

## Copyright and the New Materialism

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### Abstract

Scholars in a variety of fields have recently begun to re-emphasize the centrality of matter in their exploration of the world. This “new materialism” seeks to traverse persistent analytical dichotomies between the ideal and the material. At the same time, copyright law has long rested upon a series of dualistic doctrinal structures, including the fundamental dichotomy between the immaterial “work” and its fixation in a physical “copy.” This distinction, which was never entirely coherent even in traditional media, has broken down in the face of digital instantiations of creativity. New materialism might offer copyright a path out of such unsustainable distinctions, by providing a viewpoint that traverses the artificial opposition of work and copy, recognizing the primacy of matter in the development of creative expression.

### Keywords

copyright; intellectual property; new materialism; fixation; digital media, virtuality

### Introduction

During the past several years, an increasing number of scholars in a variety of fields have begun to re-emphasize the centrality of matter in their exploration of the world (Dolphijn & van der Tuin, 2012; Coole & Frost, 2010). This “new materialism” seems in part a reaction to the “discursive turn” during the latter years of the Twentieth Century which over-emphasized the cultural and semiotic dimensions in our understanding of the universe. Drawing on multiple theorists from Deleuze to Latour, scholars in disciplines across the humanities and social sciences have begun rejecting the physical dualisms that pervade even postmodern analyses, in order to develop a coherent understanding of observed phenomena. This approach has become particularly important in the area of “digital humanities,” where the digitization of traditional expressive forms, or the development of new digital expressive forms, fundamentally implicates the connectivity of the virtual and the material (Bassett, 2012, p. 115).

One would expect that the new materialist turn should also have profound implications for the law of copyright, the legal regime under which proprietary interests in expressive creation are governed. Copyright has long rested upon a series of dualistic doctrinal structures, including the fundamental dichotomy between the immaterial “work” and its fixation in a physical “copy” (Burk, 2007, p. 187). In copyright parlance, the “work,” which is the entity to which authorial rights attach, is a sort of Platonic ideal that may be manifested in copies. Copies are defined as material objects. Copyright attaches to the work at the moment when the work is fixed in a *tangible* medium of expression. Although the author owns the *work*, she accrues the legal right to control *copies*

### Digital Fixation

This distinction, which was never entirely coherent even in traditional media, has broken down in the face of digital instantiations of creativity. The U.S. copyright statute defines a *copy* as an object from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine (17 U.S.C. § 101). The provenance of this definition is fairly straightforward, when the work is fixed on paper, canvas, or stone, or even in the case of more exotic analog media such as

microforms, where a device is necessary to view the stored copy. The application of the definition is more difficult in the case of digital media, where no copy of the work is stored – not even a tiny one, or an encoded one – but rather where sequences of bits configure a device so as to generate the work as output.

As a practical matter it is perhaps not surprising that the statutory definition of *copy* was nonetheless applied to digital media. Courts concluded that because digital media could be used to generate the work as output of a computing device, the criterion of perception or communication with the aid of a machine was satisfied, bringing digitized creations within the ambit of the statute (Burk, 2010). This required a shift in the concept of “communicated or “perceived” to include generation or reconstruction of the work. To have done otherwise held the potential to eviscerate the statute as the most valuable instantiations of creative works are increasingly digital forms. But at the same time, embracing this dichotomy impedes not only the coherence of the law, but the development of new modes of expression.

For example, the dichotomy between the ideal and the material comes across starkly in copyright’s first sale doctrine. Copyright law grants copyright holders the exclusive right to distribute copies – that is to sell or provide to the public material objects in which the work is fixed. (17 U.S.C. § 106) An exception to this right is the “first sale” doctrine, which holds that a copyright owner’s rights are exhausted by the sale of the copy – the purchaser has the right to dispose of that particular copy as he wishes, including lease, lending, or resale (17 U.S.C. § 109). First sale is thus the basis for numerous familiar institutions in the secondary market for physical copies, including used bookstores, used CD and record shops, public libraries, and Netflix DVD rentals.

But if no material object is transferred by the sale of a digitized work, how can it be subsequently transferred by the purchaser? Downloads of music, movies, or e-books involve reproduction – the creation of new files copied in the machine of a purchaser. Subsequent transfers of such files create more copies by replicating the files – but no copies are distributed, which is to say, no material objects move from place to place across the Internet. Consequently, it has been unclear and controversial how the first sale doctrine might apply to digital works – first sale applies to distributions, not to reproductions (Reese, 2003; Liu, 2001). Businesses such as “Redigi,” which attempt to create a secondary market in digital files, have found themselves the subject of copyright infringement suits.

### **Re-materialization**

The disconnection between legal doctrine and new media has now resulted in decades of incomprehensible decisions regarding the fixation of works in computer circuitry or the transmission of works across telecommunications media, particularly the Internet. New materialism might offer copyright a path out of such unsustainable distinctions, by providing a viewpoint that traverses the artificial opposition of work and copy, recognizing the primacy of matter in the development of creative expression.

First, new materialists caution against equating the digital with the ideal. Their analysis cautions that much of the discourse accompanying the use of digital media is couched in untenable terms of virtuality and immateriality (Parikka, 2012; Blanchette, 2011). New media discourse has often run to hyperbolic claims about the ethereality and evanescence of encoded information. Electronic transmission of bits has been breathlessly characterized as occurring without physical constraints, in an idealized environment of bits free from the constraints of atoms. But new materialism reminds us that the Internet and associated digital media is in fact limited by the capacity of the hardware on which the system runs. Bandwidth is not infinite, processing cycles are not instantaneous, and environmental factors ranging from cosmic radiation to overheating routinely produce errors in the system (Dexter, 2012, p. 135).

Second, new materialism invites us to push past critiques of copyright a step further. A number of critics have noted that copyright, from its roots to its present formulation, assumes a solitary genius

who generates creative works *ex nihilo*, and thus assumes sole and despotic entitlement of such creations (Lange, 1992; Jaszi 1991). This postmodern critique emphasizes the of this romantic formulation of creativity, emphasizing that in fact authors exist within particular social discourses, that the work of an author is never wholly original, drawing from myriad cultural sources, and that the meaning and value of a copyrighted work are at least in part interpretive acts of the reader (Jaszi, 1992).

Under a new materialist approach, the notion of authorship becomes further distributed. New materialism has tended to emphasize the agential nature of material objects, to de-emphasize the prominence and distinction of human agents, and to explore the assemblage or collectivity of human and non-human interaction. Authorship, and copyright, might then be defined by particularized collaborations between various agents, some of them human and some of them non-human. The collaborative between a server, a consumer, an artist is not the same in the context of peer-to-peer sharing as it is in the context of commercial purchase. Rather than resting on idealized distinctions between the material and the virtual, copyright might move toward a coherent regime recognizing the primacy of matter in the development of creative expression.

## References

- 17 U.S.C. § 101 (2009).
- 17 U.S.C. § 106 (2009).
- 17 U.S.C. § 109 (2009).
- Bassett, C. (2012). Canonicalism and the Computational Turn. In D. Berry (Ed.) *Understanding Digital Humanities* (pp. 105-126). London: Palgrave Macmillan.
- Blanchette, J.F. (2011). A Material History of Bits. *Journal of the American Society for Information Science and Technology*, 62 , 1042-1057.
- Burk, D. (2010). The Mereology of Digital Copyright. In J. Husinger et al. (Eds.). *International Handbook of Internet Research* (pp. 135-146). Berlin: Springer Verlag.
- Burk, D. (2007). Feminism and Dualism in Intellectual Property. *American University Journal of Gender, Social Policy & Law*, 15, 183-206.
- Coole, D. & Frost, S. (Eds.) (2010). *New Materialisms: Ontology, Agency, Politics*. Durham: Duke University Press.
- Dexter, S. (2012). The Esthetics of Hidden Things. In D. Berry (Ed.) *Understanding Digital Humanities* (pp. 127-144). London: Palgrave Macmillan.
- Dolphijn, R. & van der Tuin, I. (2012). *New Materialism: Interviews and Cartographies*. Open Humanities Press.
- Jaszi, P. (1992). On the Author Effect: Contemporary Copyright and Collective Creativity. *Cardozo Arts & Entertainment Law Review*, 10, 293-320.
- Jaszi, P. (1991) Toward a Theory of Copyright: The Metamorphosis of "Authorship." *Duke Law Journal*, 1991, 455-502.
- Lange, D. (1992). At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium. *Law and Contemporary Problems*, 55, 139-151
- Liu, J. (2001). Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership. *William and Mary Law Review* 42, 1245-1366.
- Parikka, J. (2012). Archives in Media Theory: Material Media Archaeology and Digital Humanities. In D. Berry (Ed.) *Understanding Digital Humanities* (pp. 85-104). London: Palgrave Macmillan.
- Reese, R.A. (2003). The First Sale Doctrine in the Era of Digital Networks. *Boston College Law Review* 44 (2) 577-652.

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