

Reverse-Engineering Textual Meaning

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Scholars agree that despite its best intentions, copyright law is not aesthetically neutral. But they part ways over whether this lack of neutrality creates meaningful problems that the law should attempt to resolve. Typically, the aesthetic neutrality analysis arises with respect to choice of medium, style of work, subject matter depicted, and fairness of subsequent uses. In this paper, I argue that one way to get at the question of neutrality is to use “textual meaning” as a proxy. Whenever judges talk about the “meaning” of a text (here text is broadly defined to include any kind of expressive work), they are making a set of anterior interpretive and theoretical choices. Indeed, judges in copyright cases are often less than ideally straightforward about how they decide to interpret the works at the center of litigation. While procedural (and sometimes substantive) rules can govern how a judge must approach a particular work, more often than not, judges possess considerable latitude in deciding how they will choose, for lack of a better term, to *read* the works at issue. And how they read the text will often determine how they decide the case. I use a handful of copyright cases to demonstrate how theories of textuality are implicit in the judicial decisionmaking process, though not typically viewed as such. In particular, I examine how the judicial decision to consider or not to consider, *inter alia*, the author’s intention; extrinsic evidence concerning dissemination and reception of the work; and intrinsic evidence including formalist analysis of the work; can be outcome-determinative. My intention here is not to revive tired debates about the theoretical place of authors, nor to rehash their storied “death.” Rather, I aim to show that how one chooses to *read* a work matters. What a text is thought to *mean* and *how it means* can play an important role in copyright litigation. Therefore, we ought to be mindful of how courts seek to “discover” and reveal that meaning.