

United States Court of Appeals  
Eleventh Circuit

Stanley F. Birch, Jr.  
Circuit Judge

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Commission on Structural Alternatives  
for the Federal Courts of Appeals  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, DC 20544

Re: Comments on Tentative Draft Report - October, 1998

Dear Mr. Justice White, Judges Gilbert S. Merritt, Pamela Ann Rymer, and William D. Browning, Professor Daniel J. Meador and Mr. N. Lee Cooper:

Having carefully reviewed the comprehensive and thoughtful report of the Commission, I congratulate you on a fine piece of work. While some of the suggestions advanced by the Commission in order to improve the administration of justice in our courts were mildly troublesome for me, only one proposal caused serious concern. I think that it would be a grave error to centralize the decision-making in copyright appeals in the Federal Circuit.

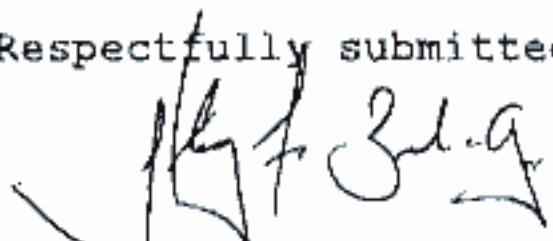
While both the copyright clause and the patent clause are joined in Art. I, Sec. 8 of the Constitution; and while certain technologies are regulated and affected in part by both patent and copyright; those minor incidents of commonality are hardly adequate justification for removing the interpretation of the law of copyright from the broadest possible base of judicial experience. Historically and practically, copyrights and patents are each separate and recognizably individual legal disciplines. The historical beginnings of each discipline are manifestly different. The copyright clause has its origins in the Statute of Ann enacted in 1710. The patent clause is based upon the Statute of Monopolies enacted in 1623.

Many of the origins and much of the life of the copyright law has paralleled and supported the free speech principles embraced in the First Amendment. Indeed, in a free republic where the central government is subservient to its citizens, the promotion of science and learning is essential. The right to know and to understand are bedrock principles guaranteed by the First Amendment and copyright clause.

Moreover, unlike patents, typically copyrights do not require technical expertise to understand and administer them. Inventions require the genius of novelty, while copyrights require only originality (the expression of an idea may or may not evidence a level of genius). The two legal disciplines impact our nation's life in very distinct ways. Inventions tend to make daily life better and concern only the products produced from the practice of the invention. In contrast, copyright is extensive and pervasive in the life of our nation's citizens. We are informed by copyrighted news (print and broadcast), we are enlightened and entertained by copyrighted books, we are entertained by copyrighted movies and television programs. Our cultural lives are filled with copyrighted music, choreography, art, verse and song. To subject such a diverse and pervasive field of law to adjudication by a small group of judges sitting inside the Beltway would constitute a mistake of, literally, historic dimensions. As fine as the jurists are on the Federal Circuit --- and they certainly are --- the range of diversity and experience is just not enough to do the law of copyright justice.

On the horizon in this technological age will be conflicts between the free speech values protected by the copyright law and lucrative transmission, access and storage technologies and the few that seek to profit from controlling access to learning by the many. This is a struggle where the enlightened breath of judicial experience must be wide and multi-disciplined if we are to achieve a balance and resolution that will advance the fundamental values and precepts that copyright law was envisioned to maintain. The issues that will be presented in the field of copyright are far too important to be entrusted to the hands of a few --- a group selected in the first instance for their emphasis on technological training. The breadth and diversity of the subject matter of copyright demands a like group of judges to interpret its future applications while cognizant of its past.

Respectfully submitted,



Stanley F. Birch, Jr.  
United States Circuit Judge

**About the Author:** Judge Birch was active in the practice of copyright law prior to appointment to the bench in 1990. He was lead counsel in over 40 cases on behalf of Original Appalachian Artworks, Inc., the owner of the CABBAGE PATCH KIDS® copyrights and trademarks and was in business with Xavier Roberts, the creator of that famous doll and marketing scheme. Judge Birch practiced in the area of software licensing, creation and protection and was lead counsel in some of the first source code infringement cases tried in the Southeast. He is also a musician, having played the trumpet and studied music since the age of 10. Judge Birch is co-author, together with Professor Ray Patterson, of new treatise on copyright law and has authored the following copyright decisions on behalf of the Eleventh Circuit, including:

Cable News Network v. Video Monitoring Services, 940 F.2d 1471 (11th Cir. 1991);

BellSouth Adv. & Pub. Corp. v. Donnelley Info. Pub., 999 F.2d 1436 (11th Cir. 1993) (en banc);

In re: Capital Cities/ABC, Inc., 918 F.2d 140 (11th Cir. 1990);

Mitek Holdings, Inc. v. Arce Engineering Co., Inc., 89 F.3d 1548 (11th Cir. 1996);

Bateman v. Mnemonics, Inc., 79 F.3d 1532 (11th Cir. 1996);

Warren Publishing, Inc. v. Microdos Data Corp., 115 F.3d 1509 (11th Cir. 1997) (en banc).