

# Copyright Law

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## Topics:

- Course overview
- Where we're headed
- 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). Much of it is statutory; much of it is judicial/common law.
- **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.*

## **COURSE THEMES:**

- Legal doctrine [tort law and / vs. property 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!

## **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

## **NOT A GOAL:**

Memorizing “the rules”

## **WHY THE DIFFERENCE:**

Copyright relies on a very small number of *basic, key concepts*. Learn the concepts, learn how to use the concepts, then ride the “waves” – decode conflicts and cooperation; incentives and punishments; rhetoric and ideology. Focus on systems and markets as well as on individuals.

## INTO SOME DETAILS, and WHAT THE COURSE IS ABOUT:

### On the surface:

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

### Under the surface:

Copyright is about money and business (and therefore: different sorts of economic, cultural, and political power). It is about speech and expression and *knowledge*. It is about different styles of legal regulation. It is about being a nimble lawyer in an uncertain and blurry world!

Scare quotation marks above 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.

## **AM I RIGHT? FOCUS ON PROBLEMS ↔ SOLUTIONS**

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

### **Does the solution work?**

Well? Poorly? Not at all? In a given case? Generally?

**Learn to ask questions at 2 levels: macro (broad social/public policy) and micro (this client, this matter). Those include:**

- [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*]<sup>7</sup>

**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:**

**[1] 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]?

**[2] THINGS [WORKS OF AUTHORSHIP]**

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

**[3] RULES**

- “Law” (the Copyright Act, for example)
- Contracts (“write your own law”): bilateral Ks, also ToU, -wrap Ks.

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

## [1] DRM, encryption, and related “technologies”

- Physical/electrical permissions and limitations that grant and limit access to stuff.
- Examples: Blu-ray, streaming v discs, etc. Older versions: ticketed access to movie theaters and concert halls.

## [2] Systems of informal custom, practice, and social norms

- These tell people when it’s OK [good] to generate stuff but also often include rules as to when other people may or may not borrow/copy stuff, wholly or partly without copyright.
- Examples: standup comics and jokes, professional magicians and magic tricks, high-end chefs and recipes/techniques, teachers and (law) professors.

# How do the PROBLEMS (plural) defined by copyright law CHANGE when stuff is created / distributed / used in DIGITAL FORM (computer programs! The internet! Artificial intelligence!)

[1] Not at all

[2] Everything is different [worse] [better]

[3] We don't know, so (in part) we pretend [1] while worrying [2], or we assume [2] while ignoring [1], and in both instances we steer around the difficult question: How can we tell?

“Everything changes” or “everything stays the same” has been a theme of copyright law and public policy since the invention of photography (late 1800s), audio recording (early 1900s), radio, motion pictures, and television (early 1900s to mid-1900s), photocopiers (mid-1900s), computers (second half of the 1900s), videotape recorders (VTRs or VCRs) (second half of the 1900s). Copyright used to be medium-specific; today it is (ostensibly) “medium neutral.” Is that true?

# Copyright Calisthenics

**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**



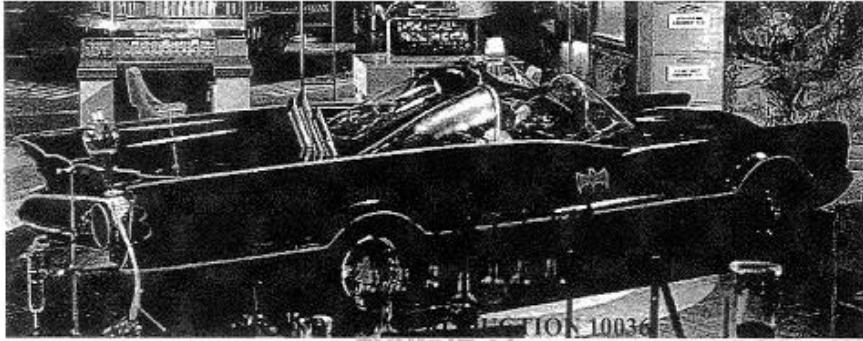
The original photo (Zhang Jingna;  
model is Ji Hye)



The painting (Jeff Dieschburg)

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

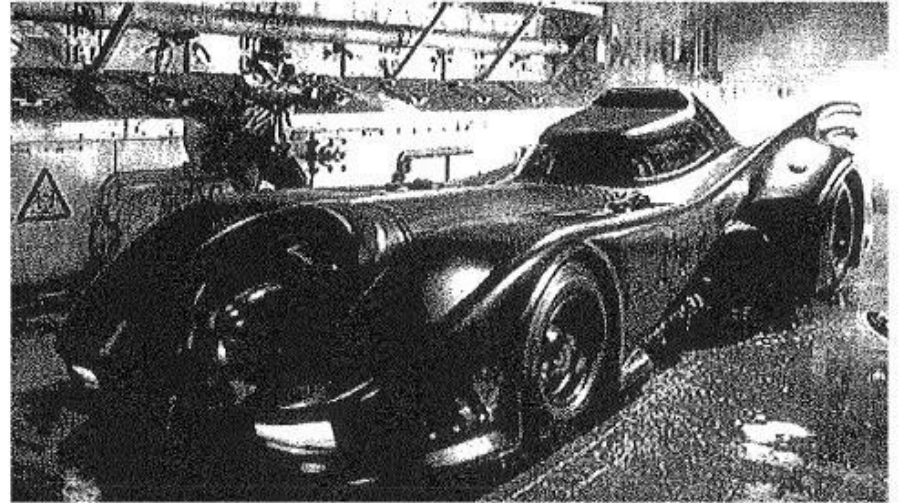
*Batmobile Depicted in the 1966 Television Series*



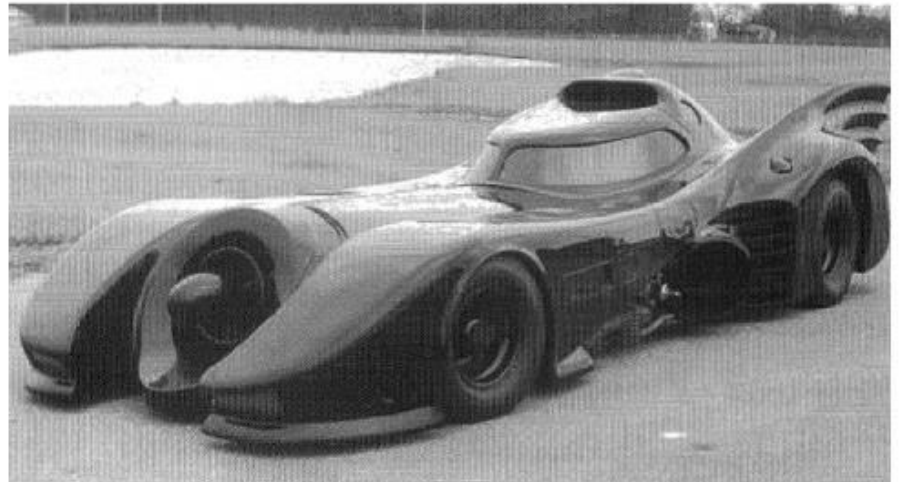
*Towle Replica*



*Batmobile Depicted in the 1989 Motion Picture*



*Towle Replica*



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

Why or why not recognize a copyright in this case?

Copyright in *what*?

Who is the author of the “work of authorship,” and to whom should the copyright belong?

How does the answer solve a problem in the world?

Whose problem?

Who benefits from the answer?

Who bears the costs?



Which one is the real Batmobile?

Does the answer depend on what DC Comics did?

On what the TV and film producers did?

On what the human artists at DC and/or ABC / Warner Bros. did?

Or

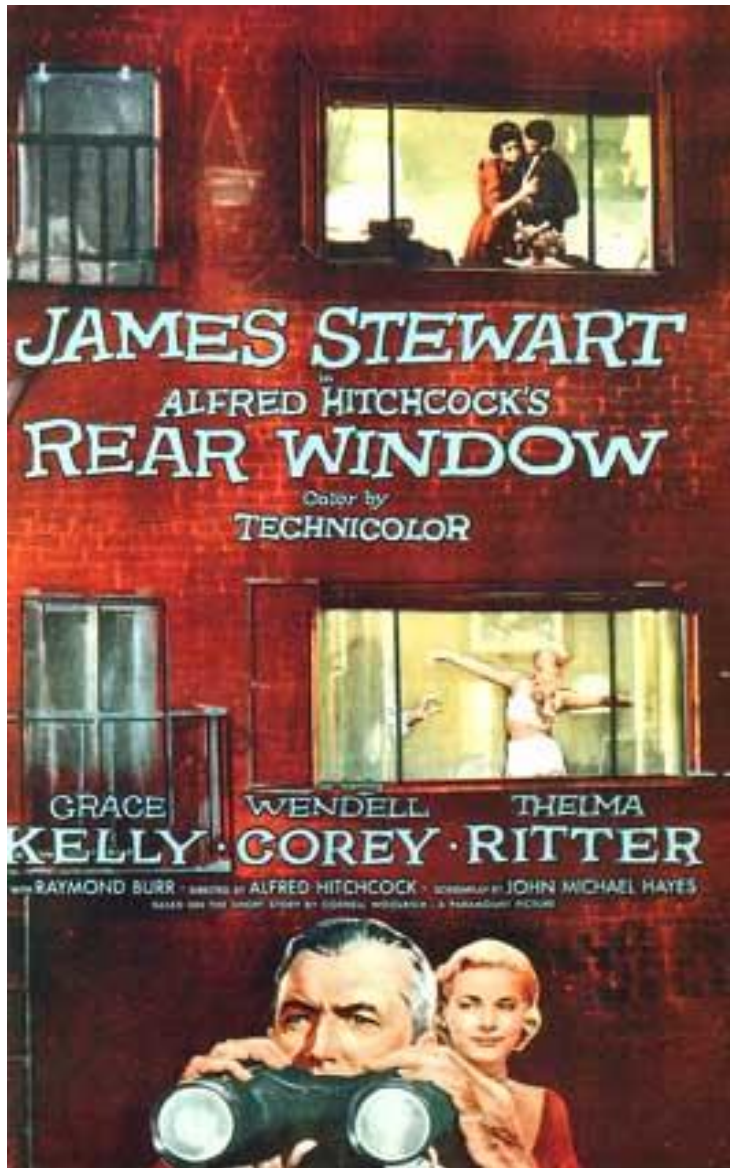
Does the answer depend on what *Towle* did?

On what *consumers* think?



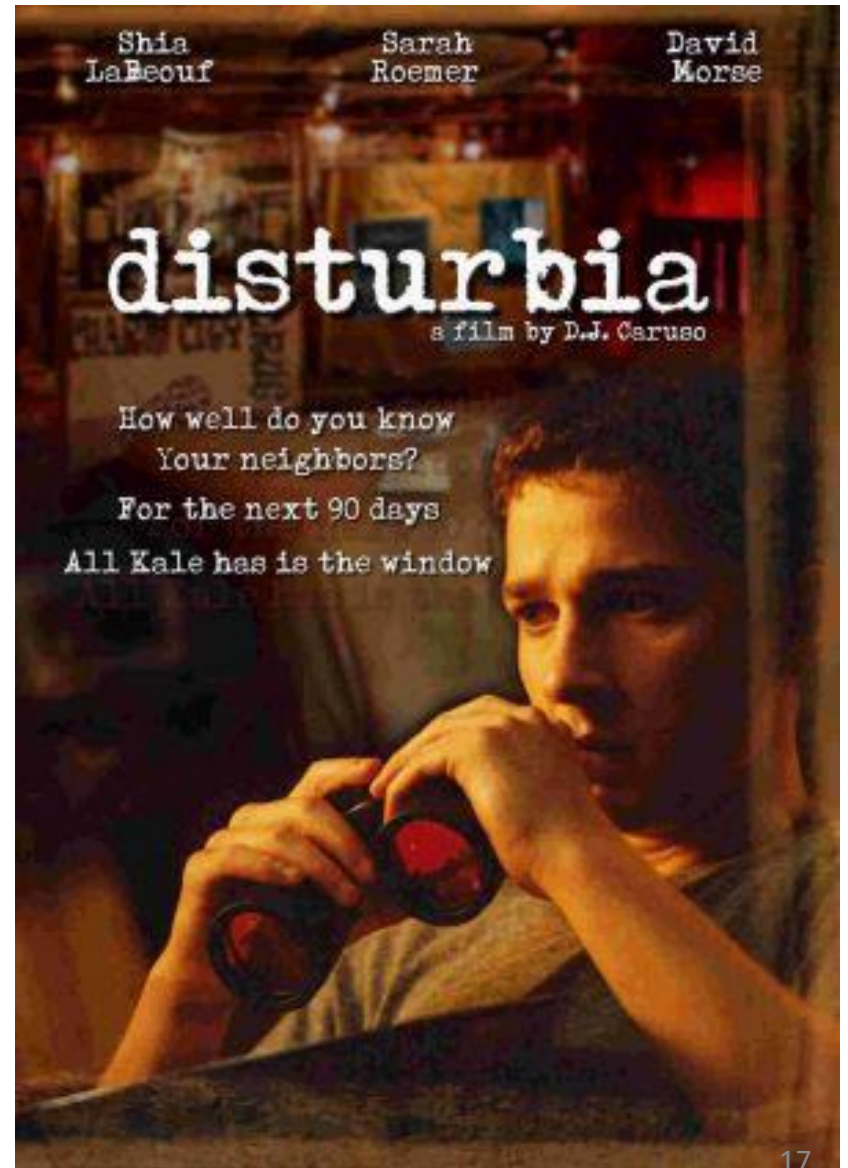
# Copyright Calisthenics

Did the producers of *Disturbia* appropriate any “thing” that belonged to the producers of *Rear Window*? Did the defendants interfere with any protected interest of the plaintiff? Why? Why not?



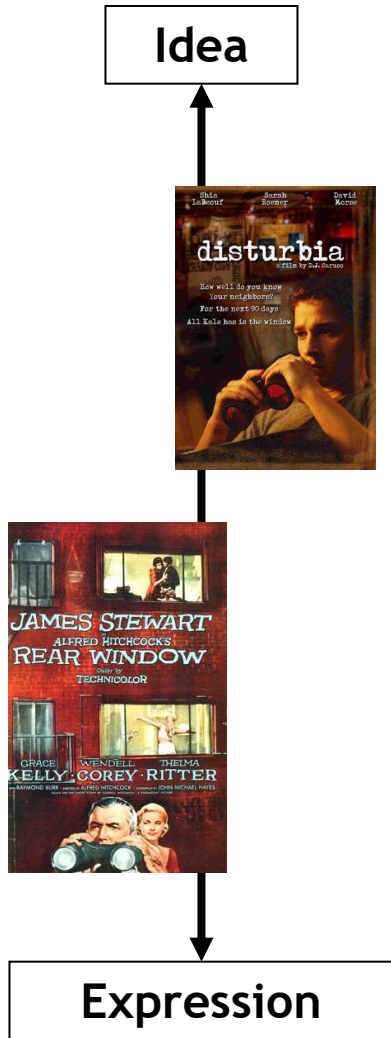
(1954)

v.



(2007)

# Copyright Calisthenics



**What does the © attach to?** Did the accused engage in improper appropriation – a/k/a infringement? Consider different “patterns of generality,” or “levels of abstraction.”

**[1] “High abstraction.”** Both are stories about voyeurism. **Is that the right level of abstraction? If so, the defendant infringed.**

**[2]** A man trapped at home by circumstance happens to observe suspicious goings-on at neighbor’s place. The man’s romantic interests complicate matters. **Is that the right level of abstraction? If so, then the defendant infringed.**

**[3]** A man victimized by an automobile accident uses binoculars to spy on creepy neighbor, whose comings and goings cast suspicion on otherwise normal behavior; blonde girlfriend is enlisted to investigate; in a chilling climax the neighbor is revealed to be a murderer and is arrested. **Is that the right level of abstraction? If so, the defendant infringed.**

**[4] “Low abstraction.”** In the original, an older man immobilized with a leg broken in an auto racing accident uses binoculars to observe neighbors in a New York apartment complex; believes that a neighbor has murdered the neighbor’s wife; enlists his glamorous blond girlfriend to investigate. The neighbor is arrested as he confronts the voyeur. In the update, a boy sentenced to house arrest after classroom outburst following his father’s death in car accident uses binoculars to observe a “normal” neighbor in suburban house-next-door and develops belief in neighbor’s murderous past. Neighbor kidnaps the boy’s mother; in a chilling climax, the boy and his blonde girlfriend rescue the mother and kill the neighbor. **Is that the right level of abstraction? If so, then the defendant did not infringe.**

# Copyright Calisthenics

**What does the © attach to?** Did the accused engage in improper appropriation – a/k/a infringement? Consider the economic interests at stake.

**[1]** The originator of the story was paid for his work and for selling a right to adapt it into a movie to Alfred Hitchcock and Jimmy Stewart, who acquired the story as a star vehicle for Stewart.

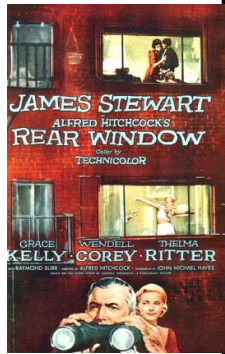
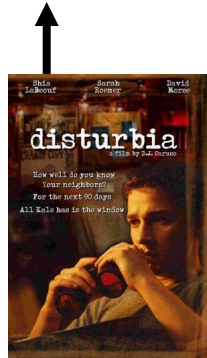
The classic film “Rear Window” was adapted from a short story published in a 10-cent “Detective” magazine in 1942, titled “It Had to be Murder.” The author was Cornell Woolrich.

**[2]** Woolrich himself got a reasonable amount of money by selling the movie rights, but no movie profits. Stewart and Hitchcock made much more.

**[3]** The producers of “Rear Window” made a film that is regarded as one of the very best of the 20<sup>th</sup> century and that is a copyrighted work in its own right. Stewart and Hitchcock made significant creative contributions of their own, changing the story (adding the girlfriend character, played by Grace Kelly) as well as producing the visuals.

**[4]** Woolrich is long gone, but the copyright in the story is still in effect (both as of the date of production of “Disturbia,” and as of the present day). It is no longer owned by Woolrich’s heirs. It is now owned by a Hollywood agency whose business consists in part of licensing older copyrights for present purposes. (Is this a valid business model? Or a hold-up game?)

**[5]** Did the release of *Disturbia* harm the legitimate economic interests of either the owners of the © in the short story, or the owners of the © in *Rear Window*?





## “Théâtre D’opéra Spatial”

Should this image be eligible for copyright? Why? Why not?

# The End

