

WHAT IS A COPYRIGHTED WORK? WHY DOES IT MATTER?

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Each year, the UCLA School of Law hosts the Melville B. Nimmer Memorial Lecture. Since 1986, the lecture series has served as a forum for leading scholars in the fields of copyright and First Amendment law. In recent years, the lecture has been presented by many distinguished scholars. The UCLA Law Review has published these lectures and proudly continues that tradition by publishing an Article by this year's presenter, Professor Paul Goldstein.

Mel Nimmer loved questions, and not only I suspect because he knew the answers to so many. Mel used questions the way a trial lawyer uses questions, but in his case, as a means for cross-examining the law itself in order to extract truths large and small. In tribute to Mel's high interrogatory style and to the fact that so many of his questions took aim at American copyright law, I have chosen two questions for the title of my remarks today: *What Is a Copyrighted Work? Why Does It Matter?*

To begin, it strikes me as curious that a law, copyright, whose constitutional source puts its emphasis on "Writings," not "Authors,"¹ and whose governing statute extends its protection to "original works of authorship,"² nowhere in fact delimits the metes and bounds of a copyrighted work, or even prescribes a methodology for locating a work's boundaries.³ Copyright law's well-known

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1. U.S. CONST. art. I, § 8, cl. 8.

2. 17 U.S.C. § 102(a) (2006).

3. The closest the Act comes is in section 101's statement that "[a] work is 'created' when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work." *Id.* § 101. However, the first clause in that sentence should not be read to imply that the copy or phonorecord in which a work is fixed will mark the work's boundaries; a novel can be dispersed across three hundred separate pages, and thousands of sound recordings can be fixed in a single computer hard drive.

idea-expression distinction may be highly indeterminate, but the statute at least provides markers to aid in the rule's application. By contrast, the statute offers no guide to the boundaries of a copyrighted work, and, indeed, in one important place,⁴ the statute expressly directs courts to ignore every legal and commonsensical understanding of what a copyrighted work might be.⁵

The reason for this nonchalance cannot be that the answer to the question of what constitutes a copyrighted work lacks consequence. As my second question implies, the answer can matter very much. Consider two examples. Statutory damages represent an important source—sometimes, the only source—of recovery for copyright owners, and section 504(c) of the 1976 Copyright Act limits statutory damage awards (between \$750 and \$30,000 for nonwillful infringements) to one award for each copyrighted *work* in suit. In awarding statutory damages for copying a season's run of the popular television series *24*, is a judge to treat each of the season's twenty-four hourly episodes as the relevant work? If so, the statutory damage multiplier will be twenty-four. Or is the relevant work bounded by the single twenty-four-hour day that aggregates the interlocking episodes? If so, the multiplier is one.

Similarly, section 107, the very important fair use provision, directs courts in fair use cases to consider, among other factors, “the amount and substantiality of the portion” used by the defendant “in relation to the copyrighted *work* as a whole.”⁶ Fair use thus may come out differently if the copied episode of *24* is treated as the entire copyrighted work or as only one twenty-fourth of the copyrighted work.

The reflexive answer to the question, what constitutes a copyrighted work, is that the work is whatever the author says it is. The problem with this solution is that the consequences I have just noted—statutory damages, fair use—create an incentive for the copyright owner to skew the calibration of his work toward a size more granular than principle, law, or practice might reasonably condone. So long as it contains the required quantum of original expression, why should an author not identify a chapter of his novel—or a page, or even a paragraph, for that matter—as the relevant work if that will multiply the damage award skyward or more effectively rebuff a claim of fair use? What about an artist claiming as her work the corner of a painting or a few bars of music? Or a one-minute scene from the show, *24*? Giving authors too great a say in establishing their work's boundaries may, it might be feared, incite

The second clause, though marking a work's evolution over time, similarly says nothing about the work's boundaries.

4. See *id.* § 504(c)(1).

5. *Id.*

6. *Id.* § 107 (emphasis added).

self-seeking claimants to turn these boundaries to an advantage that unfairly taxes copiers and, therefore, the public.

Where, then, should we look for instruction? A court in a real property boundary dispute might consult a text on the custom and principles of land surveys. But a court that looks for clues to boundary location in literary theory, art theory, music theory, or film theory will find the cupboard bare. Also, as I have noted, the statute is not instructive, and the cases reveal little analysis of the question and even less that is helpful. So, it should be small surprise that our earlier, reflexive answer—that the author is the master of his work’s metes and bounds—is also the answer generally accepted by the courts.

In the overwhelming majority of cases under the 1976 Act in which identification of the copyrighted work determined, or at least influenced, the legal outcome, the court declined to look behind the registration obtained by the copyright owner from the United States Copyright Office and, like the Copyright Office itself, simply rubber-stamped the author’s identification of his work in the registration materials. This almost uniform resolution, gleaned from a review of close to three hundred decisions under the 1976 Act, bears the expected qualification. Although the sample was confined to cases in which the work’s correct identification mattered for purposes of fair use or statutory damages, the court rarely noted what in fact had been registered. Nonetheless, there is evidence in the text of the opinions to support the conclusion that the boundaries of the work, as registered, coincided with those of the “work” identified by the court for the purpose of applying these provisions.⁷

The interesting cases, of course, are those in the small handful—about 3 percent—where the boundaries of the work identified in the judicial decision and those identified in the registration certificate diverge. One example is District Judge Nancy Gertner’s 2009 decision in *Sony BMG v. Tenenbaum*.⁸ Plaintiff record label had registered its entire CD album, and not the individual sound recordings on the album, as the relevant copyrighted work.⁹ Defendant, because he had downloaded only individual songs and not the entire CD, argued that the third fair use factor—“amount and substantiality of the portion used in relation to the copyrighted work as a whole”—weighed in his favor, for he had, after all, copied only a small portion of the copyrighted CD.¹⁰ The argument failed to persuade Judge Gertner, who ruled that the copyright

7. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803–04 (9th Cir. 2003) (indicating that a “verbatim copy” of the plaintiff’s Barbie doll “would be an exact three dimensional reproduction of the doll”).

8. 672 F. Supp. 2d 217 (D. Mass. 2009).

9. *Id.* at 229.

10. *Id.*

owner's decision to register the CD rather than its individual tracks as the copyrighted work was "the proverbial distinction without a difference."¹¹ Judge Gertner explained that "[i]ndividual songs are regularly treated as the relevant unit for evaluating the infringement or fair use of musical works."¹²

Even more interesting than cases like *Tenenbaum* that depart from the norm of registration-as-rubber-stamp are cases that follow this norm but demonstrably err in so doing. As Exhibit A, I offer *Warren Publishing Co. v. Spurlock*,¹³ where the court weighed the third fair use factor in favor of a defendant who had copied, in their entirety, paintings by the artist Basil Gogos that appeared as the covers of plaintiff's horror magazines, which the publisher had registered—magazine and cover together—as a single unit.¹⁴ Since, in the court's words, the covers thus "make up only 1–1.5% of each of Plaintiff's copyrighted works"¹⁵—that is, less than 2 percent of each magazine's content—the fair use scales tipped in defendant's favor.¹⁶ But which is the relevant work? Although they could have stood on their own as works of art, the covers were not, the court told us, the copyrighted works.¹⁷ Although there is support for *Spurlock*'s approach in the case law,¹⁸ most courts would in fact treat a magazine cover as a separate copyrightable work.¹⁹

The vast majority of cases that match the copyrighted work with its registration, as well as the handful of cases like *Tenenbaum* that depart from the registration to inquire into the author's reasonable intentions, confirm that a copyrighted work is what the author says it is. Under this view, and consistent with the provision of the Copyright Act that gives presumptive weight to the facts stated in a timely registration certificate, registration offers a first—and usually final—approximation of the author's intentions, subject to revision in light of objectively reasonable evidence of the author's true intentions.

What kind of extra-registration conduct should qualify for consideration? Inquiry need not be a particularly nuanced task, like marking off a work's internal boundaries between unprotectible ideas and protectible expression, nor even

11. *Id.*

12. *Id.*

13. 645 F. Supp. 2d 402 (E.D. Pa. 2009).

14. *Id.* at 406–07, 423–24.

15. *Id.* at 424.

16. *Id.* at 425.

17. *Id.* at 424.

18. See, e.g., *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 n.15 (5th Cir. 1980).

19. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Fed. Ins. Co.*, 189 F.3d 208, 217 (2d Cir. 1999); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925–26 (2d Cir. 1994); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1154–55 (9th Cir. 1986); *Super Future Equities, Inc. v. Wells Fargo Bank Minn.*, 553 F. Supp. 2d 680, 699–700 (N.D. Tex. 2008).

the task required of patent applicants in specifying the scope of their invention. Rather, I have in mind such homely considerations as prevailing custom in the relevant genre or the affected industry. So, for example, in *Tenenbaum* the court may sensibly have been influenced by the fact that record labels commonly register their CDs as compilations, rather than as the dozen or so individual works they embody, as an expedient to qualify the individual works as works made for hire (and thus statutorily immune from later terminations of transfer by the author). Similarly, the erring *Spurlock* court might more profitably have contrasted the terms of the registration certificate with the conditions under which the cover art was created, as well as testimony in the case that the Gogos illustrations embodied in the covers also sold individually as paintings for as much as \$20,000 each.²⁰

A court might, of course, also look to the claimed work of art itself, with the judge applying his own aesthetic preconceptions to determine the work's metes and bounds. I would note, though, that there is far less of a disposition among contemporary courts to engage in such analysis than there was formerly and, on the evidence of the early opinions, this may in fact be a good thing. Consider two opinions: one from the Supreme Court in 1914 and the other from the Second Circuit almost fifty years later, exploring the question, what is a copyrighted work, in the far more perilous context of American copyright law's late, but largely unlamented, notice requirement, prescribing affixation of the statutory copyright notice to all published copies of the work. Get the boundaries of your work wrong, the statute of those days told us, and you will lose your copyright altogether.²¹

The 1914 Supreme Court opinion was from American copyright law's grand master, Justice Holmes, writing in *DeJonge & Co. v. Breuker & Kessler Co.*²² The plaintiff had described the work in suit as "a painting representing sprigs of holly, mistletoe and spruce, arranged in the form of an open cluster having substantially the outline of a square," a painting that in Justice Holmes's view might have been "framed and used for the same purposes of pleasure as other more considerable works of art."²³ But a framed display was evidently far from the mind of the copyright owner who had instead authorized reproduction of the work on holiday gift wrap in a repetitive pattern, side by side, above and

20. Email From Manny D. Pokotilow, counsel for plaintiff, to author (Mar. 16, 2011, 06:59 PDT) (on file with author).

21. See Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1077 (codified at 17 U.S.C. § 10 (1947)) (repealed 1978).

22. 235 U.S. 33 (1914).

23. *Id.* at 35–36.

below, twelve repetitions to each strip of paper. A single copyright notice in the statutory form accompanied each strip, but not each image on the strip.²⁴

The problem, and the reason the trial court dismissed the bill of infringement, was that, under the terms of the applicable 1874 Copyright Act, publication of a work without copyright notice in the statutory form instantly cast the work into the public domain. Thus, the question: What was the copyrighted work? Was it the twelve-image strip? If so, the single notice sufficed to secure copyright. Or was the work the individual cluster? If so, copyright failed. The trial court held the latter, and the court of appeals and the Supreme Court agreed. Justice Holmes wrote for the Supreme Court majority:

The thing protected and the only thing was the painting, the whole of which was reproduced in a single square. . . . It is suggested that it is overtechnical to require a repetition of the notice upon every square in a single sheet that makes a harmonious whole. This argument tacitly assumes that we can look to such larger unity as the sheet possesses. . . . The protected object does not gain more extensive privileges by being repeated several times upon one sheet of paper, as anyone would recognize if it were the *Gioconda*. The appellant is claiming the same rights as if this work were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a Holy Family, or a scene of war.²⁵

This is not the occasion to consider why a copyright judge as pragmatic as Holmes would reach such a crabbed result.²⁶ But we can contrast his approach with the one taken by Judge Sterry Waterman, writing almost fifty years later in *H.M. Kolbe, Co., Inc. v. Armigus Textile Co., Inc.*,²⁷ one of the many fabric design cases that in those days came before courts in the Second Circuit. At issue again was a design consisting of floral clusters—this time, purple roses—each cluster enclosed and separated from the next by a square border of leaves and petals, and inverted in alternate eight-inch squares, achieving a checkerboard pattern running the length and width of the fabric. Copyright notices were printed on the selvage at sixteen-inch intervals, one copyright notice for every eight reproductions of the rose cluster. Although the 1909 Copyright Act, not the 1874 Act, applied, notice was still a requirement, making the case look very much like *DeJonge* redux. In any event, it looked

24. *Id.*

25. *Id.* at 37.

26. On Justice Holmes's pragmatic approach to copyright, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 48–53 (rev. ed. 2003).

27. 315 F.2d 70 (2d Cir. 1963).

that way to the copyist, who defended that the statute required one notice for each rose square and, failing that, all fell into the public domain.²⁸

The court ruled for the copyright owner, Kolbe. Judge Waterman wrote:

[T]he “work” . . . which Kolbe sought to copyright was not merely the single rose square from which its textile design was created. It was rather the composite design itself, which depends for its aesthetic effect upon both the rose figure and the manner in which the reproductions of that figure are arranged in relation to each other upon the fabric.²⁹

What of *DeJonge*? Judge Waterman distinguished the Supreme Court precedent on the ground that the copyrighted work there was “the component picture rather than the total design.”³⁰

What aesthetic principle whispered to Justice Holmes that the copyrighted work was the component and to Judge Waterman that it was the assemblage? The *Kolbe* fabric had inversions that the *DeJonge* wrapping paper did not, but that seems too small a distinction to have made a difference or, more generally, to invite any nodding confidence about the aesthetic forays of federal judges outside the four corners of the registration certificate. Indeed, the single fact that reconciles *Kolbe* and *DeJonge* is how the artist in each case defined the boundaries of his work. *DeJonge*’s pleadings identified the single holly, mistletoe, and spruce cluster as the work in issue as, no less importantly, did the deposit that accompanied the registration application.³¹ By contrast, *Kolbe*’s pleadings and registration characterized the composite assemblage as the copyrighted work.³² In short, both courts could plausibly have made the observation that registration offers a first, rebuttable approximation of the copyrighted work and, lacking proofs to the contrary, simply stopped there and saved us their essays into art appreciation.

How hazardous is it to allow the author’s intentions, inside and outside the registration certificate, to control the determination of a work’s boundaries? The notion that it is the author whom courts should consult in calibrating a “work” would surely seem anodyne to our friends in civil law countries, who

28. *Id.* at 72.

29. *Id.* Judge Waterman’s opinion was particularly sensitive to the practicalities of fabric conversion:

Textiles are normally sold by the bolt at wholesale, in units of a yard at retail. By repeating its notice of copyright every 16 inches down the length of its printed fabric, therefore, Kolbe affixed at least one statutory notice to each smallest commercial unit by which its product is normally sold. No other practicable arrangement of copyright notices would better have warned defendants below, or other potential infringers, of Kolbe’s claim.

Id. at 73.

30. *Id.* at 72 n.2.

31. *DeJonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33, 35–36 (1914).

32. *Kolbe*, 315 F.2d at 72–73.

traditionally measure the very existence of a work by the extent to which it bears the impress of the author's personality; the work ends where that impress disappears. And, from this remove, it might seem surprising *not* to let the author define his work's boundaries, for, indeed, who knows the work better than the author himself? It is the artist who decides how high and wide to stretch her canvas, the novelist who decides what his book's first and last words will be, and the film director who decides which frame will mark THE END.

Also, external legal referents such as copyright law's originality requirement will always be present to curb excessive authorial maneuvers. If, for example, the copyright owner in *DeJonge* sought one statutory award for the copying of each of the countless, but identical floral clusters, a court today would certainly hold that only one original work was in issue, so that only one award was appropriate.

But what if each cluster differed just enough from the others to qualify as original and thus, standing on its own, to receive a statutory award? Consider the case that first sparked my interest in this question, *Walt Disney Co. v. Powell*,³³ where a t-shirt vendor reproduced six different poses of Mickey and Minnie Mouse. How many Disney works did he infringe? Six, said the district court and awarded Disney \$90,000 statutory damages, \$15,000 for each alleged work. No, the D.C. Circuit said, the copyrights in only two works were infringed.³⁴ The court wrote:

While Mickey and Minnie are certainly distinct, viable works with separate economic value and copyright lives of their own, we cannot say the same is true for all six of the Disney copyrights of Mickey and Minnie in various poses which the district court found to be infringed in this case. Mickey is still Mickey whether he is smiling or frowning, running or walking, waving his left hand or his right. Thus, we find that Powell's mouse-face shirts infringed only two of Disney's works.³⁵

It is hard to know from the record precisely what the Disney company identified as its copyrighted works—the registrations at issue were a true dog's breakfast, including the entire of the seminal film *Steamboat Willie*. But, however the registrations identified the works, it was of small consequence, for the court of appeals took its own somewhat jaundiced view of what constitutes a work and ruled that only the ur-Mickey and ur-Minnie images were the relevant works.³⁶ Since, as I have suggested, each of the six poses was probably

33. 897 F.2d 565 (D.C. Cir. 1990).

34. *Id.* at 570.

35. *Id.*

36. *See id.* Just as copyright law's requirement of original expression clamps a brake on overreaching authors, so section 412 of the 1976 Act, making statutory damages available as a rule

original on its own, the court might better have treated each of the six poses as derivative of the ur-Mickey and ur-Minnie depictions and relied on section 504(c)(1)'s last sentence to the effect that, for purposes of statutory damage awards, all the parts of a derivative work constitute one work.

All of these considerations throw into sharp relief Congress's decision in section 504(c)(1) of the 1976 Act not only to limit statutory damages to one award for each work in suit, but also, in the provision's last sentence, to establish that for these purposes all of the parts, not only of a derivative work, but of a compilation as well, constitute but one work, thus overriding any contrary designation by the author of his work's boundaries, whether through registration or otherwise. A more complete reversal of accepted practice elsewhere under the statute cannot be imagined.

What is a "compilation?" An anthology of America's one hundred best short stories, or poems, or photographs would be a compilation, as would a business directory, so long as the selection, arrangement, or coordination of the elements possesses the requisite originality. It is the first, anthology-type of compilation—called a "collective work" by the Act—that I wish to comment on in the context of the statute's limitation of one award for each compilation, no matter how numerous the parts of the compilation may be. The result of this odd, and even obnoxious, provision, that "all the parts of a compilation . . . constitute one work,"³⁷ is that the infringer who copies one story from an anthology will be answerable for a single statutory award, and if he copies all one hundred stories, he will still be liable for but a single award. To be sure, the discretionary range of statutory damage awards, from \$750 to \$30,000 for nonwillful infringements, gives courts some room to adjust for the magnitude of the appropriation, but neither the discretionary range nor the language of the provision answers the hard question of who gets compensated for the infringement—the copyright owner of the story or of the compilation. Thus, the provision is odd because of the perverse incentive it gives an infringer to copy the entire compilation and not just one of its elements. It is obnoxious because, read literally, it may euvre the writer who has authorized anthologization of her short story out of any award at all.

only in cases where the registration preceded the infringement, blunts authorial attempts to game the system. In addition to giving potential users notice of the copyright owner's conception of what constitutes its work, this requirement also offers a litmus test of the owner's expectations, untainted by the prospect of litigation and a more or less rich recovery. To register each of 115,200 frames in a feature film to secure that number as the statutory damage multiplier in the event the entire film is copied would cost the registrant upwards of \$4,032,000 in fees alone.

37. 17 U.S.C. § 504(c)(1) (2006).

This highly stylized provision represents Congress's response to a handful of district court decisions from the 1950s and 1960s, before the one compilation-one award rule came into force, granting separate statutory awards for each of several illustrations copied from a single advertising catalogue.³⁸ If you consider what the statutory multiplier would be if a Sears, Roebuck catalogue with its thousands of photographs were copied without permission, you will understand why then Copyright Office General Counsel Abe Goldman lauded the proposed new statutory language for section 504(c) with the observation that "[t]his means, for example, that if somebody infringes by taking ten different cuts out of an advertising catalogue, he's committed one infringement, not ten."³⁹ However, it is not self-evident that Goldman's fears were well grounded, nor is it clear that true anthologies, such as the one hundred best American stories, should fall under the same hammer. Indeed, Goldman's fears largely evaporate if it is remembered that the 1976 Act allows statutory damages only if the copyright owner obtained registration for the work before the infringer came into view. To be entitled to the statutory award, each of those deaths by a thousand cuts would have to have been registered before the catalogue owner knew which, if any, of them would be infringed—and this at an expense of upwards of \$35 a pop, no discount for quantity.⁴⁰

The most sensible approach to the statute's one compilation-one award rule would be to repeal it, as Congress considered doing—at least in part—in 2006. That year's H.R. 6052 would have added, at the end of the present language, the qualifying clause: "[E]xcept that the court in its discretion may determine that such parts are separate works if the court concludes that they are distinct works having independent economic value."⁴¹ By the traditional measures, evidence of such independent economic value would have been the registration certificate and manifestations of the author's intentions outside

38. See, e.g., *Hedeman Prods. Corp. v. Tap-Rite Prods. Corp.*, 228 F. Supp. 630, 632, 636–37 (D.N.J. 1964) (finding five separate infringements where the defendant took five illustrations from the plaintiff's catalogue and published them in the defendant's catalogues); *Harry Alter Co. v. A.E. Borden Co.*, 121 F. Supp. 941, 943, 945 (D. Mass. 1954) (finding six separate infringements where the defendant's first catalogue took numerous elements from one of the plaintiff's catalogues, the defendant's second catalogue took numerous elements from two of the plaintiff's catalogues, and the defendant's third catalogue took numerous elements from three of the plaintiff's catalogues); *Markham v. A.E. Borden Co.*, 108 F. Supp. 695, 708 (D. Mass. 1952) (finding nine separate infringements where the defendant took nine elements from four of the plaintiff's catalogues), *rev'd in part on other grounds and remanded*, 206 F.2d 199 (1st Cir. 1953), *aff'd*, 221 F.2d 586, 588 (1st Cir. 1955) (rejecting the plaintiff's argument that there were more than nine infringements).

39. STAFF OF H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION WITH DISCUSSION AND COMMENTS 203–04 (Comm. Print 1965).

40. See U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last updated Sept. 24, 2010).

41. H.R. REP. NO. 109-6052, at 97 (2006).

the certificate. Surely Basil Gogos's magazine cover—at least in a court other than the one that decided *Spurlock*—would be considered an independent work, uncabined by the magazine's compilation.

H.R. 6052 failed, and short of repeal, the second most sensible approach to this baleful sentence—because it is the most practical and most responsive to authorial choice—is to treat the constituent elements of the compilation, as well as the compilation itself, as a single work only in cases where the compiler owns the copyright not just to the compilation but to its elements and has registered both as a single work. But in cases where the copyright owner of the constituent element—the compilation owner or the contributor—has timely registered the contribution before the infringement, he should receive a separate statutory award.

Courts sometimes take this approach. In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,⁴² the question was whether eight consecutive episodes of the television show *Twin Peaks* were each entitled to a statutory award against a defendant that had copied from all eight in its guide to the series, or whether, as predictably argued by the defendant, the story arcs linking the episodes made them a compilation entitled to but a single statutory award. In an opinion that weighed both the nature of the individual episodes and the fact that the copyright owner had secured a registration for each of the eight works, the Second Circuit Court of Appeals ruled that the copyright owner was entitled to eight separate awards.⁴³ The court reasoned that “[t]he author of eight scripts for eight television episodes is not limited to one award of statutory damages just because he or she can continue the plot line from one episode to the next and hold the viewers’ interest without furnishing a resolution.”⁴⁴

It is, I should warn, possible to follow this proposed approach and still reach the wrong result by misjudging the author's intentions either inside or outside the registration certificate. In *Bryant v. Media Right Productions, Inc.*,⁴⁵ a different Second Circuit panel made both mistakes. The case involved two CD albums that compiled ten songs each, and the court ruled that the relevant works were the plaintiff's albums, not the songs, even though the court assumed for purposes of decision that each song, as well as each album, had been registered separately.⁴⁶ How did the court come to this decision? Only by treating as critical a question that it imputed to *Twin Peaks* as well: whether the

42. 996 F.2d 1366 (2d Cir. 1993).

43. *Id.* at 1381.

44. *Id.*

45. 603 F.3d 135 (2d Cir. 2010).

46. *Id.* at 140 n.4.

copyright holder “issued its works separately, or together as a unit.”⁴⁷ According to the court, plaintiff songwriters had clearly done the latter.⁴⁸ It is in fact difficult to find such a criterion in the text of *Twin Peaks*, and even if such a criterion were there, it is hard to understand why it should be given any weight, since it would require any CD, even if it fails to qualify as a compilation, to be treated as a single work.⁴⁹

It may be objected that the approach I have proposed for application of section 504(c)’s compilation rule, as well as the approach that I have proposed more generally for identifying a work’s metes and bounds, give too much force to registration decisions and in any event too wide an ambit for authorial maneuvering. But there is no reason to believe that such abuse will occur on a worrisome scale. Surely, if no infringer is in sight at the time registration is made, few film producers will register their films frame by frame in anticipation of a minimized fair use defense or an aggrandized statutory award; nor will catalogue publishers register every one of the hundreds of thousands of photos in their catalogues. Also, courts can be expected to defer less completely to registrations made after, rather than before, infringement because of the clearer temptation to strategic behavior in the former circumstance, and in these cases to attach greater weight to parol evidence of the author’s intentions. In any event, section 504(c)(1)’s statutory damage multiplier represents the economically most significant consequence of a work’s definition, and here the statute’s general restriction of such awards to infringements occurring *after* registration largely removes strategic behavior as a problem.

One of Congress’s greatest, yet most unremarked, achievements in the 1976 Act was to move authors toward the center of copyright, where they belong—an achievement significantly attributable to the tireless work of the late Register of Copyrights, Barbara Ringer.⁵⁰ Courts in the years since the Act’s passage have not been so attentive. The Supreme Court has cut back on

47. *Id.* at 141.

48. *Id.* at 141–42.

49. The *Bryant* court considered but rejected an approach taken in the First Circuit to make individual statutory awards in cases where the compiled works possess independent economic value. *Id.* at 142. An example of the First Circuit’s approach is *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993), where the court held that an award could be made for each episode of a television series later released under license as a videotape compilation because each episode was produced and aired on television independently of the others and could have been rented and viewed separately. *Id.* at 1116–17; see also *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769–70 (11th Cir. 1996).

50. See Barbara Ringer, *United States of America*, in *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* 480, 500–01 (Stephen Stewart ed., 1983).

authors' reputational rights,⁵¹ and lower courts have curtailed their economic rights, for example, through questionable extensions of the Supreme Court's transformative use doctrine.⁵² Against the background of this gradually receding tide, the general, albeit not universal, dominance of authorial choice in defining a work's boundaries represents a small beacon but, let us hope, a bright and lasting one.

The aims of the Melville B. Nimmer Memorial Lecture are, I have been told, not only to celebrate Mel Nimmer's life, but to continue his work—a valuable object indeed. For their support of this lecture and for enabling me to come to UCLA to contribute my own efforts to the mix, I am deeply grateful to the family, friends, colleagues, and former students of Mel Nimmer.

51. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32–37 (2003) (holding that the phrase “origin of goods” “refers to the producer of the tangible goods . . . [but] not to the author of any idea, concept, or communication embodied in those goods”).

52. PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 12.2.2.1(c) (3d ed. 2011).