Copyright, The First Amendment, and the Right of Publicity: The Expansion of “Transformative Uses”

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Introduction

Often, there are inherent conflicts among various laws, and courts attempt to resolve these differences by “balancing” interests. A of reading the literal language of both the Copyright and Patent clause of the United States Constitution and the First Amendment of the United States Constitution is an example. The First Amendment states that, “Congress shall pass no law abridging the freedom of speech….,” yet Congress does just that by placing limits another’s use of “original” forms of written and visual expression, and providing for damages and injunctions in the event that such “expression” or copyrighted material is used without authorization. If that is not Congress “abridg[ing] the freedom of speech,” what is? Can this conflict be reconciled? Can state laws against violation of the “right of publicity,” the “right of privacy,” and defamation be reconciled with the constitutionally granted freedom of speech?

The issue of conflict between the First Amendment and copyright has recently been brought to the forefront in cases such as Eldred v. Ashcroft, Universal City Studios, Inc. v. Corley, and SunTrust Bank v. Houghton Mifflin Co. Several cases involving state “right of publicity” laws, such as Hoepker v. Kruger, Comedy III Productions, Inc. v. Saderup, and ETW Corp. v. Jirah Pub. Co., have dealt with balancing the right to use one’s image in visual art with the right of the subject, or the subject’s heirs or estate to protect and restrict the use of the image.
This paper will discuss this conflict, and look at how courts have applied and expanded the concept of “transformative uses” to expand First Amendment protection to works that incorporate the image or expression into a larger work. In most cases, the issue of “transformative work” arises in the copyright context under the “fair use” doctrine, especially in parody although it has arisen in the news context as well. I will discuss this in more detail in a short while, however, in general, the more one “transforms” a work or creates another work that is not a substitute for the original, the more latitude one will get in using the work. Recently, this mode of analysis has entered the “right of publicity” arena as well, even to the extent of, in Hoepker v Kruger of allowing the sale of merchandise incorporating the work, such as coffee cups, refrigerator magnets, etc. I will first discuss the copyright aspect, and then move on to illustrative “right of publicity” cases. Finally, I will discuss where the trend is going and how it applies to museums and the visual arts.

Copyright Law

Copyright law protects “original works of authorship fixed in a tangible medium of expression.” The degree of originality does not have to be great. The requirement is not the same as the “novelty” requirement in patent law, under which one may not get a patent if the same invention was described, known, or used before the creation of the one in question. Knowledge of the preexisting invention is irrelevant. “Originality” basically means that if the work has only some degree of originality that came from the author, it is original. Even if a work is based upon another work, it may be original. In addition, even if one independently creates a work that is exactly the same as another, but had knowledge of the prior work, that work is “original,” and is entitled to copyright protection.

In general, very few works fail the “originality” test. One very noticeable case, and in the
The case is troubling on several levels. Since the 1880s, in the U.S. Supreme Court’s *Giles Lithographing Co. v. Sarony*, the case involving copying of a portrait of Oscar Wilde, courts have found originality in the lighting, set, decisions for exposure, even deciding what to shoot as sufficient to protect the photograph. Now a court is saying that if a photograph is not “sufficiently different” from the subject that it cannot be “original.” Would this mean that Ansel Adams’s photographs could not be original because they looked too much like the actual landscape...or Walker Evans’s photographs could not be original because they looked too much like the people or buildings themselves? I doubt that a court would hold that way, but who knows...courts have done strange things. Under *Bridgeman*, it seems as though there is now an incentive when making reproductions of public domain works to crop, overexpose, oversaturate a color, etc., so that the work would be “distinguishable” from the original. The court failed to understand that it takes more deliberate lighting, camera placement, and exposure in order to make an “exact copy” than it would to make one that is a “distinguishable variation.”

The only way that *Bridgeman* can be reconciled with preceding copyright law is that a
copyright doctrine known as the “sweat of the brow” doctrine was repudiated in the Supreme Court’s *Feist*, case in the early 1990s. In *Feist*, Justice O’Connor, writing for the majority of the Court held that “originality is a constitutional requirement.” That being the case, Congress has no authority to protect works that are not original, but were protected in order to reward the time, effort, and capital – “the sweat of the brow -- expended in their production. The court held that, in essence, there was no Lockean “natural law” that protected copyright. While most of the cases to which *Feist* applies are directory cases, nonetheless, there is no longer protection for works based upon the amount of work expended in their creation. *Feist*, therefore, leaves “unoriginal” works based upon preexisting public domain works free for all to appropriate.

It should be noted that *Bridgeman* applies only in the Southern District of New York. It is not binding law in any other jurisdiction and the issue has not been adjudicated, as of the author’s knowledge, in any other jurisdiction. The risk does exist, however, that third parties may be free to copy your copies of public domain originals. If someone copies an “unoriginal” authorized copy of an original underlying work, the holder of the copyright in the underlying work would still have a cause of action for copyright infringement of the underlying work.

Assuming that a work has passed the “originality” test, the issue of how much of the work may be taken and what is done with the work falls under copyright law’s “fair use” doctrine. Fair use has been called an “equitable rule of reason.” It is now codified in Section 107 of the Copyright Act. The statute contains four factors that should be considered in the analysis of whether a work that incorporates another copyrighted work without authorization infringes or does not infringe.

Section 107 of the Copyright Act provides as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use as reproductions in copies or phonorecords or by any other means