

## **Uncertain Rules and Unfair Standards: Copyright Subject Matter under the Strain of Disruptive Innovation**

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Since the first copyright statute, emerging technologies have repeatedly challenged copyright incentives, threatened to cast copyright law into obsolescence, and, generally, fueled the expansion of copyright's subject matter and scope. Legislation drafting has been a frequent exercise in trying to make copyright law prescient, better at predicting how expressive works will be authored in the future. With the 1976 Copyright Act, Congress made two moves in an effort to enhance copyright law's durability: it aimed for technology neutrality and also softened the rules for copyrightable subject matter, adopting, instead, a general standard. This move comported with what has become the modern trend in intellectual property scholarship to eschew rules as too lumbering to adapt to new technologies and to praise standards for their flexibility; even more so, technology neutrality has become, in many areas of law, an unquestioned principle of legislation drafting. But rather than reduce disputes over copyright's application to new technologies, the moves further complicated copyright law by displacing what were subject matter disputes into extant and emerging doctrines.

This Article shows how the 1976 Act's move toward tech-neutrality and a subject matter standard created an over-inclusive copyright regime that courts have tried to reign in with a patchwork of limitations that amplify uncertainty, increase disputes, and diminish fairness. These consequences undermine Congress's intent with the 1976 Act and challenge the accepted wisdom on technology neutrality and rules-vs-standards as applied to copyright subject matter. By exploring how the moves toward tech-neutrality and a subject matter standard have further complicated copyright law, this Article illuminates special considerations for choosing rules or standards in copyright law, particularly at the threshold level of subject matter requirements, and beyond; it also questions the common assumption that technology neutrality is standard-like and technology specificity is rule-like.

Having demonstrated the difficulties with both rules and standards for copyright subject matter, this article concludes with a normative exploration of the efficiency and feasibility of subject matter agency adjudication. Delegating subject matter determinations could avoid the pitfalls of both legislatively determined rules and standards. An administrative agency could respond to emerging technologies much more quickly: protecting author incentives where appropriate, providing technologists with greater clarity about attendant costs, and freeing both parties from conflicting judicial decisions. A rulemaking agency also could help simplify copyright by avoiding over-inclusiveness and, in turn, slowing the growth of limiting doctrines.

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