Copyright as a Rule of Evidence

by Douglas Lichtman
Many copyright doctrines are best understood as tools that exclude cases where evidentiary issues would likely so increase the costs of litigation that those costs would outweigh the social value derived from offering copyright protection in the first place.

I teach an introductory copyright course at the Law School, and in that course I find myself repeatedly talking about evidence. I talk about the obvious evidentiary issues—for example, the elements of a prima facie infringement case and the logic behind various limitations on the use of expert testimony. But I also talk about evidence in many settings where evidentiary issues might not readily come to mind.

For instance, it is now well accepted that a work of authorship must show at least a modicum of creativity in order to qualify for copyright protection. Students typically find this requirement intuitive. Novels, plays, and musical compositions are at the core of copyright, after all, so naturally some bit of creativity is required. I nevertheless ask my students to defend creativity as a legal, as opposed to artistic, threshold—in essence, to explain why a well-designed copyright regime would exclude ordinary, or what I call "banal," expression. That conversation inevitably leads us toward a discussion of evidence.

Of course, no one starts there. The first responses typically come from students who argue that copyright favors the creative over the banal simply because banal work is not valuable to society. Obviously copyright excludes banal expression, these students tell me; why incur the costs of administering a complex legal regime with respect to worthless work? The class usually accepts this argument for a few minutes, but then someone offers an example of a banal yet valuable work, and the argument unravels. The phone book lacks any creative spark, but telephone listings certainly serve an important function in society. In fact, a creatively organized phone book—say, one organized by the named party's height—would likely be less valuable than a traditional, alphabetical one. Databases similarly are often banal but valuable. The Kelley Blue Book, for example, greatly assists purchasers of used cars by gathering information about the market value of various vehicles, but the result is definitely not the kind of book that makes for exciting bedtime reading. The American Bone Marrow Donor Registry is similarly an utterly uncreative but nonetheless valuable work.

Having rejected the idea that creativity is a filter for social value, the class traditionally turns next to an argument about costs. Maybe copyright excludes banal work because it is inexpensive to create. No point in incurring the costs of the copyright regime with respect to works that are cheap to create, the class tells me this time; even without protection, firms and individuals would still find it worthwhile to produce inexpensive work. This argument falls more quickly than the first, mainly because the same examples that debunked the social value theory serve to undermine the cost theory, too. There are significant up-front costs associated with compiling new phone books and researching new databases. So, while it is true that banal expression is sometimes cheap to produce, this is not true across the board, and, overall, there is no reason to think that a lack of creativity is a good proxy for a lack of production costs.

The arguments from here get more sophisticated. For example, sometimes students suggest that copyright excludes banal work as a way of encouraging authors to focus on creative work. Increasing the reward for banal work might distract authors, these students argue, causing them to spend more time developing
dictionary and databases and less time writing *Moby Dick* and *Canterbury Tales*. This distraction argument has some appeal at first, but it ultimately proves too much. For starters, it is hard to imagine that Mark Twain was torn between either working on the phone book or penning American classics; so, when we talk about marginal incentives, we really are thinking about the decisions made by investors, publishers, and similar business entities, but not authors themselves. If our focus is on these sorts of business entities, however, the argument does not just argue against protecting banal work; it actually expands to argue against almost any legal protection. That is, if we were to change the law so as to make any business less attractive—from cattle ranching to, yes, database production—that would, at the margin, slightly increase the allure associated with investments in creative expression. Yet surely no one argues against federal farm subsidies on the grounds that a more precarious cattle industry would lead to better Hollywood scripts. Just the same, the argument is not compelling as applied to banal expression, unless (again) we think banal expression either is of extremely low social value or is extremely inexpensive to produce.

Note that, during the conversation in which all of these hypotheses are in turn brought forward and rejected, my class inevitably finds itself growing less and less comfortable with the creativity inquiry itself. In making the above arguments, students naturally offer what they believe to be no-brainer examples of banal work. Yet, in every case, at least someone in the room disagrees with the example as offered. Creativity, it becomes clear, is hopelessly subjective. As students struggle to explain creativity's role in the copyright regime, then, they also begin to wonder whether judges and juries are capable of measuring creativity in the first place. Is Piet Mondrian's painting *Composition with Yellow Patch* really a work of creative art, or is it just a few ordinary squares painted in black with one small patch of yellow? Can Campbell's Soup cans ever be anything more than boring cupboard material? As Justice Holmes said in an earlier era, it is "a dangerous undertaking for persons trained only [in] the law to constitute themselves judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

But then I point the class back to an explanation tied to something

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judges are quite competent to evaluate evidence. My argument is simple. If the copyright system were to recognize rights in banal work, courts would be overwhelmed by difficult evidentiary disputes. Two parties would come forward with remarkably similar banal works, and the court would find it virtually impossible to determine whether one copied from the other (impermissible infringement) or whether instead any similarity between the works was just a natural outgrowth of the fact that both works were banal. Ask four students to create a directory of Asian restaurants in Chicago and, whether they copy or no, the four will likely produce markedly similar directories. A creativity requirement, then, empowers courts to exclude from the copyright
system a particularly messy class of cases: cases where courts would not be able to use similarity as the basis for even a weak inference as to the likelihood of impermissible copying.

Evidence is a topic of conversation throughout my course, helping to explain not only the treatment of banal work but also copyright doctrines as diverse as the merger doctrine, the doctrine of *scènes à faire*, and the fixation requirement. The details of the argument change in each setting, but the basic point is always the same: copyright is in part a rule of evidence. Many copyright doctrines are best understood as tools that exclude cases where evidentiary issues would likely so increase the costs of litigation that those costs would outweigh the social value derived from offering copyright protection in the first place.

To examine one implication of this thesis—a thesis that I develop and analyze more fully in the working paper on which this essay is based—let us focus again on the question of why copyright law today needlessly denies protection. Protection is denied due to a lack of creativity, but there is no underlying evidentiary concern. Consider, for example, factual works. Factual works like directories and databases often lack creativity, but issues related to evidence can be quite manageable in these settings. A famous example involves a telephone directory. The firm that produced the original directory thought ahead and, with evidentiary issues in mind, peppered its listings with a smattering of fictitious entries. Those entries did no harm since no consumer was ever going to look up a nonexistent neighbor; but when a rival entered the market and copied the existing directory instead of gathering the data anew, those fictitious listings proved who copied from whom. If the rival had compiled its own telephone listings, or if it had even simply confirmed the existing listings, it would have detected all of the false entries and eliminated them. But the rival did not. Four fake listings thus appeared in the new directory, testifying both to the fact of copying and also to its approximate extent.

Now admittedly this sort of subtle trickery is only possible for certain types of work. Fictional entries on maps, for example, could be problematic. Even where such tricks are impractical, however, evidentiary issues concerning fact-intensive works should be easily resolved since the labor put into these works will typically provide all the evidence a court might need. Suppose, for example, that two biographers each chose to write the life story of boxer Lennox Lewis. True, the works would both likely tell a similar tale of a young man who grew up in London and went on to win Olympic Gold in Seoul. But a court would have no trouble determining whether the biographers copied from one
another as opposed to working independently. After all, the very act of researching Lewis's life should generate a rich paper trail of airline tickets, taped interviews, and the like, evidence that would clearly and easily distinguish cases of innocent similarity from cases of impermissible copying.

Not only does factual work thus not present problems with respect to proof; it also presents a very sympathetic case for some form of intellectual property protection. Facts can be extremely expensive to uncover, yet they are subject to free-rider problems the moment they are revealed to the public. Leaving facts unprotected therefore diminishes the incentive to discover and disseminate them, since the first party to do so will always be at a disadvantage vis-à-vis later parties that can avoid the up-front costs by copying. This might on balance significantly decrease the flow of factual information in society, an effect that could be reversed by an appropriately tailored form of intellectual property protection.

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Readers might object, worried that by recognizing copyright in facts, copyright laws will create monopolies in factual information. Similarly, some factual research might be so expensive as to exhibit natural monopoly properties. The costs of sending an unmanned vehicle to explore the Titanic wreckage are exorbitant even given modern technology; so, while it is technically feasible for a second exploration, the economics might cause us to think about the Titanic example in the same way we think about the Kennedy example. But, again, these are special cases that would likely justify special exceptions. In most situations, however, facts can be independently gathered by multiple parties and thus copyright would not yield monopoly.

Another concern that must be accounted for is the worry that protection of factual information will lead to wasteful duplication of research. The possibility of Coasian bargaining calls that claim into question; the fact that the second-comer can re-gather the information should set up a dynamic where the first party licenses to the second and thereby avoids any wasteful duplication.

that one can recognize copyright in these instances without creating monopolies in factual material.

Readers might also worry that in certain settings a second-comer might not be able to re-confirm a first author's factual claims. That is admittedly an important special case, and it might be that a doctrine like the fair use doctrine should be available to excuse unauthorized borrowing in such circumstances. It would be impossible, for instance, for a second videographer to capture footage of the Kennedy assassination, and certainly that is relevant when considering the appropriate scope of protection for the
But many respected commentators worry that transaction costs will block the bargain and, in cases where that seems plausible, again intellectual property rules could be tailored accordingly. Lastly, a reader might object on grounds that the public has a strong interest in making full use of factual information. As the Supreme Court once framed this objection, the “very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains,” and “this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.” But this objection, too, misses the mark. Copyright protection simultaneously increases and decreases the amount of information available to the public. It increases the available information to the extent that it gives authors an added incentive to develop and disseminate useful work. It decreases the available information to the extent that it allows authors to charge a nonzero price for information they reveal. If a court’s purpose is to increase the free flow of a particular type of information, then, it is not by any means clear that the best option is to deny copyright protection to that class of works. Instead, the best option might be to increase protection and in that way increase the incentive to gather and share the desired information. It all depends on which of the two above-referenced effects dominates.

This is of course not to say that factual work raises exactly the same incentive/access tradeoff that is raised by creative work. Quite the opposite, one can easily distinguish factual from creative work along this dimension. For example, one might reasonably argue that the public has a stronger need for access to factual information than it does to fictional because important public policy decisions often turn on factual data. On this argument, former President Ford deserves less protection for the facts presented in his autobiography than George Lucas deserves for the creative elements inherent in his Star Wars movies. Ford’s memoir, after all, tells us important details about Watergate and the Nixon pardon. One might reasonably argue the opposite point, too, namely that the public has a weaker need for access to factual information since in most cases a second author can invest his own time, money, and energy and in that way independently gather any factual information that is of interest. On this argument, it might be harder to create a substitute for Star Wars than it would be to reinvestigate the facts that led to the downing of the German airship Hindenburg. Overall, then, there is no reason to believe that, for factual work, the incentive/access tradeoff is skewed completely to one side. The scope of protection might very depending on the nature of a given work, but the fact that the public often values factual information certainly does not explain why factual work should be left unprotected.

In short, one insight of the evidence theory is that a lack of creativity itself is not a good reason to deny protection to factual works. False facts and rich paper trails both operate in this context to minimize any evidentiary concerns. And, given that, there are strong arguments to be made in favor of at least some narrow form of protection. Debate over this possibility is prematurely cut off by the modern insistence on creativity per se, and the result may very well be an information economy where too few resources are spent preparing and disseminating factual works like databases and directories.

This article is adapted from a fuller working paper which is available directly from Professor Lichtman via e-mail at dgl@uchicago.edu. Comments and feedback are appreciated.

1 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).
3 The fair use doctrine excuses infringement in instances where various public policy concerns support that result. See 17 U.S.C. § 107.