

The Discursive Turn in Copyright

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ABSTRACTS

Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality

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This article approaches the Fearless Girl/Charging Bull controversy as a case study in how copyright law regulates conditions of interaction between existing artistic works and new ones, in order to protect the value and integrity of the former without diminishing production of the latter. To assess the merits of sculptor Arturo DiModica's legal claims in light of the policies underlying copyright law, I turn to the theory of intertextuality and the work of two narrative theorists—M.M. Bakhtin and Gerard Genette. Although the concept of intertextuality comes from literary theory, it isn't (and needn't be) exclusive to the study of literature. As Bakhtin reminds us, "dialogic relationships in the broad sense are also possible among different intelligent phenomena, provided that these phenomena are expressed in some semiotic material." The fact that intertextuality is a feature of meaning-making generally and not just of meaning-making through language justifies bringing textual theory to bear on works of visual art, including, in this case, sculpture. As I hope to demonstrate, Bakhtin's concept of dialogism and Genette's concept of hypertextuality are especially useful for understanding how the intertextual relationship between Fearless Girl and Charging Bull fits within the range of work-to-work and author-to-author relationships with which literary theory and copyright law are mutually concerned.

Reader Response and the Challenges of (Re)Appropriation

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The Second Circuit's 2013 opinion in *Cariou v. Prince* marked a turning point in courts' consideration of whether a work is transformative, as part of its evaluation of the first fair use factor in U.S. copyright law. Before *Cariou*, courts had typically focused on the defendant's intentions or activities in connection with the potentially infringing work. In *Cariou*, the court adopted a framework aligned with reader-response theory, holding that the touchstone should not simply be what a defendant might say about his artistic intentions or purpose but rather "how the work in question appears to a reasonable observer." Given the recognition of Richard Prince's work among the artistic community, the fact that he offered little testimony on his artistic aims in using Patrick Cariou's photographs nearly wholesale was not fatal to his claim of fair use.

Since then, courts engaging with *Cariou's* directive have put themselves in the role of the reasonable observer, either deciding the transformativeness question on the face of the two works or postponing the decision until later in the case to wait for (unspecified) helpful evidence. What these courts have not yet grappled with, however, is whether this inquiry should be affected in any way by the nature of the appropriation. When a number of "reasonable observers" assert that the defendant's work has not only appropriate the plaintiff's work but the plaintiff's culture, what should courts do with that information? Which "reasonable observers" should have their voices heard, and how should a court take those voices into account?

Fair Use as Resistance

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Making fair use of copyrighted material can, itself, be a form of resistance, upending traditional hierarchies and disrupting the creator-consumer dichotomy that copyright law otherwise presumes. Using the theoretical framework of Mikhail Bakhtin, one may frame the doctrine of fair use as enabling the “carnavalesque,” in which free expression facilitates interaction among disparate groups, eccentric behavior is permitted, participants are considered equal in a way that defies socioeconomic and political expectations, and transgressive or subversive behavior can occur without punishment. Fair use is a right, permitting all to resist the dominance of exclusive rights-holders, and marginalized groups often employ fair use practices to “talk back” to dominant culture and to establish communities of belonging that strengthen their identities and senses of self. However, framing fair use practices as carnivalesque also reveals underlying hierarchies implicit in copyright law. Indeed, discourse surrounding fair use often relies on hierarchical notions of authenticity and power, and fair use jurisprudence often reflects hierarchical assumptions regarding the corporate/personal divide and regarding race, class, and gender. This essay explores the theoretical and discursive implications of framing fair use as a mechanism for resistance.

**The Task of the Jury Instructor:
Copyright Litigation Viewed through Translation Theory**

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Jury instructions have been the source of extensive study by legal scholars and social scientists, and a rich body of literature catalogs problems in the way jury instructions are used in both criminal and civil litigation. Yet even though a substantial subset of that literature tackles jury instructions from the perspectives of language, and linguistics, little attention has been paid to translation, a topic of significant scholarly focus in both those fields. This Essay argues that translation theory could be ported over to law and used to conceptualize the way jury instructions are created, and operate. In translation studies, there is a translated text (an output), and a foreign-language text (a source or target text). In litigation, there are jury instructions (an output), and law (a source text, very broadly defined, since in fact it is a collection of texts and interpretive practices). In both domains, there is a process of making the former out of the latter, and translation theory is fertile soil for scholars tilling that ground, especially those interested in the discursive and interpretive questions at the heart of this Symposium. “Translation theory” is itself a sprawling category, with schools of thought dating to the early twentieth-century at least, and comprising many different disciplines and approaches. Yet some questions recur throughout the field, such as the tension between equivalence and function; the need for dynamic equivalence; the difference between essence and information; the politics of voice; and the status of the reader. Translation may have special value for copyright scholarship in particular. Copyright law has a few distinct features with respect to jury instructions. For example, in copyright law, there are many confusing cognates (words that appear to mean something familiar, but which are terms of art meaning something else); juries sometimes exercise considerable power in determining the scope of the protected interest; and juries possess broad discretionary power in determining statutory damages award amounts between statutorily fixed minima and maxima. Translation theory offers insights into each of these copyright-situated jury instruction issues, and suggests that it may have relevance for scholars of jury instructions more generally.

Justifying Copyright in the Age of Digital Reproduction: The Case of Photographers

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This paper explores the justification for copyright from two sources: seminal court cases and accounts from photographic authors. It takes as its premise that copyright protection requires justification, not only because creative work is frequently made and disseminated without reliance on copyright, but because, in the age of digital technology, practices of creative production and dissemination have sufficiently changed to question the existing contours of the forty-year old Copyright Act. Why read the photographers' stories alongside the court cases? Each presents contested views of copyright's relation to creativity. At times, the photographers' accounts and the case law strengthen and reinforce each other; other times, their differences challenge the other's coherence. Last century, Walter Benjamin warned us that totality in aesthetics may lead to fascism. At the beginning of a new century, it is worthwhile to critique the totalizing account of copyright's function and purpose in law or a particular creative community. Moreover, reading the accounts side-by-side identifies synergies that may serve as moral confirmation for winners in the copyright system at the same time as reveal opportunities for resistance by those who contest copyright law's explanation of its method for promoting creativity as a function of "progress." The social structures made legible through the overlapping stories of creativity, copying, and copyright deserve attention for their particularly strong form of normative resonance. Not only do they form an object of value to analyze and critique as such ("copyright" and "original works of authorship"), but they delineate anxieties regarding digital age trends of widespread dissemination and the default for verbatim copying. Simultaneously, and somewhat paradoxically, these same stories signal an expectation of access to the tools of distribution and of opportunity to practice one's own art. Understanding this complex position regarding verbatim digital reproduction, creative practices, industry changes, and professional opportunity may be useful for reforming copyright in a manner that includes rapidly evolving aesthetic practices and diverse creators of the future.

**Authors v. Booksellers?
Fictional Enforcement of Copyright Law
in Eighteenth-Century Britain**

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Although the provisions of the 1710 Statute of Anne are often characterized in terms of property rights, this view of copyright was advanced by the bookselling industry, not by legislators or authors. In lobbying for the statute, the booksellers made it clear that they wanted a property rule, but all the statute expressly afforded them was a liability rule. The booksellers used litigation and various other techniques to pursue a view of copyright as property. Eighteenth-century authors seem to have been less concerned to pursue any kind of legal claim with respect to their writings, and they figured only rarely as plaintiffs in copyright litigation. When we turn to authorial complaints about the misuse or misappropriation of their work, a conception of copyright emerges that displays very features from that of the booksellers. Jonathan Swift, for instance, objected the way in which his poems were published by Benjamin Motte, not the fact of Motte's publishing them. Henry Fielding, in *Tom Jones*, seems to regard authorial claims of control over others as generally ludicrous. Tobias Smollett in, the preface to *Humphrey Clinker*, presents unauthorized publication as a question of libel. Using these and other examples, I will suggest that, insofar as writers were concerned with plagiarism, imitation, and unauthorized publication, they focused more on reputational issues than on questions of property.