

## BIZARRO COPYRIGHT

*Brad A. Greenberg<sup>†</sup>*

*ABSTRACT*

The apparent simplicity of a copyright infringement claim—was a work copyrighted and was it used without permission?—buries a complexity introduced by new technological mediums. Though copyright law is designed to treat known and unknown technologies similarly, new technologies often introduce a new locus of inquiry, creating alternate universes of facts. One exists inside the machine and the other outside it. How should judges respond? Should judges look internally at the technological structure or instead focus externally on the technological behavior? This structure vs. behavior choice of perspective often is determinative. Yet, courts continue to diverge on approach, without explanation, and scholarly literature lacks either a descriptive account of the phenomenon or a normative justification for one perspective over the other.

This paper highlights the long, overlooked presence of copyright law's problem of perspective. It considers tools for helping courts choose between structural and behavioral perspectives in infringement inquiries. In particular, this paper approaches choice of perspective as a proxy for judgments about IP design and institutional competence. A structural perspective places a greater burden on Congress to decide how copyright law applies to a new technology; a behavioral perspective defers that determination to courts. Accordingly, this paper homes in on the nature of provisions in the Copyright Act of 1976 as signals for resolving the problem of perspective in infringement inquiries. It argues that Congress, where it used standards or technology-neutral provisions, indicated a preference for courts to adopt a behavioral perspective; in contrast, narrower rules or technology-specific provisions evince a concern for technological design, suggesting that courts should adopt a structural perspective. I conclude by applying this framework to copyright law's exclusive rights and evaluating the implications for two limiting doctrines: fair use and first sale.

---

<sup>†</sup> Intellectual Property Fellow, Kernochan Center for Law, Media and the Arts, Columbia Law School. For helpful comments and feedback, I thank <acknowledgements to come>. George Mason's Center for the Protection of Intellectual Property supported this project with a Mark Twain Fellowship.