Copyright's Interpretive Turn

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Date : June 10, 2016

Zahr Said, *Reforming Copyright Interpretation*, 28 **Harv. J. of L. & Tech.** 469 (2015).

Zahr Said's *Reforming Copyright Interpretation* puts its finger on an important, yet little studied, aspect of copyright law: judicial interpretation. It pushes the ball quite a bit by providing a descriptive taxonomy of courts' interpretive approaches in copyright law, advancing and defending an interpretive approach that it considers best overall, and applying and exemplifying its framework and arguments with a good number of cases while situating it all within a larger body of law and literature scholarship. For me, that's tons of progress in one article, and the reason why I like it lots.

In resolving copyright disputes, judges must make interpretive decisions. Decisions regarding interpretation are often outcome-relevant – for example, when they lead a judge to decide whether an issue is a matter of law or fact or whether expert testimony may be admitted or not. These decisions can also be outcome-determinative – for example, when a judge makes an interpretive decision that resolves a case on summary judgment or finds an allegedly infringing use to be fair. The interpretive judgment that these decisions involve often flies under readers' radars. Said draws our attention to judges' interpretive choices and to the systemic effect that they have, or could have if they were to be conducted appropriately, on copyright law.

Descriptively, Said organizes judges' interpretive choices along two axes. First, judges decide what to focus on in their interpretation. In doing so, they choose a point on a Text/Context spectrum. By analogy to patent law, this could be thought of as the proper mix of intrinsic and extrinsic evidence in claim construction. "Text" here stands for any interpretive decision drawn out of, or relying on, the copyrighted work itself—be it textual, pictorial, musical, etc. "Context" stands for interpretive decisions relying on evidence outside the work such as the author's intent, expert opinion, or readers' perception or response.

For example, a court may need to decide whether a work is substantially similar to another. It may make this determination by comparing the two texts. Or, it can rely on the author's (or alleged infringer's) intent, the lay reader's view, community perceptions, expert opinion, or even the court's own subjective impression of the works. Each choice vests the interpretive authority over the text in a different source. This decision can be outcome-determinative: a judge reviewing a defendant's motion for summary judgment may grant it based on reviewing the text alone and conclude that no similarities exist. But if the judge's interpretive approach gives weight to the author's intentions or to audience perceptions, then she may deny the motion.

Second, judges choose an interpretive method along an Analysis/Intuition axis. The interpretive method helps the judge reach her legal conclusion from her chosen source of authority over the work. "Analysis" stands for careful explanation of the judge's reasoning, applying doctrine to facts, a practice that may constrain a court's future analysis or subject it to appellate review. An example of analysis is *Mannion v. Coors Brewing Co.* (SDNY 2005), where the court identified three potential loci of originality in photographs generally, and then moved to determine whether any of the three were present in the photograph before it. Alternatively, courts can assert conclusions about the works at issue that appear to be based on nothing more than intuition. An example of intuition is *Roth Greeting Cards v. United Card Co.* (9th Cir. 1970), where the court found infringement by noting that the defendant's greeting card copied the plaintiff's "total concept and feel."

Underlying Said's perspective is the notion that interpretation is inevitable. Courts engage in it whether they

acknowledge it or not. Said wants judges to be aware of the interpretive phase of their decision-making process, and to choose and defend their points of choice along the two axes deliberately. Said suggests that it would be better if doctrine provided judges with an interpretive roadmap – perhaps like patent doctrine does – rather than assuming that judges already own the enterprise of formulating interpretive methodology. An agreed-upon methodology would enhance the enterprise's predictability and fairness, and subject it to more effective appellate review.

Said laments judges' tendency to view artistic, expressive, "nontechnical" copyrighted works as "self-interpreting" or "facially clear" and thus semiotically accessible and in no need of interpretation. This is different from the case of more technical works, such as software, where courts recognize the need for interpretation and for following an interpretive framework. Said resists this technical-artistic distinction for interpretation. Every text is complex, and meaning is not clear on the face of the work. Accessing works requires an act of interpretation.

Normatively, Said provides two prescriptions for a desirable approach to copyright interpretation. First, she suggests that judges lean toward the text side on the Text/Context continuum. Text is an easy-to-locate, objective source that both parties have access to. Focusing on text tends to minimize the amount of evidence presented in trial, and thus minimizes litigation costs and trial uncertainty. Second, Said prefers that judges use analysis over intuition because of current doctrinal confusion with the "total concept and feel" test, because different judges have different intuitions, and because intuition allows little ground for appellate review. Analysis, on the other hand, tends to create precedents, interpretive roadmaps, and case law consistency.

Said acknowledges that her prescription-favoring, text-based formalism may resolve most infringement cases, but that it may not suffice for cases turning on issues such as contested authorship or transfers of copyrights. Here, courts' decision-making will often have to go outside the four corners of the work, such as by considering the parties' intentions and community norms. Said acknowledges fair use as another context in which text-based formalism may prove inadequate, and where courts will have to look at contextual considerations, such as social meaning in finding a work transformative.

Said's work is rich and intriguing. Paralleling its insight and direction, it also opens up new questions and possible extensions, and here I would like to mention two. First is a possible empirical extension. As for the descriptive portion of the article, it would be interesting to know what more could be said to portray a more accurate descriptive model of courts' interpretive choices. Take the Text/Context axis, for example: what ideal points do courts tend to choose in deciding cases? If I had to guess, a uniform distribution would seem unlikely: while I can see courts choosing points ranging from the text end of the spectrum up to about the midpoint or even beyond, I would be surprised if many cases gave exclusive or predominant weight to context, and little or no weight to the text. The article's descriptive insight could be augmented here with an empirical component. Further, one may wonder about whether courts' choices of ideal points along the two axes in particular cases are independent of each other. Again, if I had to guess (and as the article recognizes in passing), I would think that there is some correlation. It seems that choosing a point involving a high degree of intuition and little analysis on that spectrum would correlate with a preference of text over context. Again, mapping these correlations would enhance the article's descriptive power.

A second possible extension may be tying Said's work on copyright interpretation to other bodies of IP. The framework might be extendable to patent and trademark laws, for example, perhaps with some adjustment. In patent law, the Text/Context axis seems readily applicable, as it can be used to model courts' and commentators' preferences as between intrinsic and extrinsic evidence in claim construction, for example. What about the Intuition/Analysis axis? How many patent law summary judgments could be described as founded on little more than intuition as to the meaning of patent claims? Can patent courts be characterized as distinguishing between "simple" and "complex" technologies, so that patent cases reflect (an implicit) judgment that the former require little interpretation of claims while leaving more room for interpretation in the latter category (paralleling copyright courts' distinguishing between technical and nontechnical works)? Trademark infringement's test calls for a mix of textual and contextual considerations, such that its choice and direction could be mapped using that axis as well. Perhaps the framework could be used across all IP fields, even if the normatively desirable "ideal point" may differ among them, and perhaps

it is even of broader application in interpretation generally. These are for sure laborious and non-trivial questions that go well beyond the scope of Said's article, which already does a lot. They are, however, a testament to the article's utility and insight.

Cite as: Dotan Oliar, *Copyright's Interpretive Turn*, JOTWELL (June 10, 2016) (reviewing Zahr Said, *Reforming Copyright Interpretation*, 28 **Harv. J. of L. & Tech.** 469 (2015)), http://ip.jotwell.com/copyrights-interpretive-turn/.