the flexibility with which these kinds of exceptions temper exclusive rights.

Next I will examine the bolder proposition that, compared with their need for limitations on copyright, authors today neither desire nor require exclusive rights. The claim suggests that today’s authors do not (or should not) seek to make a living from or control the exploitation of their creations. Behind the belittling of exclusive rights there loom significant business interests built on the expansion of copyright exceptions. The exceptions in question do not foster creativity, they redistribute the fruits of creativity. They are authorship-undermining exceptions because their justification increasingly relies on the denigration of proprietary authorship.

It has long been popular to point out that the romantic author has long been a front for unromantic, unlovable copyright industries, from the booksellers of the eighteenth century to the MPAA and RIAA of today. I would like to suggest that today’s counterpart – or antidote? – to the romantic author, the techno postmodernist participant, is also a shill for big industry. The instrumentalization of the author, or of the anti-author, still serves big business, it’s just that the business consumes copyrighted works, rather than produces them.
Biography

Jane C. Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University School of Law, and Faculty Director of its Kernochan Center for Law, Media and the Arts. She teaches Legal Methods, Copyright Law, and Trademarks Law, and is the author or co-author of casebooks in all three subjects. With Professor Robert A. Gorman, she is the co-author of COPYRIGHT: CONCEPTS AND INSIGHTS (Foundation Press 2012), and with Professor Sam Ricketson, of INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (Oxford University Press 2006). Other books include several volumes on domestic or international copyright and trademark law. With Professor Dreyfuss and Professor François Dessemontet, she was a Co-Reporter for the American Law Institute project on INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008).

A graduate of the University of Chicago (BA 1976, MA 1977), Professor Ginsburg received a JD in 1980 from Harvard, and a Diplôme d’études approfondies in 1985 and a Doctorate of Law in 1995 from the University of Paris II. She is a Corresponding Fellow of the British Academy, a Member of the American Philosophical Society, and an Honorary Fellow of Emmanuel College, University of Cambridge.

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