

Copyright Law

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Topics:

- Course overview
- Where we're headed, and some macro themes

Some course MECHANICS:

- **No final exam**; three (3) open writing assignments instead.
- **Class is for conversation** about what the law does, how the law works (or doesn't work), and how the law is used. Not reviewing the content of the law. *Do the reading. Study the reading.*
- **Copyright law is the most confusing and difficult area** of IP and one of the most confusing and difficult areas of law full stop.
- **Ask questions.** Lack of clarity is *standard and to be expected*.
- **Copyright blends different styles:** some is like (some actually is) Constitutional law (concepts anchored in conflicting public policies and theories); some is like tax law (technical and detailed statutory scheme intended to promote this and discourage / punish that); some is like (some actually is) tort law (basic concepts elaborated by judges).
- **Learn to figure out the cultural references.** Copyright means lots of (popular) (historical) culture: literature, art, music, film, TV, videogames, social media, other. *Be a lawyer: know your clients.*²

P A R E N T A L

A D V I S O R Y

E X P L I C I T C O N T E N T

GOALS for the course:

Knowing the questions, knowing the answers:

- Talking like a copyright lawyer talks
- Writing like a copyright lawyer writes
- Solving problems like a copyright lawyer solves problems

Course THEMES:

- Legal doctrine [property law and / vs. tort law]
- Legal theory / policy / history
- Institutional and cultural context
- Art, technology, speech/expression, business
- Economics, philosophy, sociology
- Morality stories and moral panics
- Inside the law [how to understand it in order to use it] and / vs. outside the law [how to understand it in order to critique it]
- Constant, continuous change!

What the course is ABOUT:

A course about money and business. A course about speech and expression. A course about different styles of legal regulation. A course about being a nimble lawyer in an uncertain and blurry world!

Copyright law regulates producing, distributing, and accessing “creative” “works of authorship,” via a system of exclusive but limited rights.

Scare quotation marks because these are terms of art. Not everything covered by copyright is *creative* in colloquial terms, and not everything that is *creative* in colloquial terms is covered by copyright.

Some creative things are not “works”; some “works” are not creative.

The core case and source of almost all important copyright theory and copyright doctrine – but not copyright practice: *books*.

COPYRIGHT LAW is an *institutional* solution to a set of social, cultural, and economic problems.

Macro (broad social/public policy) and micro (this client, this matter).

- [1] What are the problems?
- [2] How well does copyright law function as a solution?
- [3] What other solutions exist?
- [4] When / why / how is copyright a right, good, or best solution?
- [5] When / why / how are other solutions better or equally good?
- [6] What criteria should be used in analyzing the “fit” between solution and problem in these contexts?

The PROBLEMS [plural] defined by copyright law are:

- [1] Creating [new] stuff (?)
- [2] Distributing [new] stuff (?)
- [3] Accessing / using [new] stuff (?)
- [4] Piracy (?)
- [5] Free riding (?)
- [6] Plagiarism (not giving credit) (?)
- [7] Not paying authors/creators (?) / Not paying publishers (?)
- [9] *Limiting* [new] stuff (?)

The SOLUTION [conventionally] offered by copyright law has 3 key “levers” or variables:

- [1] **People** [Authors/Creators] [Readers/Users] [Intermediaries]
- [2] **Things** [Works of Authorship]
- [3] **Rules** (such as “rights,” “liabilities,” and “duties, s/k/a “obligations”) [*Rules* are collected and practiced as *Institutions*]⁷

The SOLUTION [conventionally] offered by copyright law has 3 key “levers” or variables, used both in designing the law and applying it case by case:

PEOPLE [especially AUTHORS but also READERS, others]

- Why do we need [authors]?
- Who is an [author]?
- When does someone become an [author]?
- When/how do new or next [authors] matter more than [or less than] current or past [authors]?

THINGS [WORKS OF AUTHORSHIP]

- Do we need “works,” and why?
- What is a “work”?
- How do we know whether something is a “work”?

The SOLUTION [conventionally] offered by copyright law has 3 key “levers” or variables, used both in designing the law and applying it case by case:

RULES [INSTITUTIONS]

- People and things are linked in *patterns* of activity, or groups, a/k/a institutions: firms, markets, organizations, disciplines, traditions, practices, & customs, with rules and rewards that define good behavior and discipline and punishment for bad behavior
- When / how / why should those *patterns* be incentivized, encouraged, promoted, and/or protected by the law? E.g.: legal systems that implement the rule of law! libraries! Wikipedia! (?)
- When should they be punished? E.g.: large-scale, organized piracy rings

What OTHER / ADDITIONAL SOLUTIONS might be relevant? How might they be relevant?

- [1] **Contracts.** Think: click-wrap licenses, permissions, ToS, ToU, etc.
- [2] **DRM, encryption,** and related “technologies” that limit access to stuff. Think: Blu-ray, streaming v discs, etc.
- [3] Systems of **informal custom, practice, and social norms,** which generate stuff but also often include rules as to when other people can borrow/copy stuff, wholly or partly without copyright. Think: standup comedy.

How do the PROBLEMS (plural) defined by copyright law CHANGE when stuff is created / distributed / used in DIGITAL FORM?

- [1] Not at all
- [2] Everything is different [worse] [better]
- [3] How can we tell?

Copyright Calisthenics

MACRO: Thinking INSTITUTIONALLY

Who BENEFITS from the application of copyright law?

Who is HARMED?

Magazine

The Music-Copyright Enforcers

By JOHN BOWE AUG. 6, 2010



Few things can make Devon Baker cry.

There was the time her pet hamster, Herschel, died. There was the time she was run over by a car. Neither episode provoked tears. Not even close. And yet, on a recent Thursday, as Baker drove down Highway 60, about 55 miles northwest of Phoenix, she had to wonder, Is today one of those days when I'm gonna cry?

Baker, who has preternaturally white teeth, green eyes, soft brown hair and a friendly way that she's the first to describe as "country," was on her once-a-month, weeklong road trip. She'd flown to Phoenix to meet with bar and

RELATED COVERAGE

Letters: The Copyright Enforcers AUG. 26, 2010

- Should some interests (needs? contributions? values? opportunities?) “count” more than others? If so, why?
- Observe how these questions are answered via *stories*. Whose stories are told in this article? Who tells the stories? How are the stories used?

MACRO: Thinking INSTITUTIONALLY

Who BENEFITS from the application of copyright law?

Who is HARMED?

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MACRO: Thinking INSTITUTIONALLY

Who **BENEFITS** from the application of copyright law?

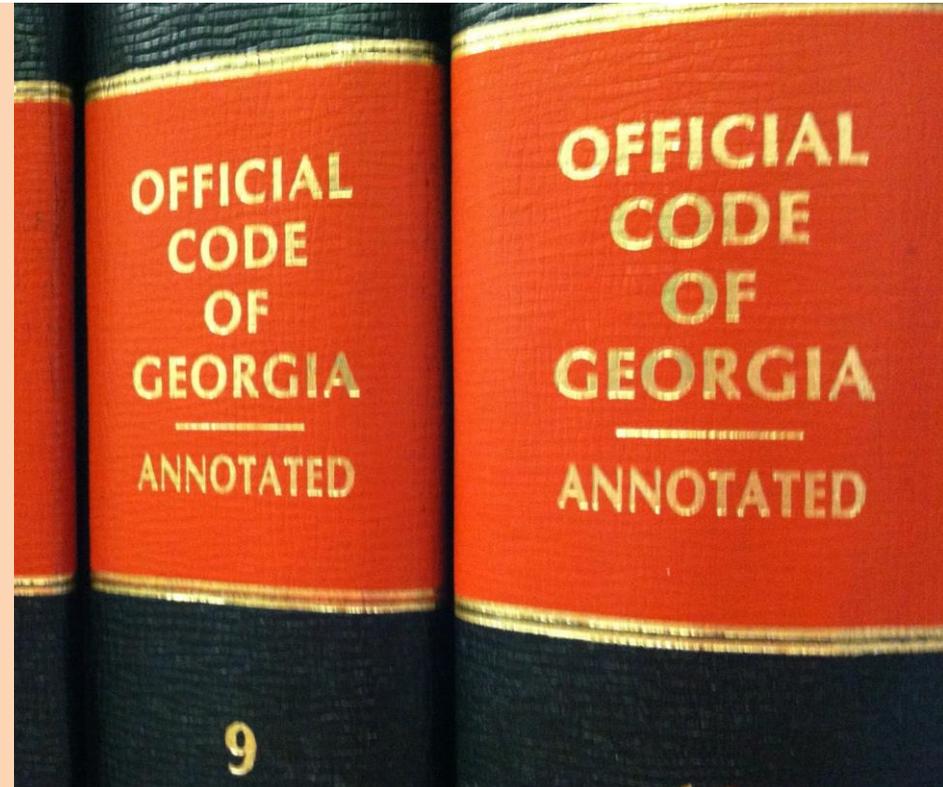
Who is **HARMED**?

Georgia v. Public.Resource.Org., Inc.

Supreme Court of the US, 2020

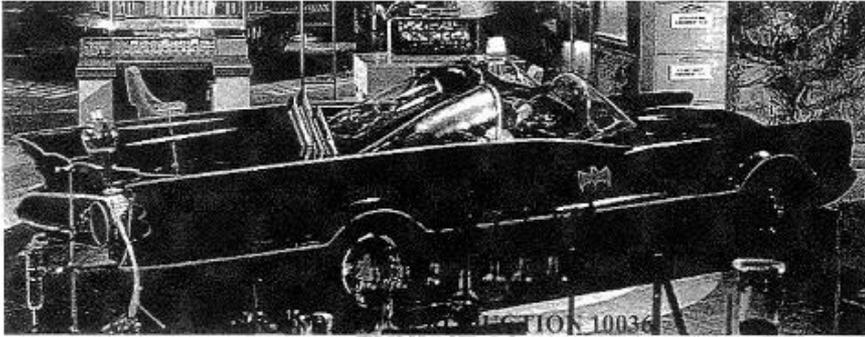
Section 105 of the Copyright Act: works of the US Government are in the public domain. “Government edicts” doctrine places state law legislative materials in the p.d.

For now: focus on the forest (the structural/policy implications) rather than the trees (the rules)



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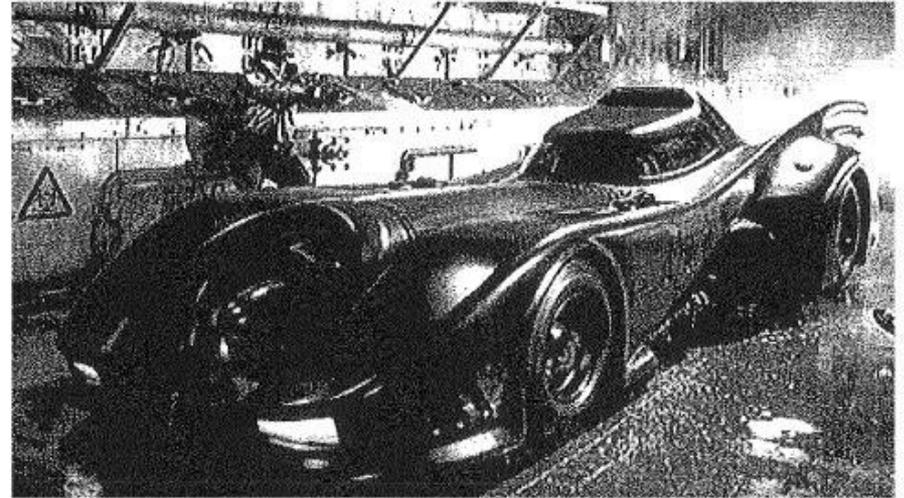
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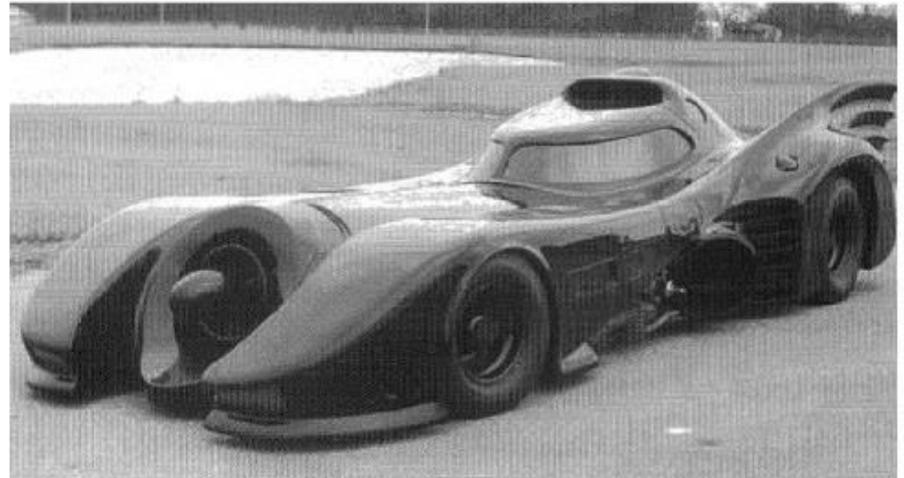
Towle Replica



Batmobile Depicted in the 1989 Motion Picture



Towle Replica



**MICRO: Thinking Work by Work
(corporate plaintiff edition)**



**MICRO: Thinking Work by Work
(individual plaintiff edition)**

***How do the stories change
when the context changes?***

The End

