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Copyright: A Critical Lens

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Copyright: A Critical Lens

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Abstract

Keynote Presentation by Sandra Aya Enimil for the 12th Annual Kraemer Copyright Conference. For this presentation, I focused on a few areas – publishing, music, and images. I did not intend to provide a comprehensive breakdown of all the ways that racism, sexism and the other issues, or as one of my colleagues said when I explained some of this to her “the ‘isms” interact with copyright. I pride myself on my ability to speak practically about copyright. My ability to share and translate the law in ways that are helpful and hopefully useful. Today, I am interested in sharing with you how I came to learn and think about practical remedies and discussions as it interacts with race and copyright.

Keywords: Copyright, racism, sexism

This article received editorial review, but the authors chose to forego peer review, which was optional for submissions consisting of conference presentations.



Copyright: A Critical Lens

Context for the Presentation: Copyright and the “isms”

I wasn't sure what I wanted to speak about during the 12th Annual Kraemer Copyright Conference. Tucky Taylor encouraged me to consider discussing the intersection of race and copyright. I am a facilitator for a group now known as the Copyright History Reading Group (formerly the Copyright and Racism Reading Group), which is an interest group of the University Information Policy Officers (UIPO) organization. Charlotte Roh served as the first convener of the reading group. This group, which began after the murder of George Floyd, gathers to discuss the ways we see race, sex, and other issues intersect with and conflict with our understanding of copyright law in the United States. Copyright law serves as the basis for my work and for the work of many of you. Our reflections during group meetings allowed us to stop taking the law for granted that it just is what it is. This is the law. Maybe we should look deeper into why some laws exist and why copyright functions in the way it does. Some of it needs to be questioned.

This group met and spoke through some discomfort initially but came to be more engaged and open to conversations centered on race. The group explored copyright and race using a variety of resources to develop our own knowledge and engage with the ways in which copyright and intellectual property reckon with race, racism, and white supremacy. We also identified ways to actively engage in care and both restorative and social justice. We are not acting like experts, we understand many scholars have been researching and writing on these topics, including colleagues in copyright and scholarly communication like April Hathcock. We have a digital space with all the topics we've covered, relevant readings, and videos. All members of UIPO are welcome to join our monthly discussions.

For this presentation, I focused on a few areas: publishing, music, and images. I did not intend to provide a comprehensive breakdown of all the ways that racism, sexism and the other issues—or as one of my colleagues said when I explained some of this to her, “the ‘isms’”—interact with copyright. I pride myself on my ability to speak practically about copyright, to share and translate the law in ways that are helpful and hopefully useful. Today, I am interested in sharing with you how I came to learn and think about practical remedies and discussions as it interacts with race and copyright.

Copyright and the “isms”: Publishing, Music, and Images

On the face, I believe that U.S Copyright law is in fact neutral. The copyright system is a quid pro quo; you get protection for your creative works for a limited time. After copyright expires, everyone can benefit from your creativity through the public domain. My new critical lens for copyright now felt conflicted, because this is

also a country that had language stating, “all men are created equal” and they truly only meant wealthy land-owning white men. A country that counted people who looked like me as 3/5ths of a person, a move which only served to increase the power to that same group of wealthy landowning White men. So, we have the law and what it promised and never really intended to fulfil and laws that were specifically created to limit access and control specific members of our society. If that isn’t enough, we also have societal norms and practices that impact the ability of equal access to the benefits of these laws.

Publishing

I chose to focus on two women, Phillis Wheatley Peters and Lucy Stone. Phillis Wheatley Peters is recognized as the first African American woman and only the third American woman to publish her works. Lucy Stone was the first woman from Massachusetts woman to earn a college degree. Lucy Stone also broke ranks with other suffragists and supported the efforts for the vote, even when it appeared that Black men might get the right to vote before White women.

One was not initially believed to have written her poems, and it would have been extremely difficult for her to register copyright in the US due to her sex, race, and status as an enslaved person. And the other woman, if she were able to register a copyright, possibly would not have been able to do so unless she used her married name, which she refused to do. It is a supposition on my part that neither of these women were especially keen to copyright their content. But they were both authors who wanted to share their works. I don’t know if they wanted to copyright their materials, but I know Phyllis Wheatley had to be in another country to publish her works. I know Lucy Stone persevered to not only write speeches, but to also be the one to deliver those speeches. So, I can imagine a world where they should have been afforded the option to register on their own terms.

In more recent times, the US Copyright Office released a report called “Women in the Copyright System: An Analysis of Women Authors in Copyright Registrations from 1978 to 2020.” The report draws on work by Professor Joel Waldfogel, the Copyright Office’s 2021 Kaminstein Scholar in Residence which showed an increase in registrations over the period, but lower than expected registration numbers for creative women. But registration is no longer a requirement, so what does this truly show? Perhaps, certain women find the system difficult to navigate or registration unnecessary? The Copyright Office mentions a commitment to copyright for all, and a plan to continue to collaborate with colleagues and stakeholders to develop programs responsive to their research findings and further empower women to benefit from their creativity. The status on this declaration is unclear considering our current political circumstances.

Music

In this section, I acknowledge that music copyright is still a growth area for me, but I do know that there are a minimum of at least two copyrights: one in the sheet music and one in the sound recording. I discuss my learning around the racialized history and development of musical genres in the United States. Newly freed from bondage in the late 19th and early 20th centuries, African Americans were participants in the creative economy—they were performers, musicians, and songwriters. Some understood the music business and were quite savvy or at least knew how to maneuver within the system. But some could not read and therefore did not, or perhaps did not fully, understand what rights they were signing away to music/record companies. From the 1920s on, record company marketing started differentiating by race. They exercised control over who recorded what and what genre was assigned. “Race records” through the 1940s were renamed to R&B in 1949. It became very profitable to release White imitations of recordings by African American artists. Not just the same song, but “mirror” recordings.

In the talk, I discussed Langston Hughes and his use of his platform to critique and write about the injustices he observed in the music business. Instead of paying royalties, record companies —often owned by Whites—would offer their artists a flat fee for a song. Unfamiliar with U.S. copyright laws and, as noted earlier, sometimes unable to read or fully understand the agreements, the artists would sign the contract, collect the fees, and lose all ownership rights (future royalties) to the song. During my research for this talk, I came across the story of Fred Parris, who wrote the classic “In the Still of the Night,” which sold between 10 and 15 million copies. It was estimated that he should have earned \$100,000 in royalties, instead he walked off with \$783. Also, Black vocal performers, who sing music written by others, typically would receive no copyright protection for additional elements that they might add or contribute to sound recording. In these scenarios, one is working within the limitations of copyright, they likely get paid, but perhaps not as well as they should. The other has no protection whatsoever and they more than likely do not receive the compensation that they should for their vocal contributions.

Finally, I end this portion, I spoke about a remedy that's kind of been offered, I think, to try to address some of the inequities in the music industry. In the 1976 Copyright Act, for works that are created after 1978, creators can start a process to get their rights back after 35 years. The Copyright Office stated these provisions are intended to protect authors and their heirs against unfair agreements by giving them an opportunity to share in the later economic success of the works by allowing authors or their heirs, during periods of time after the original grant, to regain previously transferred copyright. This is a useful provision. But it doesn't really address some of the people that were harmed in the early 20th century, late 19th century. It does acknowledge that there is probably likely unfair treatment. But that

hasn't changed. So, while there is some value in having some protections available for people after 1978, it's a somewhat convoluted process, especially for someone who is maybe not as sophisticated and without legal assistance. Professor K. J. Greene has spoken about helping hip-hop artists whose work may be hitting the 35-year mark. He is interested in how we help so that we can really fulfill the promise of what this termination of transfer is really supposed to do.

Image/Likeness

The last topic I chose to cover in discussing my enlightened approach to copyright is the subject or person in images—the use of someone else's likeness in visual media. Under state law you do have opportunities around privacy and rights of publicity, but currently there are no federal protections for your likeness if captured in copyrighted content. The rights belong to the person or entity that fixed the copyrighted item. They have rights under copyright; the person or subject does not. These days subjects will typically sign releases, granting permission to use likeness, but not copyright, because that is not a right you can surrender as a subject. Though if a lawyer drafted the release, you might see that they include any possible other rights one could possibly claim.

Similarly to the thoughts about how someone performing the copyrighted music of another cannot claim copyright even when they might add elements to a vocal performance, subjects of copyrighted images cannot claim copyright in the image. Arguably, a human subject in a photo contributes greatly to the resulting image, but only the person who takes (or fixes) the photo can have copyright protection. Some scholars have noted that that this may be a result of the fact that women are most often the subjects of artworks such as paintings. Perhaps, because women are most likely to be in these roles, no rights were given to subjects? I mentioned something I have discussed before at Kraemer, involving uncomfortable photos and content that we might find in our collections. There has been fairly recent litigation against Harvard from a descendant of enslaved persons represented in photographs taken in 1850.

So, should the subject be allowed to have rights under copyright? I am not sure. Some countries, in light of artificial intelligence, are considering ways to give a person copyright in the use of their likeness. But it is something worth thinking about.

Conclusion

Why does this matter? Why go back and look at the messiness of the past? We all know the saying “those that don't remember history are doomed to repeat it.” Has anyone thought about this phrase lately? Why look at the messiness of the past? Because the past is present. The topics I mentioned, even in today's terms, still have

negative impacts on creators and authors. Certain groups of people might face difficulties understanding their rights or how to access certain systems.

There's an opportunity for us as librarians to support creators. We can provide support for educational and creative fields, creative organizations, yes, maybe even rights holder organizations. Many face difficulties navigating systems that are maybe not intended for them to use or have access to. Creators may need assistance in understanding their rights as well. Maybe you mention it just in passing as part of a presentation where you have five minutes to talk about this stuff. Maybe you do a whole session and talk about copyright race issues in music or in painting or in the arts. And I think there are opportunities for us as librarians as creators of content and when we're working with people who are creating content. Talk to people about reading contracts. I like to say that you should read contracts like you read the works of your mortal enemy or your academic rival.

So, again why look at the messiness of the past? We must deal with the past to move past it. I know there's an argument to move on and forget, but forgetting is why we're still talking about it. It feels like we should learn lessons from what has happened before, but we literally do not. And I feel like it is important for us to know some of the basis for copyright law and to share this information with a critical lens.

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