

Individuality or Multiplicity of “the Work”: Tracing an Evolving (and Perennial) Concern of Copyright Law and Policy

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Copyright law has traditionally been concerned with “the work.” Copyright protection attaches at the level of the work, and it is on a work-by-work basis that infringement claims typically have been assessed. Of late, however, some of the most controversial models for operating in copyright space have emerged at the level of multiple works. For example, the practice of bulk registration of photographs through registration of an automated database that does not identify the individual photographers’ names has come under challenge. Likewise, the litigation model under which certain news outfits “outsourced” the copyright policing of their works to Righthaven LLC provoked concern among some. Perhaps most pressing are the problems that arise out of mass digitization projects. At one point, the Google Books litigation, through the proposed settlement, might have served as a judicially-approved, streamlined mechanism for resolving copyright claims appurtenant to millions of works. Now, whether the case can still serve as such a vehicle will depend, in part, on how the court resolves whether “individual issues predominate” with respect to copyright ownership and fair use.

Although they are just examples, each of these instances has reflected the challenges posed by the modern desire to make use of copyrights, and of copyrighted works, *en masse*, especially in the absence of a comprehensive licensing system. In this article, I am teasing apart the kinds of “individual” and “multiple” dynamics at play in these and other recent developments. For example, in some instances the relevant issues relate to ways of structuring a single copyright holder’s relationship to his or her multiple works. Other instances relate to mechanisms for dealing with multiple authors’ relationships to their individual or multiple works. Looking back in time, I will consider some ways in which these tensions in the appropriate focus of copyright were in fact present under pre-digital copyright regimes. By tracing the evolving practices that press the copyright system to confront how various stakeholders seek to manage and use multiple works, I hope to draw some useful conclusions about how copyright should be viewed today. At bottom, I argue that through such comparative analyses we can more clearly resolve whether copyright law and policy in the modern technological era should be driven principally by concerns about individual, or multiple, works.