

Chicago Daily Law Bulletin®

Volume 161, No. 84

Can copyright survive global culture wars?

The 1970s television show "It Takes a Thief" featured the exploits of a professional thief working for the U.S. government. Each week's episode featured a new problem solved by breaking into an impregnable fortress to steal something (usually a Cold War secret) from the bad guys.

It was "creative theft" in its purest form of the word. Today, we still have "creative theft." Only now, as the "Blurred Lines" case in the United States recently demonstrated, such thefts involve the unauthorized use of intangible copyrighted works, such as someone else's music.

The "creativity" of such thefts does not lie in how they are accomplished, but in what they produce.

In "Blurred Lines," a jury found that Pharrell Williams' song infringed Marvin Gaye's "Got To Give It Up" and awarded \$7.3 million in damages. In defending his actions, Williams declared that he was "inspired" by Gaye's song but had not copied it. Culture warriors described Williams' actions as protectable "creative theft" and bemoaned his liability.

Creative theft is not a U.S. phenomenon. It is a growing trend in the rhetoric surrounding current international reform efforts to narrow the scope of rights granted authors over the use of their works. Digital technology has made self-publication of books, songs, videos and other copyrighted works an accessible alternative.

It has also made the creation of new works to feed the voracious demands of the digital public easier. Reproductive technologies such as Photoshop allow end users to crop, mash and alter works to create new derivative versions in the blink of an eye (and with relatively limited technological expertise).

International copyright came of age in the 1840s where the primary concern of its leading lights, such as Victor Hugo and Charles Dickens, was the elimination of

pirated works from the international book trade. With the increase in self-publication of digital copies, the same economic factors arguably no longer apply to support strong copyright protection. Instead, copyright is increasingly seen as interfering with the creation and distribution of new works.

With the issuance of a new Report of the Special Rapporteur in the Field of Cultural Rights, copyright has not only become a stumbling block to creativity, its enforcement may actually qualify as a human rights violation.

The culture wars of the 21st century have little to do with competing artistic movements. They arose as a direct result of the reproductive culture encouraged by digital technology. The "culture" at issue is the "culture" produced by strong versus weak copyright protection.

The call-to-arms for this war dates in the United States from *Eldred v. Ashcroft*, 537 U.S. 186 (2003), upholding the extension of copyright protection to 70 years after an author's death. Described as a Pyrrhic victory by then-Register Marybeth Peters, *Eldred* became a rallying cry for the evils of protectionist culture.

In an aptly titled work, "Free Culture," Lawrence Lessig argued: "A free culture supports and protects creators ... by limiting the reach of [intellectual property] rights, to guarantee that follow-on creators ... remain as free as possible from the control of the past." (Emphasis in original.) That "control" was copyright.

Under the pressure of digital technology, culture morphed into free culture as fair use-fair dealing expanded to support increasingly broad categories of unauthorized use.

The seminal culture war case in the United States may be *Prince v. Cariou*, 714 F.3d 694 (2d Cir. 2013). In *Cariou*, Prince's unauthorized use of "significant portions" Cariou's photographs of Rastafarians on his million-dollar canvases was considered fair because "Prince's audience is very



Doris Estelle Long is a law professor, director of the Center for Intellectual Property Law and chairwoman of the intellectual property, information technology and privacy group at The John Marshall Law School. She has served as a consultant on IPR issues for diverse U.S. and foreign government agencies, including as attorney adviser in the Office of Legislative and International Affairs of the USPTO. She can be reached at 7long@jmls.edu.

different from Cariou's."

Simultaneously, in human rights circles, copyright was increasingly criticized for its negative effect on cultural participation.

The foundation for such criticism lies in Article 27 of the Universal Declaration on Human Rights. Established in 1948, it expressly provides: "Everyone has the right freely to participate in the cultural life of the community [and] ...to the protection of the ...material interests resulting from any scientific, literary or artistic production of which he is the author." This language has been reproduced in countless multilateral and regional treaties.

Over time, this cultural participation right has morphed into an increasing demand for greater access to copyrighted works without compensation. Such access demands have resulted in the refusal of the European Union to include criminal penalties for digital copyright piracy in its IP Enforcement Directive (2004/48/EC) despite the strong adverse economic impact of such piracy on content industries.

The zenith of these efforts to limit copyright based on human rights concerns may be the special report currently in discussion before the U.N. Human Rights Council. (A/HRC/28/57). Titled

"Copyright Policy and the Right to Science and Culture," it represents a powerful victory for those who support "free culture."

The report places the right to culture over authorial rights, urging that copyright laws "should place no limitations upon the right to ... culture, unless the state can demonstrate that the limitation ... is compatible with ... this right and is strictly necessary for the promotion of general welfare in a democratic society."

Like all challenges to copyright in this era of reform, the special report does not urge the elimination of copyright. It simply declares: "Protection of authorship does not imply perfect authorial control." This "imperfect" control, however, presently includes loss of control over the publication decision, a narrowing of derivative rights and a lack of viable enforcement options (among other restrictions).

The report's timing is critical, given the ongoing efforts of countries as diverse as Great Britain, Australia, China and the United States to reform their copyright laws. Most problematically, it erodes economic support for authors by advocating for expanded limitations and exceptions to copyright and greater open licensing.

At best, limitations and exceptions establish compulsory licenses that provide authors seriously reduced licensing fees. At their worst, they promote free use through expanded fair-use rights. Open licensing, such as Creative Commons, similarly reduces authorial compensation to zero.

Even if copyright survives these expanded limitations, combined with the dramatic rise of digital piracy, it will lose its most critical feature — the promise of economic support for creators.

Without such support even the most dedicated creator will be forced to spend valuable time in noncreative efforts to secure a livelihood. If that occurs, the ultimate victim of the global culture wars may well be culture itself.