

Law in the Books vs. Law in the World: The Case of Copyfraud

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Jason Mazzone, [Copyfraud and Other Abuses of Intellectual Property Law](#) (Stanford Law Books, 2011).

So what does my frustration with the [New York Mets](#) have to do with copyright law? A surprising amount. And I say this even though the Mets have done *a lot* of things to make life difficult for their fans. Over the years, I've watched my ballclub pay insane money to a series of pitchers who could not pitch, hitters who could not hit, managers who could not manage. I've endured a seemingly endless string of [Subway Series](#) failures against the hated [Yankees](#). I've celebrated the demise of the awful [Shea Stadium](#), only to see it replaced with a new ballpark named for a bank that combined greed, arrogance, and ineptitude at a scale nearly sufficient to destroy the American economy.

And yet, from an IP geek like me, the ways in which the New York Mets have abused the copyright laws of the United States are even worse.

At some point during the telecast of every Met game, we are treated to this announcement:

This copyrighted telecast is presented by authority of Sterling Mets. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated, without the express written consent of Sterling Mets.

Which is a lie. Or at least a gross overstatement. And it isn't just the Mets. It's all of Major League Baseball, which inserts a similar warning into the broadcast of every baseball game.

So, what's the problem? It's hard to know where to start. First off, it's just wrong to assert that a broadcast of a baseball game "may not be reproduced or retransmitted in any form." To say this ignores the fact that snippets of the game will appear on all of the local evening newscasts, and on ESPN's "[Baseball Tonight](#)". Of course Major League Baseball and its teams are probably thrilled to have this coverage, but even if they weren't, they couldn't stop these news organizations from using short clips of the telecast to recap the game. Copyright's fair use doctrine almost certainly allows the use of short clips from a baseball game for the purpose of news reporting. But the Mets' copyright warning acts as if the fair use doctrine doesn't exist.

Worse is the assertion that "the accounts and descriptions of the game may not be disseminated" without the Mets' consent. Let's say I take to my blog to complain about yet another Mets late-inning collapse. I angrily bang out a blog post describing the series of mishaps, bad decisions, and plain awfulness that led to the loss. In doing so, I am certainly "disseminating" "accounts and descriptions of the game." Am I violating the copyright law in doing so? Certainly not. Copyright protects original expression. It does not allow anyone to assert ownership of facts. My "accounts and descriptions" of how the Mets lost are cold, hard facts; they are not copyrightable. And, consequently, the Mets' stern warning against disseminating "accounts and descriptions" of the game is a sort of fraud. It's an assertion of copyright rights where none exist. Or at least an assertion of rights that is far broader than what the law actually provides.

This sort of thing happens a lot, and a few years ago, Brooklyn law professor [Jason Mazzone](#) gave the phenomenon a name – "copyfraud". Mazzone first limned the term in an [article](#) published in the New York University Law Review in 2006. And he's now expanded his analysis in a new book, *Copyfraud and Other Abuses of Intellectual Property*

Law (Stanford Law Books, 2011).

According to Mazzone, the clearest example of copyfraud is the act of attaching a copyright notice to a public domain work. Mazzone gives many examples, including claims of copyright in the U.S. Constitution, sheet music of compositions by Beethoven, Chopin, Handel, and Bach, posters of paintings by Monet, Van Gogh, and Cezanne, the plays of Shakespeare, the *Federalist Papers*, and the opinions of federal judges. In all of these instances, property rights are asserted that simply do not exist. And that, Mazzone argues, is a fraud on the public. Copyright provides temporary property rights designed as inducements – i.e., as bait to lure creators to produce new works. Copyright does not need to last forever to do that job – a fact which the Constitution recognizes by restricting copyright to “limited Times”. And this conduct, Mazzone argues, is damaging to all of us:

“Copyfraud stifles creativity and imposes financial costs upon consumers. False copyright claims lead individuals to pay unnecessarily for licenses and to forego entirely projects that make legitimate uses of public domain materials. Copyfraud is a land grab. It represents private control over the public domain. Copyfraud upsets the balance that the law has struck between private rights and the interests of the public in creative works.”

More broadly, Mazzone describes other kinds of copyright overreaching – in particular, dubious claims by copyright owners that are made possible by the law’s lack of clarity, and by the severe consequences that defendants may suffer if they lose in a lawsuit. The Mets’ copyright warning is an example. So too is the copyright warning attached by Adobe to its [ebook](#) version of Lewis Carroll’s *Alice’s Adventures in Wonderland* – a work that is in the public domain. The warning reads like something the Mad Hatter would have come up with:

Permissions on: Alice’s Adventures in Wonderland

Copy – No text selections can be copied from this book to the clipboard.

Print – No printing is permitted on this book.

Lend – This book cannot be lent or given to someone else.

Give – This book cannot be given to someone else.

Read Aloud – This book cannot be read aloud.

Or consider the execrable conduct of the estate of James Joyce, which has repeatedly threatened copyright lawsuits against scholars and others who make use of materials owned by the Joyce estate – even when those uses should obviously fall within the ambit of fair use. The Joyce estate threatened a choral production that used 18 words from a Joyce novel. And the estate’s copyright threats forced English professor [Carol Schloss](#) to cut crucial evidence from her book detailing the important relationship between Joyce and his daughter, Lucia. Schloss eventually sued the Joyce estate (with the help of lawyers from the Stanford Law School Center for Internet and Society) and prevailed. But in many other cases, overzealous assertion of copyright has chilled or altered academic projects – in part because academic publishers lack both the stomach and the wallet to fight back hard against dubious copyright claims.

By detailing these examples and many, many others, Mazzone’s book convinced me that copyfraud happens often enough to be worth noticing. And Mazzone does a great job explaining the many ways in which copyright overclaiming leads to mischief. If this was its only achievement, Mazzone’s slender and readable book would be worth your time. But the real value of Mazzone’s book lies in the way in which it links to a broader issue. The copyright law on the books is not the copyright law we have out in the world. The rights of copyright owners are both broad and relatively clear, and the remedies available for infringement of those rights are very powerful – indeed, they are purposely designed to be supra-compensatory. But the rights of users – i.e., of the public at large – are both narrow and poorly

defined. The result of this mismatch is predictable: over-assertion of copyright is unlikely, in the run of cases, successfully to be resisted. This fact contributes in turn to a slow shift in the real-world content of the copyright law toward broader property claims, and away from the careful balance that copyright law attempts to achieve between private rights and public access to our culture. And this means that in considering changes to copyright law in the future, Congress should not presume that its understanding of the proper copyright balance will be the rule that governs conduct. Out in the real world, people take what they can grab, and our current copyright law puts a lot within reach.

So what can we do about it? Mazzone proposes a number of cures. He suggests we should treat copyfraud as fraud – and deter it by toughening penalties for false copyright claims and dialing back evidentiary requirements required to impose copyfraud liability. He also proposes a number of ways in which we could make copyright's fair use doctrine a more effective shield against copyfraud. His principal suggestion in this regard is that we gin up a federal agency responsible for developing and enforcing the fair use doctrine. Oh how I wish this would help, but I fear that Mazzone's proposal to create a federal Fair Use Agency would more likely make things worse. Narrowly focused federal agencies are subject to capture, and it's difficult to imagine an environment more ripe for capture than a federal fair use agency. What fair use bureaucrat wouldn't dream of escaping the dreary confines of DC for a job in Hollywood? More seriously, the content producers would be repeat players before the agency, and the principal source of employment for former federal fair use agency workers. The likely result is that fair use would come to be exactly what content producers would prefer: fairly useless.

So Mazzone's book misfires a bit on the proposed solution. But that is far from a fatal critique. The book is a good, quick, bracing read, and it details a piece of the copyright debate that no one had properly understood before Mazzone got to it. In my view, that's a fair achievement.

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