Does Copyright Have a Framing Problem?

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Date : May 29, 2018

Margot E. Kaminski & Guy A. Rub, Copyright's Framing Problem, 64 **UCLA L. Rev.** 1102 (2017).

Numerous provisions of the Copyright Act of 1976 ("1976 Act") use the term "work" as a key referent for determining copyrightability, ownership, scope of rights, limitations on scope, and remedies. Yet, Congress did not provide a general-purpose definition of what counts as a "work," even though it defined a plethora of arguably much less important terms. When the parties in litigation explicitly or implicitly disagree about the fundamental issue of what the plaintiff's or defendant's work is, what is a court to do?

This is a big and important question. While Kaminski and Rub do not provide a full response, they do frame the problem and illustrate how it plays out in many contexts. They demonstrate that courts have considerable flexibility in how to define the relevant work. Sometimes, courts use this flexibility to "zoom in" on particular facets of, for example, a design on a carpet that mixes public domain and original elements. Other times they "zoom out" to consider a work's total concept and feel. Courts rarely defend their framing of the relevant work, and when they do, they do not use a shared set of criteria to justify their choices.

Kaminski and Rub have three goals for this article. First, they review numerous cases that illustrate the range of legal issues for which a court's framing choice is consequential. They show the inconsistency of judicial framing choices and the rarity of justifications of these choices. Second, they argue that the doctrinal flexibility judges have exercised is more a feature than a bug in copyright law because it supplements a court's ability to tailor the scope of rights or remedies in particular cases to better achieve copyright's goals. Third, they argue that courts should more self-consciously exercise this framing flexibility and provide a justification for their choices. The authors close with a set of criteria courts might rely on to provide such a justification.

In their survey of the choices that are available to courts in framing the definition of the "work," the authors start with the cases involving copying that is not wholesale, so-called "non-literal infringement." The legal test is whether the two works are "substantially similar," and how this is applied depends greatly on how the plaintiff's and defendant's works are framed. One of the more difficult issues in this analysis involves whether a character is a work independent of the larger narrative in which the character appears, and if it is a work, how is that work defined when the character, say, Sherlock Holmes, or the Batmobile, evolves? The article briefly discusses how the Ninth Circuit "zoomed out" from the many iterations of the Batmobile to focus on its general characteristics in the *Batman* series to define the work in *DC Comics v. Towle*.[1] As a reader, I wanted the authors to dive a little deeper into this issue to compare and contrast some of the other character cases.

The article then turns to questions of authorship, showing that courts have decided in motion picture cases to zoom out and treat the dominant author of the motion picture as the author, rejecting the theory that an actor creates a distinct work in a scene for which the actor is primarily responsible. The article then dives deeper into the useful article doctrine, arguing that the Supreme Court, in its enigmatic recent decision in *Star Athletica LLC v. Varsity Brands, Inc.*,[2] sent conflicting signals about how to frame the design features and the utilitarian aspects by zooming in on the chevrons on a cheerleading uniform in parts of the discussion and zooming out to look at the uniform as a whole in others.

Turning to the framing tests the courts have used, or could use, Kaminski and Rub argue that most courts use no test, showing the inconsistent framing in cases involving photographs copied from collections of photographs as an

example. Courts sometimes ask whether something is a work or a constituent element by testing it for copyrightability, but the authors persuasively argue that this test does too little work. A market-based approach has some appeal, and some courts ask whether the putatively independent works can "live their own copyright life [sic]."[3] A variant on this test is whether the putative work has independent economic value. The authors acknowledge the appeal and some utility of this approach, but they rightly caution that with increasing variety in bundling and unbundling of works in digital form, market signals are less likely to provide stable guidance.

The closing section of the article argues that judicial flexibility in framing the work is beneficial because it allows courts to tailor protection and remedies with respect to policy considerations such as: the incentives-access tradeoff, managing transaction costs, and channeling creativity. As a result, permitting inconsistent framing depending on the doctrinal context provides some benefit. Small units may be copyrightable, and therefore works, for the purposes of copyrightability, but if each copyrightable unit is eligible for a separate award of statutory damages, existing problems with proportionality in statutory damages would become greatly magnified, for example.

The authors set an ambitious task for themselves, and their ability to range across the copyright caselaw is impressive. Two caveats: As a reader, I would have liked to see greater engagement with Justin Hughes's article on microworks,[4] which the authors acknowledge that they are building on, particularly when considering the available framing tests. I also think that the framing choices they discuss in the subsections on fair use, statutory damages, and Section 201(c) are qualitatively related but distinct because the decisions in the cases discussed there focused more on choosing which work – the collective work or the contribution to the collective work – to focus on rather than whether to zoom in or out on aspects of the work, as in the substantial similarity or useful article cases. That said, Kaminski and Rub make a persuasive case that courts should more explicitly identify and justify their framing choices about the relevant work(s) when applying the wide range of doctrines tied to the "work."

1. 802 F.3d 1012 (9th Cir. 2015). [?]
2. 137 S. Ct. 1002 (2017). [?]
3. Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1116 (1st Cir. 1993). [?]
4. Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 **Fordham L. Rev.** 575 (2005). [?]

Cite as: Michael W. Carroll, *Does Copyright Have a Framing Problem?*, JOTWELL (May 29, 2018) (reviewing Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 **UCLA L. Rev.** 1102 (2017)), https://ip.jotwell.com/does-copyright-have-a-framing-problem/.