

Tales From the Public Domain: Bound by Law?

By Keith Aoki, James Boyle, and Jennifer Jenkins

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The team of Keith Aoki¹, James Boyle² and Jennifer Jenkins³ could be responsible for creating a revolutionary movement among law students and educators - a movement which rejects the strict confines of the typical legal education and embraces the freedom heretofore embraced only by coffee table books and Saturday morning cartoons: instruction via comic. Their book, *Tales from the Public Domain: Bound by Law?* is exactly that: a page-turning comic book which can be read, or more appropriately viewed, by the average reader in under an hour.⁴ Thanks to the skill of the authors, however, this page-turner packs more real world copyright application into its contents than the tomes of caselaw which have been thrown at intellectual property law students for years. While concentrating on the copyright and trademark implications

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² James Boyle is a professor at Duke Law School and one of the founders of the Center for the Study of the Public Domain. He is also a Board Member of Creative Commons. Mr. Boyle was the winner of the 2003 World Technology Award for Law. He has also written SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY, and is the special editor of COLLECTED PAPERS ON THE PUBLIC DOMAIN.

³ Jennifer Jenkins is Director of Duke Law School's Center for the Study of the Public Domain. She heads the Center's "Arts Project" and teaches a seminar on Intellectual Property, the Public Domain and Free Speech. She was a member of the team that defended an infringement suit against the publisher of the novel "The Wind Done Gone," which parodied "Gone With the Wind." Ms. Jenkins co-authored NUESTRA HERNANDEZ and has written several short stories, one of which was published in Duke's Tobacco Road literary magazine.

⁴ JAMES BOYLE & JENNIFER JENKINS, TALES FROM THE PUBLIC DOMAIN: BOUND BY LAW? (2006).

arising in the context of documentary filmmaking, it provides a concise, effective introduction to the principals of intellectual property law in modern contexts.

Article I, Section 8, Clause 8 of the Constitution gives Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings...”⁵ To effectuate this constitutional power, the Copyright Act of 1976 bestows protection on original works of authorship fixed in any tangible medium of expression.⁶ This protection does not extend to facts and ideas, but to the expression of such concepts.⁷

The policy behind copyright law balances the constitutional goal of encouraging authors and artists to create new works with the desire not to limit the public’s access to these works. For this reason, Congress has limited the term of protection afforded to copyrighted works.⁸ For example, works created on or after January 1, 1978 are protected during the life of the author and 70 years after his or her death, or in the case of anonymous, pseudonymous works and works for hire, for 95 years from the date of the work’s first publication or 120 years from its creation, whichever expires first.⁹ Once this term of protection is up, the work enters the public domain and anyone may, without permission, exercise the rights which formerly only belonged to the copyright owner.

Infringement occurs when anyone violates any of the exclusive rights of the copyright owner.¹⁰ The fair use doctrine can be invoked by an alleged infringer as a

⁵ U.S. CONST. art. I, § 8, cl. 8. The exclusive rights granted to authors of original works are the right to make and distribute copies, to prepare derivative works, to perform works publicly, to display such works, and to perform sound recordings publicly via digital transmission. 17 U.S.C.S. § 106 (West 1776).

⁶ 17 U.S.C. § 102.

⁷ *Id.*

⁸ *Id.* §§ 302-305.

⁹ *Id.* § 302.

¹⁰ *Id.* § 501.

defense to avoid repercussions.¹¹ Under the fair use doctrine, copyrighted material can be used without infringing for purposes such as news reporting, criticism, comment, teaching, scholarship and research.¹²

Trademark law is another important branch of intellectual property addressed in *Bound by Law*. A trademark is any word, name symbol or device which a person uses or has a bona fide intention to use in commerce to identify and distinguish his or her goods from those manufactured or sold by others.¹³ A trademark is infringed when an unauthorized person uses it in a way that causes consumer confusion as to the source of the goods.¹⁴

Bound By Law opens with a drawing of a sinister, shriveled old man reminiscent of The Cryptkeeper. He beckons the reader into the Center for the Study of the Public Domain, where he will discuss “a subject that makes strong men and women tremble”- the law. As the title suggests, *Bound By Law* focuses on copyright issues and fair use applications in documentary filmmaking. A unique situation faced by documentary filmmakers today is that they rely heavily upon others’ copyrighted material to create their own works. The book takes readers through the plight of a fictional documentarian, Akiko, who wants to make a film “capturing a day in the life of New York.”¹⁵ The legal implications of her film are addressed and explained by two other fictional characters, who serve as her guide to intellectual property law.

¹¹ *Id.* § 107.

¹² *Id.* The determining factors for whether a work qualifies as a fair use are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the work used in relation to the work as a whole, and the effect of the use on the potential market for or value of the copyrighted work. *Id.*

¹³ 15 U.S.C.A. § 1127 (West 2006).

¹⁴ *Id.* § 1114.

¹⁵ AOKI, BOYLE & JENKINS, *supra* note 1 at 5.

The guides give a surprisingly comprehensive examination of copyright law. With each concept, they provide examples of real-life disputes and court decisions to put theory into context. In a discussion about fair use, they address how incidental, unintentional filming of 4 ½ seconds of an episode of “The Simpsons” in Jon Else’s documentary about Wagner’s Ring Cycle led to a demand by Matt Groening, the cartoon’s creator, for \$10,000.¹⁶ The guides then explain how such limitations and protections can stifle creative expression by forcing artists to correct, cut out, or pay for such minor appropriations at the risk of a lawsuit by the copyright owner.

The book goes on to address other implications arising in documentary filmmaking. In discussing critical uses of copyrighted materials, the guides use the example of Michael Moore’s unchallenged use of uncleared news reports in “Bowling for Columbine.”¹⁷ Policy arguments are made on both sides of various copyright issues such as skyrocketing licensing costs and parody. Landmark court decisions such as *Sony v. Universal Studios* (1984), *Campbell v. Acuff-Rose* (1994) and *Harper & Rowe v. Nation Enterprises* (1985) are presented in concise layman’s terms for the readers.¹⁸ Trademark and licensing concerns arising in documentary filmmaking are also addressed, such as rights of publicity, errors and omissions insurance. The book ends with more policy discussion on the protections afforded and limitations imposed by copyright law, and a promise by the sinister old man that he’ll be seeing the reader again.

Author James Boyle contributed an Afterword to *Bound By Law*, entitled The True Story of *Bound By Law* (or ‘Why Three Stodgy Academics Wrote a Comic Book’).

It gives a brief biography of each of the authors, and presents their collective respect for

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 23.

¹⁸ *Id.* at 37-40.

the adaptability of copyright law to new technologies. He adds, however, that the current system seems to have gone astray of its original goals and has nurtured a “permissions culture” where owners believe they have the right to demand compensation for any use, regardless of length, purpose or context.¹⁹ While he laments the resulting tragedy of young artists viewing the law as an obstacle instead of a “valuable tool for artists and creators of all kinds,” he stresses that copyright law can work in the modern technological culture if balance is maintained.²⁰ True to these ideals, Boyle provides two more pages in the back of the book which suggest further reading materials and list helpful information for websites, legal resources, and organizations.²¹

Stylistically, *Bound by Law* gives readers a welcome change from the dry manuals typically produced by legal authors. As it is written as a comic book, practically each line of text is accompanied by an often comically illustrated example of the legal concept it elicits. While readers may be initially skeptical about the academic merits of such an approach, the technique holds their interest more completely and makes for a more enjoyable, albeit brief, read.

Perhaps the most refreshing aspect of *Bound By Law* is the way the authors have chosen to publish it. Although the book is sold on several websites, readers are invited to download the full document free of charge at the Duke Law School’s Center for the Study of the Public Domain website.²² Aoki, Boyle and Jenkins are truly practicing what they preach about fair use, as they have licensed their work under the terms of a Creative

¹⁹ *Id.* at 68.

²⁰ *Id.* at 69-70.

²¹ *Id.* at 71-72.

²² See <http://www.law.duke.edu/cspd> (last visited October 10, 2006). The Center for the Study of the Public Domain’s mission is “to promote research and scholarship on the contributions of the public domain to speech, culture, science and innovation, to promote debate about the balance needed in our intellectual property system and to translate academic research into public policy solutions.” AOKI, BOYLE & JENKINS, *supra* note 1 at 70.

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Bound By Law presents a unique experience for anyone even slightly interested in the modern applications of copyright and trademark law. Though it is only 72 pages long and reads as easily as a cartoon strip, it conveys complex, nebulous intellectual property principals in an effective and straightforward way. By providing readers with real-life examples of disputes and concepts in action, *Bound By Law* easily appeals to those with no formal legal education. By presenting its material in such a novel and humorous way, however, it will also appeal to seasoned attorneys. *Bound By Law* makes for a pleasant diversion for readers of all levels of legal expertise.