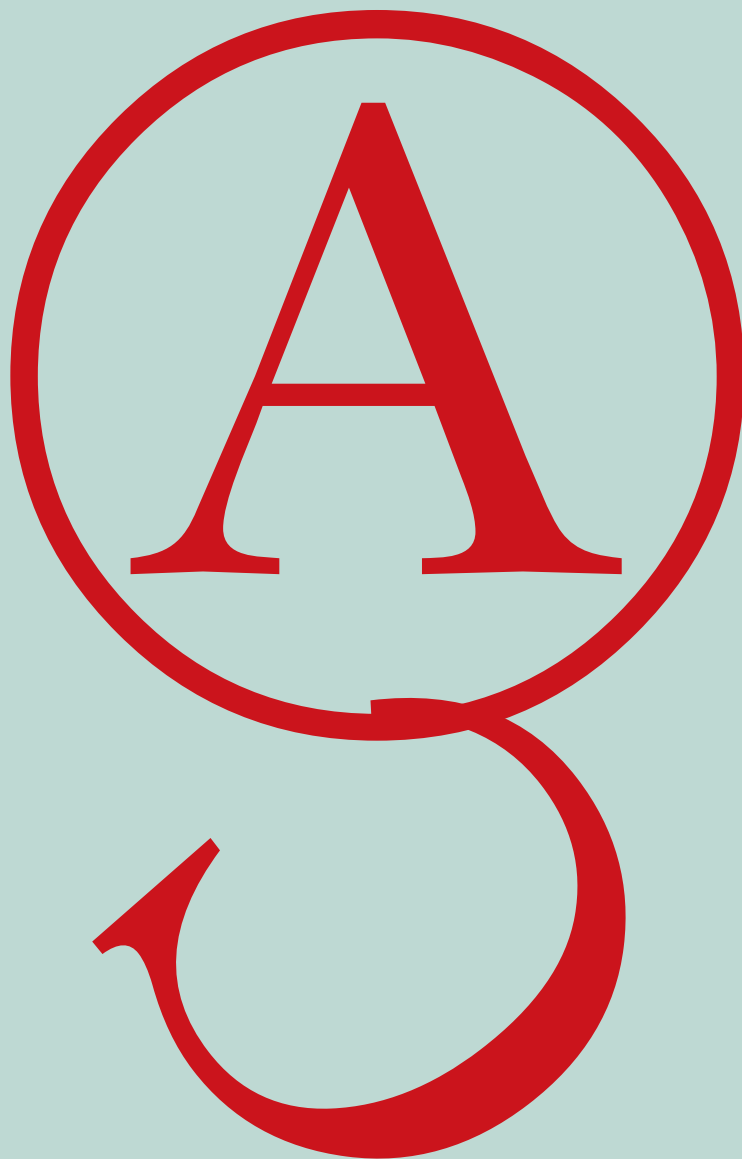


Edited by Mireille van Eechoud

The Work of Authorship



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Voices near and far

Introduction

Mireille van Eechoud

Copyright laws are important regulators of cultural expression, because they grant extensive rights to control the reproduction, adaptation and communication of 'literary' and 'artistic' works. The twin concepts of authorship and original work are central to copyright laws the world over. They might not be clearly defined, and certainly not uniformly, but they enjoy global recognition. That is evident first and foremost by the fact that the Grande Dame of international copyright law, the Berne Convention for the Protection of Literary and Artistic Works (1886/1971), has over 180 contracting states.

One might be forgiven to think that, being concerned with (the study of) regulating creative practices, legal scholars of copyright as well as policymakers are deeply interested in how works get made, how authors operate.

But there is remarkably little in the way of academic publications and policy documents to show that this is in fact so. In the past decade or so, empirical studies of creative and innovation industries are on the rise. They tend to foreground technological and economic aspects of production and use, tracking in a sense the predominant outlook of IP policy makers. That is at least the image that arises when one browses the articles in the e-journal *Intellectual Property: Empirical studies* at the Social Sciences Research Network. It is devoted entirely to quantitative research, with a strong orientation towards patents and litigation studies. In the copyright domain, there is a growing body of work on income effects and working conditions for creators in the media and entertainment industries (see e.g. Poort et al., 2013, Kretschmer et al., 2011). Other popular topics include the economic effects of music sampling, or file-sharing on markets for copyright works, or spelling out what it is we do not know (Towse, 2011). More concerned with actual practices, power relations and institutional dimensions are sociologists and anthropologists, for example, the work of Keltly (2008) queries collaborative practices in free and open source software development, including community copyright strategies and norms. Reagle (2010) studied attitudes to 'ownership' and collaboration in Wikipedia communities.

The authors of this volume set themselves the challenge of identifying how insights from a variety of humanities disciplines can help inform the interpretation and construction of copyright law. We considered that legal scholars – especially ones close to legal practices and policymaking – would do well to take note of the accumulated knowledge of the arts and humanities as students of how and why works, pieces, performances get made, what their significance is, how they are read, received, used. For reasons detailed below, we choose to focus on two core concepts in copyright law: the original work and authorship.

We embarked on a three-year research project entitled *Of Authorship and Originality*. It was funded by a grant from the Humanities in the European Research Area programme ‘HERA’, a joint effort of national research councils and the EU, managed by the European Science Foundation.¹ One of the principal objectives of the HERA programme is to bring the humanities into the European Research Area and promote humanities research in the EU framework Programmes (the latest one being ‘Horizon 2020’, with an estimate budget of 70 billion euro). EU programmes have until now had an overwhelming focus on (hard) scientific and technological progress and the development of businesses: an orientation that dominates copyright policy also. Our effort thus mirrored, albeit in a very small corner, HERA’s ambition to raise the contribution of humanities research to help ‘address social, cultural, and political challenges facing Europe’ (HERA 2009).

The goal of this introduction is to ‘set the stage’ so to speak for the various explorations that follow, of notions of collaborative authorship and original works in academic thought, societal practice and as legal norms. To provide especially the readership not familiar with copyright lawmaking with a useful backdrop, what follows is a characterisation of the current state of copyright law in Europe. I shall briefly describe the role of the EU as primary actor in copyright reform. We can then sketch what the pertinent questions are on authorship and copyright subject-matter, a.k.a. original intellectual creations, and how the authors of each chapter have addressed these. The contributions in this volume all borrow from different disciplines. This introduction concludes with some observations on the many voices in academia that speak on creative practices, and on their relative proximity to copyright scholarship. Although technology and economics will continue to drive developments in intellectual property law, humanities research can (and should) have real impact on the quality of law and legal interpretation.

Copyright reform EU style

In Europe, two major forces drive copyright reform: the realisation of the internal EU market for goods and services, and technological change. The workings of national copyright laws affect the operation of the internal market and therefore in the past twenty years or so the EU institutions have legislated harmonised norms piece by piece, in different parts of the copyright and related rights domains. Directives have been the preferred instrument.² To date, most of the harmonisation effort has been in areas where technological change was thought likely to result in diverging legislative responses by Member States.

The first-ever copyright directive was the 1991 Computer Programs Directive, aimed at ensuring that software was treated as a 'literary work' under national copyright laws, at a common originality standard. To unequivocally bring computer programmes into the copyright domain was seen as necessary for the development of software industries. Subsequent directives also responded to exploitation models made possible by 'new' technologies, e.g. on the right to control rental of copies on video, CDs and other media (1992/2006)³, the right to control satellite broadcasts (1993) and of course the dissemination of works over the internet (2001). The most recent directive, on orphan works (2012), and the proposed Collective Management Directive (2012) also are direct responses to the impact of digital technology. There are only two directives which we can safely say are not technology driven. One is the Term Directive (1993/2006), which lays down rules for (near) uniform duration of copyright and of the related rights of performers, broadcasting organisations, film producers and record producers. The other is the Resale Right Directive, which gives authors of art works (sculpture, painting, photography, installations, and so on) a claim to share in the proceeds of the resale of their work.

A much criticised effect of EU harmonisation is that all initiatives have led to higher levels of protection, for more types of subject-matter, for a longer period of time (Van Echoud et al., 2009). It has proven to be nearly impossible to harmonise 'down' to the level of protection in the most liberal Member States. This is caused by the mechanics of policymaking at EU level combined with the status of copyright as a quasi-property right in national traditions and under the EU's charter of fundamental rights. Harmonisation is thus mostly upward. The focus on technological and economic concerns does not of and in itself dictate certain outcomes of harmonisation processes. Much is to be said and has been said about the intransparency of agenda setting, the lobbying power of established stakeholders in the cultural and

IT industries, and the quality of evidence on which changes to copyright laws are 'sold'. But that is not the topic of this book. The harmonisation project continues, but especially with respect to author prerogatives – be it exclusive rights to authorise, or merely claims for remuneration for certain uses – harmonisation is by now fairly complete. Our interest is how all the years of piecemeal harmonisation have influenced notions of authorship and work.

Intellectual creations and their authors

Until a few years ago, the obvious impact of EU law on the issue of copyright subject-matter seemed to be limited to computer programmes and databases. On both topics directives prescribed the standards for and scope of protection. It was widely assumed that there was not a truly harmonised notion of what qualifies as an original work in other areas of copyright. Some countries operate stricter standards than others, and there is no uniformity as to the types of productions that are eligible for protection. Many genres are generally recognised as falling in the copyright domain. These include for example all types of texts whether fiction or non-fiction, practical or for entertainment; music, film, photography, visual arts, maps, and applied arts. But there are also categories whose inclusion in copyright is controversial, they may be recognised in some countries but not in others. Examples include perfume, fashion shows, cookery recipes but also certain forms of *ex tempore* speech.

On the topic of 'work' developments in copyright law have become volatile with the Court of Justice of the EU's judgment in the landmark *Infopaq* case and subsequent judgments (*BSA*, *Painer*, *Football Dataco*). The Court has started to construct an autonomous work concept based on the notion of a work being 'the author's own intellectual creation'. The terminology is borrowed from the Computer Programs Directive but can be traced back to the Berne Convention's article on the protection of collections, like anthologies for example, as literary works in their own right. The judgments have sparked much controversy and have far-reaching impacts on the legal systems of some EU Member States (Van Eechoud, 2012). Drawing upon the above cases, in the eyes of the Court a work is an original intellectual creation of the author on condition that it is 'reflecting his personality and expressing his free and creative choices in its production'. In his contribution to this book Stef van Gompel critically examines what the EU court could mean by 'free and creative choices' and what we

can learn about constraints to creativity as identified in art studies and other disciplines.

What seems clear from the Court of Justice's case law is that an intellectual creation easily qualifies as original. In that respect, the judgments are not exactly earth-shaking. In many copyright laws, the work of authorship had already become a vessel that accommodated a very broad array of works of the mind, from 'high art' to 'low art', from the purely aesthetic to the predominantly functional or technical. The standard for protection in many jurisdictions had evolved to the point where 'original' and 'creative' seemed to be synonymous terms, both meaning little more than 'not directly copied' or 'resulting from a modicum of freedom of choice'. Coupled with a the ever-expanding scope of the reproduction right, what does this imply for the linked legal concepts of 'work', 'copy' and 'adaptation'? How can we meaningfully interpret these terms in the digitally networked age, with its possibilities of borrowing, sampling, reworking, appropriation at unprecedented scale? These are questions raised in my chapter on Adapting the work.

Equally important is the question: If everything is a work, does that make everyone an author? The EU directives have little to say on exactly who qualifies as (co) author or initial owner of copyright, beyond some provisions for software, databases and film. There are shared notions of authorship in national laws of course. At present, by and large, national rules on authorship and copyright ownership are still based on the author as an individual autonomous agent operating in relative isolation. This model continues to work well for small-scale production, but is much more problematic in other areas. Three of the chapters in this book are the fruits of contrasting legal notions of authorship with those circulating in creative communities.

How authorship status is attained in law, and viewed in the practices of scientific publishing, literary editing and conceptual art is the topic of Lionel Bently and Laura Biron's contribution. Drawing on sources from literary studies, and the history of science and art, they analyse discrepancies for these sectors between who copyright law recognises as author (and therefore typically owner of rights) and who has authorship status in social practice. As it turns out, copyright, they show 'makes authors-in-law out of social "non-authors"' (and vice versa). In the domain of 'digital' arts, Elena Cooper also explores the diverse ways in which relations between contributors are perceived within creative communities. She does so on the basis of interviews conducted with sixteen artists and poets who use digital technology, considering how and why 'authorship' is attributed to

some contributors but denied to others. Cooper's fieldwork testifies to the wide range of practices and notions of authorship among 'digital' artists and their collaborators. It also brings out how technological change can engender collaborations – as when digital technologies require highly specialised skills – but also return work from collaborative to solitary when technologies become ubiquitous and easy to use.

Collective production processes in the arts hardly began with digital media and the world wide web. They have existed in key artforms such as theatre, dance and music since the dawn of civilization. To contrast the analogue and the digital, Jostein Gripsrud studied a theatrical production at a national repertory theatre in Norway and in his contribution to this volume compares the findings with those of fieldwork among younger musicians/producers involved in professional and semi-professional digital production of popular music. In historical work for the project Elena Cooper uncovered how large-scale collaboration in the analogue age of print took place, in a case study of the Oxford English Dictionary. Its early making relied heavily on volunteer contributions, a Wikipedia model *avant la lettre* in certain respects.

Many voices, confusing sounds

To ask how 'humanities' research can inform the construction and interpretation of copyright norms and concepts is in a way an absurdly broad question: An additional reason for us to focus on notions of authorship, originality and work, since these are areas where it is reasonable to expect a rich body of relevant work within the humanities. Even so, a veritable *mer à boire* remains. What then, are the disciplines that seem to hold particular promise? Art history is one, albeit not for its traditional focus on artist monographs. Instead, Laura Biron and Elena Cooper have considered multiple authorship in copyright through the looking glass of institutional theories of art (2014).

The ever-burgeoning fields of 'creativity studies' are not the predominant ones we have drawn upon. This is because much of the research that attempts to model and describe forms of creativity and the circumstances that support creative activity takes the perspective place of (cognitive) psychology, education, or business studies, or sociology (e.g. Uzzi and Spiro, 2005) i.e. social sciences. Theories of creativity tend to focus on one of four 'p's: person, process, product, and press, that is external factors like the environment (Torrance, 1993). Interesting for copyright is the well-known

model of person-oriented creativity that distinguishes between big-C (the creativity of a recognised genius), pro-C (expert-level creativity but not of the kind that has legendary status), little-C (normal day-to-day creativity), and mini-C, i.e. novel and meaningful discoveries each person has as part of learning processes (J.C. Kaufman and R.J. Sternberg, 2010; Kaufman and Beghetto, 2013). Stef van Gompel does consider a number of insights from these perspectives in his analysis of the notion of 'free creative choices', bedrock of the originality standard in copyright law.

Genius, or big-C creativity, is one topic where literary studies, history and legal scholarship have met. The purported influence of Romantic notions of authorship on copyright law has been a topic of rich debate in the US. Twenty years ago, Coombe was happy to report that due largely to the historical work 'intellectual property law has at long last become a field of engaged interdisciplinary inquiry' (Coombe, 1994). In Europe too, the history of copyright and intellectual property law more generally is going mainstream. The recent establishment of the International Society for the History of Intellectual Property (ISHTIP), whose annual conferences are well attended, is testimony to the growing interest. Our understanding of the historical trajectories of copyright laws will undoubtedly also grow as a result of projects that bring together primary sources for academic use, such as the Primary Sources on Copyright (1450–1900) project curated by Lionel Bently and Martin Kretschmer (www.copyrighthistory.org).

That the meeting of literature, law and history leads to insights that can actually help reform copyright is not a given. After reviewing the efforts made in literary studies to reassess the Romantic image of the author, historian Haynes (2005) concludes '... the historicist turn in literary studies has done little to advance our understanding of the history of authorship but has, in fact, often served to perpetuate the Romantic notion of genius it purports to critique'. But even where the Romantic notion of genius has been supplanted, the results do not readily translate into useful insights for lawmaking. Erlend Lavik in his contribution critically examines how literary discourse might have influenced legal discourse and sets out the methodological difficulties involved in unpacking the interplay. He also argues that the Myth of romantic authorship in copyright itself has characteristics of a myth.

The critique of Romantic authorship is argued not just on historical grounds, but also with reference to theories on intertextuality. Here literary studies serve not just to deconstruct ideas of (original) authorship, but of course even more the idea of a stable work itself. Musicology and popular music studies are likewise domains in which critiques of the idea of music

as a 'work' abound. In the chapter on Adapting the work, insights about the artificiality of distinguishing the work (composition) from musical performances are applied to other contemporary instances of 'versioning', notably the process of constant rewriting (versioning) that characterises wiki-style and open source software production. Also, genre studies are brought to bear on the question of when law does (or should) consider a text to be an adaptation rather than a copy, an important difference between the two being that adaptations typically qualify as works in their own right while mere copies do not.

It is near impossible to treat copyright's notion of original creation without turning to aesthetics. Drawing upon both history and aesthetics, Stef van Gompel and Erlend Lavik in earlier work critically examine the conventional wisdom among legal scholars and practitioners alike that the legal concept of 'original work of authorship' must in no circumstances be informed by an assessment of quality, merit or purpose (Van Gompel & Lavik, 2013). Lavik's contribution to this volume maps the confusion that shows up in academic texts and court decisions on the role that aesthetics does, can or ought to play in copyright law. He identifies where aesthetics and legal reasoning overlap, and what kind of contributions we could expect humanities to make especially to the interpretation of standards of originality and work.

It sometimes seems that no PhD thesis on copyright can do without a chapter on philosophical justifications for intellectual property. Usually Locke beats Kant and Hegel as the thinker whose work lends itself best for a justification of copyright, especially in Anglo-Saxon jurisdictions. In her chapter Laura Biron convincingly argues that many of the more popular readings of these philosophers are askew, and that if one seeks to address copyright expansionism, there is promise in the effort to distill from labour, personality, and communicative accounts of intellectual property elements 'that support the idea of authorship as an internally constraining process'.

From the above it is clear that the HERA project has brought together more disciplines than law, literature and history. It has also brought home just how difficult it is to translate insights from one discipline into another. There is a growing openness in international communities of legal scholars to perspectives from other disciplines beyond economics and technology. The 2012 ATRIP (Association of Teachers and Researchers in Intellectual Property) for example was devoted to methods and perspectives in intellectual property and featured contributions from cultural studies, ethics and political science (Dinwoodie, 2014). No doubt the trend towards multidisciplinary research that is evident across academia plays

a role. Especially the disciplines oriented towards empirical studies are the more likely ones to be able to exert influence on the interpretation and construction of law.

In our day, copyright has spread its tentacles into every nook and cranny of human production or as the modern critique would have it: all culture is copyrighted. Lawmaking and interpretation are practices characterised by constructing the general from the specific. It may prove to be of great value to have insights in how cultural productions are created and circulated across all copyright domains. Which actors are involved, what are their relations, roles, authority, how do creative processes work, how do ideas, styles travel? The developing field of 'production studies', a recent offspring in the field of film/audiovisual studies, holds promise here. The growing room for empirical studies in various other disciplines such as music studies will yield useful insights too. What complicates matters immensely is that the entire copyright system leans strongly towards generalised norms for a broad range of cultural production types and practices, using 'creative' effort as a catch-all. It is non-discriminatory in that sense. Still, the transition to digital humanities might lead to just the mix of in-depth analysis of individual instances of production and trend studies that would allow enriched legal reasoning.

Notes

1. The project Of Authorship and Originality was financially supported by the HERA Joint Research Programme (www.heranet.info) which is co-funded by AHRC, AKA, DASTI, ETF, FNR, FWF, HAZU, IRCHSS, MHEST, NWO, RANNIS, RCN, VR and the European Community FP7 2007–2013, under the Socio-economic Sciences and Humanities programme.
2. In the arsenal of EU legislative instruments, 'directives' are laws that oblige EU Member States to adapt their internal law to meet the directive's legal norms. It is a result-oriented instrument, and is not necessarily aimed at achieving complete identical legal treatment of issues throughout the EU. A Directive might just set a minimum standard, or present a catalogue of options. For example, the Computer Programs Directive of 1991 obliges Member States to accord copyright protection to computer programmes as literary works at a unified originality standard, but leaves Member States the freedom to accord software producers additional protection under unfair competition law or other norms. Another example: the Information Society Directive (2001) contains a catalogue of some twenty permitted uses of copyrighted materials (limitations and exceptions), but only one of them is mandatory for all Member States.

3. Where two dates are given for Directives, the first is for the year in which a directive was first adopted, and the second for the latest version. Substantial changes normally result in a new directive that replaces rather than revises its predecessor.

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Creative work and communicative norms

Perspectives from legal philosophy

Laura Biron

In consideration of the application of insights from the humanities to the interpretation of core legal concepts in copyright, this chapter examines three questions: first, what is a ‘work of authorship’, and why does copyright law place such a strong emphasis on originality for determining what counts as a work? Second, can and should we modify ‘romantic’ conceptions of authorship, to take into account the various ways in which authorial practices seem to conflict with their highly individualistic and creator-centred focus? Finally, how might copyright law make sense of the various ways in which authorship is collaborative, in light of its somewhat restrictive definitions of co-authorship?

This chapter will consider the contribution that existing philosophical literature on the justification of copyright might have to these questions. It begins by outlining three categories that have application to questions about authorship – labour, personality and communication – and explaining a deeper distinction between proprietary and non-proprietary accounts of authorship which underlies these categories. It goes on to illustrate how these differing approaches to authorship can be applied to the three questions under consideration. For reasons of space and practicality, the focus of this chapter will reflect my expertise in Anglo-American copyright theory and doctrine.

Philosophical accounts of ‘authorship’

Leaving aside utilitarian or consequentialist justifications for copyright, which tend to focus more on incentivising acts of authorship than the nature of authorship *per se*, there are, broadly speaking, three different theories distinguished in the literature: *labour* theories, associated with John Locke; *personality* theories, often thought to be linked to the writings of Hegel; and *communicative* theories, taking inspiration from Kant’s writings on intellectual property.

It should be noted at the outset that these justificatory theories are not usually directly applied to questions about authorship; indeed, the labour and personality accounts are more conventionally viewed as theories of property, rather than theories of authorship as such. The Kantian approach may seem more directly linked to authorship, through its focus on communication and explicit rejection of proprietary language, but it is still at an early stage of development in the philosophical literature. Thus, a central question explored by this chapter is the extent to which communicative accounts of copyright have more direct application to questions about authorship than labour or personality theories. The chapter argues that we should not fall into the trap of assuming that one set of theories (based, for example, on communicative norms) can provide a complete answer to the complex questions at stake, but rather that we should be aware of the need to develop 'hybrid' theories of authorship, drawing together the key premises from communicative, labour and personality theories which have application to the questions at stake.

Before moving on to discuss the three sets of theories in more depth, a further observation is needed about the role of the concept of authorship in philosophical discussions. Although it might seem as though authorship is one of copyright law's most central concepts, Waldron points out that policy defences of copyright are 'seldom cast in purely individualistic terms. Officially, the justification is supposed to have more to do with the social good than with the individual rights of authors' (Waldron, 1993, p. 848). Why, then, does there seem to be such a strong focus on authors' rights in debates about the justification of copyright? Waldron draws attention to many ways in which social defences of intellectual property become cast in individualistic terms, and notes that 'social policy, judicial and scholarly rhetoric on the topic retains many of the characteristics of natural rights talk' (*ibid.*, p. 849). Another explanation is given by Peter Jaszi, who argues that theorists of copyright have become entranced by a 'mythologised' conception of authorship, viewing it as a privileged category of intellectual activity, tied up with notions of self-ownership, personality and originality (Jaszi, 1991, p. 455). At the same time, Jaszi draws attention to the fact that authorship is anything but a unified or fixed category of aesthetic experience, something which could provide a 'stable foundation for the structure of copyright doctrine'; rather, he seems to agree with Waldron's observation that authors' rights lie at the centre of a tension between social and individualistic defences of intellectual property, describing authorship as 'the locus of a basic contradiction between public access to and private control over imaginative creations' (*ibid.*, p. 457).

What are the implications of these observations for philosophical conceptions of authorship? It seems fair to say that, in the philosophical literature on authors' rights, a similar tension exists between individualistic and social theories of authorship. On the one hand, there is a tendency to assume that the relationship between an author and their work can be viewed analogously to the relationship between an individual owner and an object of property. Certainly, this is the assumption underlying most interpretations of the labour theory of authorship, as we shall see below. This means that authorship and ownership become intertwined categories, and authorship is often cast as a matter of individual entitlement. Nonetheless, there are justificatory theories of copyright that focus less on individual authors (*qua* individual owners), and more on the social goals that acts of authorship can promote – in particular, goals associated with communication and public knowledge. This distinction between *proprietary* and *non-proprietary* conceptions of authorship will emerge as we unpack some of the different theories of authorship that have been said to be associated with labour, personality and communicative theories.

Authorship and labour

Judges often appeal to labour in intellectual property rulings. A well-known example is Justice Potter Stewart's observation that: 'The immediate effect of our copyright law is to stimulate a fair return for an author's creative labour' (*Twentieth Century Music Corp. v. Aiken*, 1975, para. 156). In UK law, copyright's originality requirement is even specified by reference to labour (Bently and Sherman, 2005, p. 94). This has led to discussion about whether such appeals could be grounded in philosophical theories of property based on labour, and in particular the work of John Locke, whose account of property will be considered in this section.

Locke's theory of property has three central components: an initial commitment to common ownership, arguments for privatising the commons, and a specification of some provisos that must be in place before ownership is fully justified. The implications for Lockean accounts of authorship and author entitlement vary, depending on which component of his theory we emphasise. Indeed, a brief look at the literature on Lockean theories of intellectual property reveals a divergence of views about the implications of Locke's theory for the justification of authors' rights. According to Nozick (1968, pp. 178–181), Hughes (1988, p. 291) and Becker (1993, pp. 610–612), Lockean arguments can be used to support strong intellectual property rights, assigning authors expansive rights to control uses of their intangible assets

by others. On the other hand, commentators such as Gordon (1993), Shiffrin (2001), Damstedt (2003) and Hull (2009) stress the various limitations on ownership of intellectual property that follow from Locke's account, arguing that his justifications for intellectual property would be weaker than his justifications for tangible property. Although it is not necessary to choose between these different interpretations, it is important to be aware that there is no one definitive 'labour' account of authorship. In the remainder of this section, I outline the four most popular interpretations of Locke's theory in the literature.

Interpretations of Locke's account of copyright often begin with Locke's famous 'labour mixing' argument for the justification of property, according to which 'every man has a property in his own person' and in 'the labour of his body and the work of his hands' (Locke, 1689, book II: sec. 27). When a person removes a thing from its natural state, he has:

[...] mixed his labour with it and joined it to something that is his own ... and thereby makes it his property ... For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to (ibid., II: sec. 27).

The idea behind this argument is that, through mixing our labour with what is available in the common for appropriation, we extend our natural property in our persons to that which is available, thereby grounding property rights in particular resources. If another person takes what you have mixed your labour with, that person also takes your labour 'which another had no title to' (Locke, 1689, Book II: sec. 32). Locke describes this argument as providing the 'great foundation' of his theory of property (ibid., II: sec. 44). What are its implications for Lockean theories of authorship?

Although some commentators have been sceptical about the application of labour-based arguments to copyright, arguing that labour 'generates too many indeterminacies and problems to provide a justification for intellectual property' (Drahoš, 1996, p. 54), others have been keen to ground defences of authors' rights on the basis of Locke's labour-mixing argument. The first, most popular description of Locke's theory is known as the *labour-desert* theory. This suggestion is made explicitly by Becker (1993, p. 620), Hughes (1988, p. 305) and Tavani (2005, p. 88), and even when not explicitly made it is implied by the comment very often made that Locke's theory of intellectual property is a matter of rewarding authors for the fruits of their labour. And the idea of intellectual property rights being a 'reward' for authorial labour has certainly been influential in the courts, for

example: 'Sacrificial days devoted to ... creative activities deserve rewards commensurate for the services rendered' (*Mazer v. Stein*, 1954, p. 219). But it is important to note that desert-based interpretations of Locke's account of authorship do not fit neatly with the spirit of Locke's own discussion of the justification of property through labour.

Indeed, Locke's discussion of the relationship between a subject and their labour seems to preclude it being wholly framed in terms of desert. For example, he admits that the productivity of one's labour can depend on luck and other conditions that are independent of the labourer's efforts whereas, of course, whether or not a person deserves a reward for a particular action should depend on the effort they put in. The same can be said – perhaps to an even greater extent – for the case of authors; after all, authors benefit from talents that are in many respects dependent on natural endowments (over which they have no control, and hence cannot be said to deserve) and also on various social factors that reward certain kinds of talents over others, depending on the context. In Rawlsian terms, it would be 'morally arbitrary' for individuals to be rewarded for the fruits of their talents because the natural and social factors that determine their value lie outside of their control (Rawls, 1971, p. 74). It follows that it makes little sense to ground a labour theory of authorship in a theory of desert. This means that, whatever emphasis might be placed on the connection between authorship and desert in judicial settings, such an emphasis cannot find philosophical support in labour theories of property.

Setting aside desert-based labour theories of authorship, a second account of Lockean authorship can be termed the *creationist* account. Taking its inspiration from interpretations of Lockean labour as God-like, *ex nihilo* activity that does not depend on what comes before it (Tully, 1980, pp. 108–9), the creationist account supports the view that Lockean natural rights to intellectual property can be easily derived, since 'it seems as though people do work to produce ideas and that the value of these ideas ... depends solely upon the individual's mental work' (Hughes, 1988, p. 291).

Even though the creationist account of Lockean labour has been criticised as limited in its application to tangible property (Simmons, 1991, p. 259; Waldron, 1988, p. 199), it might nonetheless apply to questions about authorship and intellectual property. After all, when Locke considered the material common, he was thinking about an expanse of resources that was 'given' to mankind by God to be used and enjoyed by all, which makes it difficult to see how individuals could labour *ex nihilo* without building on pre-existing raw materials. But, arguably, the intellectual common is not always construed as a given set of raw materials, because it depends

crucially on activities by human beings over time, and this points to a difference between resources that are given to us by nature and intellectual resources that are given to us as a result of individuals creating, producing and inventing them. If such a distinction can be maintained¹, it follows that creationist interpretations of Lockean labour – which focus on labour as something not dependent on the prior labour of others – lead one toward strong, creator-centred theories of authorship. The implications of this account for the broader questions considered by this chapter are made clear below.

A third interpretation of Lockean labour, which I have termed the *intellectualist* account, leads to a more balanced picture of Lockean rights of authorship than is suggested by the creationist account. The first point to note about this interpretation is that it views Lockean labour not in physical terms, but as connected to Locke's remarks on personhood. Indeed, Locke speaks of an individual having property in their 'person', not their body, which provides reason for thinking that labour should be understood as fundamentally connected to our nature as persons – rational, reflective beings capable of choice and self-awareness. This also connects Lockean labour to the more general right to self-government – a 'right of freedom to his person' (Locke, 1689, Book II: sec. 190) – which underlies his theory of rights. If we understand Lockean labour as intellectual activity broadly construed – or, in Simmons' phrase, 'purposive activity aimed at satisfying needs or supplying the conveniences of life' (Simmons, 1992, p. 273) – it follows that, when a person mixes their labour with an object they do not literally change that object, but the object becomes part of their labour through being brought within their purposes, aims and actions. Provided such labouring does not encroach upon others' rights to self-government, the object cannot be removed from the labourer without interfering with their labour and thereby violating their right to self-government.

What are the implications of the 'intellectualist' account of labour for Lockean theories of authorship? One interesting observation is that, through connecting labour to personhood in this way, we actually move towards a Lockean theory of authorship that has much in common with personality theories (see below). This makes it possible to discuss 'hybrid' theories of authorship that blend elements of both labour and personality theories together, and may be able to give us a more comprehensive theory of authorship than when these theories are considered separately. A further, important element of the Lockean intellectualist account is that, through grounding authors' rights in rights of self-government, authorship (like ownership) becomes a category that generates internal constraints on its scope and extent.

That is to say, the intellectualist account of authorship states that authors should be given opportunities to originate and control their works provided that they do not violate others' rights to self-government – by pretending a work by another author is really the product of their own labour, or by merely copying another author's work without investing any new labour of their own, for example.² From the perspective of the intellectualist account, limitations on the extent of appropriation are considered part and parcel of what it means for an individual to mix their labour with an object, and not external constraints on the activities of owners (or authors).

The three interpretations of the labour theory of authorship considered above make use of an analogy between individual owners and individual authors. The fourth, and final account, found in the work of Seana Shiffrin (2001), is more radical, and attempts to move away from the proprietary framework offered by labour theories. The key difference between Shiffrin's *non-proprietary* account and most other interpreters of Locke is that she does not place a great emphasis on Locke's argument that private property is justified through individuals mixing their labour with unowned resources. In her view, conceptions of authorship which focus on the importance of labour give authors rights to their works that are too strong to be justified on other Lockean grounds, such as material survival and subsistence, not to mention Locke's basic commitment to equality. Shiffrin argues that access to intellectual products is not necessary for survival or subsistence and, due to their non-rivalrous, inexhaustible nature, they can be used by an infinite number of people without being used up. As she puts it: 'The fully effective use of an idea, proposition, concept, expression, invention, melody, picture or sculpture generally does not require prolonged exclusive use' (Shiffrin, 2001, p. 156). According to Shiffrin, this feature of intellectual products precludes their privatisation from the common on Lockean grounds.

Shiffrin's interpretation seems to give us a highly limited Lockean account of author entitlement: on her account, many of the property rights that authors have in their works under the current copyright system are unjustified. Her interpretation of Locke would favour systems of copyright that provided very little proprietary protection for authors – authorship would be seen as a shared endeavour, and most intellectual works would be viewed as existing in a kind of permanent common, outside the scope of proprietisation. This view might be gaining support in certain 'Copyleft' movements, but it is not usually one that is seen as having philosophical support from Lockean accounts. Shiffrin's interpretation of Locke goes against the grain of some standard accounts of Lockean authorship, then, and this is largely because she chooses not to give Locke's labour-mixing

argument for the justification of property much prominence. In Shiffrin's view, labour plays a 'subsidiary' role in Locke's account of appropriation, 'justifying the appropriation by one individual rather than another once private appropriation of the given sort of property is antecedently valid' (2001, p. 144). Even if controversial as an interpretation of Locke, it might nonetheless have interesting implications for copyright law's definitions of authorship and, in particular, it provides a way of bringing Lockean insights into the burgeoning literature on non-proprietary accounts of copyright (discussed below).

Authorship and personality

A different set of philosophical theories has been developed to support the proposition that an author's right to their work is justified on grounds that it expresses their personality. Applied to tangible property, Radin (1982, p. 957) has described this as the 'personhood perspective', noting that 'to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment' (in the form of property rights). In the context of intellectual property, the personality theory requires that we grant creative works strong legal protection (against misattribution, for example, or other actions which inhibit the author's control over their work). Not only is the personality theory said to be a creator-centred theory, elevating the importance of the individual author at the expense of both copiers and the public domain, but it is also assumed to lead to stronger protection for copyright owners than other justifications for copyright (Bently and Sherman, 2005, p. 39).

When we look further into the roots of the personality theory, however, we find a confused and under-analysed picture of its philosophical lineage. As Fisher notes, personality theories of intellectual property are thought to be 'loosely derived from the writings of Kant and Hegel' (2001, p. 171). However, such theories may turn out to be very 'loosely' derived from the writings of these philosophers, and there is little scholarly work on personality theories in Anglo-American philosophical literature on copyright.³ As Wendy Gordon notes:

[...] for investigation of whether and how the "personal" element [of intellectual property] should be important, we should probably look to sources such as Kantian and Hegelian philosophy. At least in the English-speaking world, although some valuable work has been done, application of those schools of thought to IP is still at an early stage (Gordon, 2003, p. 10).

Legal discussions of the personality theory so far have looked more to Hegel's theory of property for support and clarification than to Kant's (Hughes, 1988; Fisher, 2001; Netanel, 1993; Palmer, 1990). In this section, I consider whether Hegel's discussion of intellectual property justifies such a connection.

The personality theory of intellectual property is often said to apply particularly well to the legal protection of artistic work. Indeed, it seems especially well suited to support systems of 'moral rights' which include artists' rights to 'control the public disclosure of their works, to withdraw their works from public circulation, to receive appropriate credit for their creations, and above all to protect their works against mutilation or destruction' (Fisher, 2001, p. 174). These rights are said to be 'perpetual, inalienable and imprescriptible', as is stated in Article L121-1 of the French Act on intellectual property (*Code de la propriété intellectuelle*). The personality theory that underlies these legal protections, then, has two features: first, it gives philosophical grounding to copyright law's acknowledgement that some intellectual property rights are *inalienable*. Second, it is a *creator-centred* justification for intellectual property (Spence, 2007, p. 45). That is, the theory is used to justify legislation that protects creators of intellectual works against those who use, copy or modify their works.

Let us consider the first feature of personality theories – their focus on the inalienability of an author's personality. Hegel's account offers a nuanced and complex perspective on this issue. His discussion of *Entäußerung* ('alienation') at paragraphs 65-71 in the *Philosophy of Right* contains his most extensive remarks on intellectual property. On the one hand, his comments on the status of personality and mental traits such as ideas supports the view that they are inalienable: '... those goods, or rather substantive characteristics which constitute my own private personality and the universal essence of my self-consciousness are inalienable' (§ 66). This seems to align closely with the personality theory's recognition of inalienable authors' rights. On the other hand, Hegel was prepared to view authors' works as alienable 'things', despite the 'internal' or mental nature of intellectual production:

The distinctive quality of intellectual production may, by virtue of the way in which it is expressed, be immediately transformed into the external quality of a thing [*Sache*], which may in turn be produced by others (§ 68).

Although it might seem that alienation of an author's work is 'alienation of personality – a prohibited act in Hegel's system' (Hughes, 1988, p. 347), Hegel goes on to argue that the author nonetheless remains the 'owner of

the universal ways and means of reproducing such products and things' (§ 68) suggesting that the author has a stronger right than the person to whom they have alienated the external use of the object – a right to control the various external uses of the work by others, in keeping with the personality theory's support of moral rights. This means that there is some support for the notion of inalienable moral rights within Hegel's account; however, this is not because there is anything internal to the work which 'embodies' the author's personality – the work is external, alienable property, unlike personality which is inalienable – but rather because the author's personality is inalienably connected to the work through the author's control and choice over the way it is used by others. The implications of this view for copyright's notion of the work are considered in more detail later below.

As regards the second feature of the personality theory – its creator-centred focus – Hegel's discussion begins by focusing on the legal protection intellectual property offers to individual authors or creators:

The purely negative, but most basic, means of furthering the sciences and arts is to protect those who work in them against theft and to provide them with security for their property ... (§ 69).

This suggests that Hegel viewed intellectual property as a system that secured individual creators rights to their property; in keeping with the standard personality theory, he viewed its purpose and goals from the perspective of individual creators. Nonetheless, it soon becomes clear that the central focus of Hegel's account is the social nature of authorship:

The purpose of a product of the intellect is to be apprehended by other individuals and appropriated by their representational thinking, memory, thought, etc. Hence the mode of expression whereby these individuals in turn make what they have learned (for learning means not just memorising or learning words by heart – the thoughts of others can be apprehended only by thinking, and rethinking is also a kind of learning) into an alienable thing, will always tend to have some distinctive form, so that they can regard the resources which flow from it as their property, and may assert their right to reproduce it (§ 69).

Hegel is implying here that individuals who 'apprehend' or 'appropriate' existing intellectual products can build upon them in such a way that it might become very difficult to determine when repetition of ideas becomes a special property of an individual, rather than part of the common pool of

ideas. As such, his focus seems more balanced than standard interpretations of personality theories would allow.

We should not be surprised that Hegel's discussion moves away from a purely creator-centred or individualistic account of authorship, since the need for individuals to supersede or transcend subjectivity is crucial to his philosophy. Hegel argues that the development of individual personality involves some sort of 'transition' from the inner subjective world to the external objective world, and that property is an important part of this transition:

Abstract property contains the arbitrary moment of the particular need of the single individual; this here is transformed ... into care and acquisition for a communal purpose, i.e. into an ethical quality (§ 179).

More generally, as the *Philosophy of Right* develops from abstract right to *Sittlichkeit*, Hegel ceases to draw any distinction between the collective interest of a community and the individual interests of the members of that community. Hegel's communitarianism and his developmental model of personality mean that we should be cautious about describing his theory of authorship as creator-centred and individualistic, along the lines of the personality theory.

Authorship and communication

Before moving on to address the specific questions about authorship at stake in this chapter, I shall briefly outline the final set of theories under consideration: those rooted in a desire to steer discussions of copyright away from proprietary frameworks, focusing instead on communicative norms. In recent years, philosophers have engaged with some conceptual issues raised by the very idea of intellectual 'property'.⁴ Although some have argued that it is perfectly coherent to treat works of authorship as works of property (Biron, 2010), others have attempted to move the debate in a more radical direction, seeking alternative (or supplementary) conceptual frameworks for justifying copyright. Most theories of this sort are united in the claim that works of authorship should be viewed not as commodities to be owned but as vehicles of authorial communication. Often taking inspiration from Kant's writings on copyright and linking them to his discussion of public reason (Barron, 2012; Biron, 2012; Borghi, 2011; Capurro, 2000; Chiara Pievatolo, 2008 and Johns, 2010) communicative approaches to copyright

attempt to put forward principles of communication that can be drawn on to distinguish an author's legitimate communication 'in their own name' from their derivative communication in another's name.

I have engaged with Kant's writings on copyright, autonomy and public reason in depth in previous work, so for the purposes of this piece I shall provide only a brief summary of the communicative approach I have defended elsewhere (Biron, 2012). Kant puts forward three principles of communication in the *Critique of Judgement* (Guyer, ed., 2000, p. 173) – principles I have termed authority, intelligibility and consistency – and they can be applied to questions about authors' rights in the following ways. First, the principle of authority – to 'think for oneself' – points to the need for an author's speech to be non-derivative: the authority of the author's speech must not be derived from another person's speech; rather, it must be carried out in their own name. Second, the principle of intelligibility – to think from the standpoint of everyone else – can be read as a necessary condition for authorship that aims at public communication, not just self-expression. Third, the principle 'always to think consistently' can be read as a demand that authors adjust their communications to meet the requirements of intelligibility consistently, depending on the interaction with and also the scope of their possible audiences. As Garrath Williams puts it, this condition entails 'regarding oneself, first, as the genuine author of one's judgments, and second, as [epistemically] accountable to others' (Williams, 2009, sec. 3:2). If principle [3] is in some sense regulative of [1] and [2], we can see that public reasoning is not static but, just like all communication, dependent on its audience, its interlocutors and the willingness of authors to reconsider and re-evaluate their communications in light of the testing and mutual questioning of their writings.

The above principles of public reason provide a way for copyright scholars to engage with questions about the relationship between authorship, copyright and freedom of expression, but with some important modifications. Indeed, Kant's approach does not really warrant the label 'expressive autonomy' or 'autonomy of expression' (Treiger-Bar-Am, 2008, p. 1075), at least to the extent that such labels emphasise a somewhat individualistic and creator-centred approach to authorship. When we focus not on individual acts of expression but more broadly on *principles* of communication – such as intelligibility or consistency – we appreciate Onora O'Neill's point that 'freedom of expression can provide only one part of an adequate ethics of communication' (O'Neill, 2007, p. 169), because rights of self-expression can be exercised without meeting other important principles of public communication.

We have now outlined three philosophical accounts of the justification of copyright: based on labour, personality and communication respectively. Interestingly, the extensive literature on labour theories has provided room for a discussion of non-proprietary Lockean accounts of copyright; the literature on the personality theory is at a less developed stage, in the Anglo-American sphere at least, and still seems firmly rooted in a proprietary framework even if, as we have seen, Hegel's writings do not support the creator-centred standpoint that it is often taken to justify. Finally, a Kantian approach based on principles of communication is explicitly non-proprietary, and may seem to have more direct relevance to questions about authorship; however, to fully appreciate the implications of these theories, we can now apply them to the questions under consideration in this chapter.

Author, work and originality

Let us begin with the question about originality and the 'work'. Taking the overarching distinction between proprietary and non-proprietary conceptions of authorship, it has been argued that proprietary conceptions of authorship are more committed to a notion of a 'fixed' work of authorship, understood analogously to a tangible object of property, and with the concept of originality invoked to draw boundaries around it (Litman, 1990). Non-proprietary conceptions of authorship seem less focused on the work as a fixed object and more focused on viewing the work as a process of communication or a means to promote valuable social goals.

Let us now consider the above theories in more depth, starting with Lockean conceptions of authorship. It is interesting that Shiffrin's non-proprietary theory is the most 'work-centred' Lockean account, because she begins her analysis with a discussion of possible objects of ownership (or authorship), and then considers whether their nature is such as to justify rights of ownership on Lockean grounds. Since she severs the connection between labourer and product, she also seems to sever the connection (important as it is to copyright law) between authorial originality (understood as *origination*) and the work. Once 'the work' is allowed to float free of any connotations of authorial labour, Shiffrin is able to consider it more in terms of its social value – the ways in which works of authorship might stimulate others, be read or accessed by a range of different individuals and, thereby, transformed and used in a variety of ways that promote valuable social goals such as freedom of speech.

The creationist labour account of authorship, on the other hand, would seem to support a strong and intimate connection between authorial originality and the work. Indeed, it would support attempts to define originality in value-laden ways – viewing works of authorship as shot through with creativity and novelty. Of course, viewing originality in terms of ‘novelty’ is not at all in keeping with how copyright law defines the term: a work of authorship ‘... need not be ... novel or unique’ (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004, SCC 13) to count as original and thus protected by copyright. But there have been some recent attempts in US courts to specify copyright law’s originality requirement in terms of creativity as opposed to mere ‘sweat of the brow’ (most notably, the ruling in *Feist v. Rural Publications Inc.*, 1991). It might be argued that such appeals to creativity have shifted the focus of copyright’s originality requirement towards ‘the gospel of Romantic “authorship”’ (Jaszi, 1994, p. 34).⁵ That is to say, appeals to creativity move beyond a fairly neutral specification of originality in terms of origination and towards a more normatively loaded conception of originality which could imply artistic merit, even genius, thereby elevating the status of individual authors, and according them stronger rights to control their works. Creationist conceptions of Lockean authorship might indeed be invoked to support these more value-laden conceptions of originality, though it must be noted that they offer just one particular interpretation of Locke, and are by no means fully representative.

Finally, on the intellectualist labour account of authorship, there does not seem to be a presumption that works of authorship are original in the sense of being ‘novel or ‘creative’, even though there is still an important connection to be drawn between an author’s labour and their work (unlike Shiffrin’s non-proprietary account, which severs this connection). According to the intellectualist account, we should look at the author’s intellectual input – such as judgement or choice in bringing raw materials within their plans and purposes⁶ – to determine what counts as a work, and thus leave room for a definition of originality that is more neutral than the creationist focus on ‘novelty’ or ‘creativity’. How expansive this definition of originality should be – and hence how extensively we might grant rights over works of authorship – would be determined by considerations of the contours of more general rights to self-government, held equally by authors and users of works. Overall, then, labour theories of authorship offer a variety of answers to the question of how copyright law could understand the ‘work’ and ‘originality’, and the most promising theories for addressing questions about internal constraints on the scope of authorship are Shiffrin’s non-proprietary account and the intellectualist account outlined above.

What are the implications of Hegel's personality theory for copyright law's category of 'the work'? We have seen that, far from there being an intimate connection between an author's personality and the work in which personality is expressed, Hegel seems to sever the connection between 'personality' and 'work'. As Netanel puts it: 'Hegel regarded intellectual works as external things rather than as extensions of personality' (Netanel, 1993, p. 377). This goes against copyright law's suggestion that works of authorship can be delineated by looking for a 'stamp of personality' or individuality as evidence for authorial originality. Hegel's focus seems to be not on the work itself, and the extent to which it displays the author's personality, but rather on the ways in which an author's personality can be expressed through various aspects of control and choice over how their work is used. This means, of course, that Hegel's account supports the idea that authors' works should be protected from mutilation, destruction or misattribution, if so desired by the author. But that is not to say that there is anything inherent to 'the work' that need display or contain the author's personality, and that personality is somehow ontologically built into a work of authorship; personality, rather, is a category associated with choice and control over how a work is used by others.

Finally, as I have argued elsewhere, copyright law's originality requirement harmonises with the first principle of Kantian public reason outlined above – the principle of authority. Copyright's originality requirement applies to both new and transformative work and, in both cases, the key to determining originality rests on the question of the source of the work: to count as original for the purposes of copyright it '... must not be copied from another work ... it should originate from the author'.⁷ Understanding originality in this sense as *origination*, we can revisit the distinction between derivative and non-derivative forms of communication, which underlies the principle of authority. A transformative work of authorship whose authority is actually derived from a primary work cannot be classed as having 'originated' from the transformative author – in this sense, works of authorship that count as 'derivative' under the principle of authority would likewise not count as 'original' for the purposes of copyright protection. On the other hand, provided the transformative work's authority is derived from the transformative author's own communication, the transformative work would count as 'non-derivative' under the principle of authority – and, for the purposes of copyright protection, it would count as original. Although a lot more needs to be said about exactly how the contours of originality might be drawn, this approach indicates that copyright need not base its conception of authorial originality on a proprietary model, as is so often assumed to be the case.

Romantic authorship

Let us now turn to some questions about romantic authorship, and the extent to which the theories outlined above either reinforce or challenge it. Exactly what copyright scholars mean by 'romantic authorship' is, of course, a complex question to address. As Erlend Lavik notes in his contribution to this book, the so-called 'myth' of romantic authorship, and its impact on copyright law, requires detailed examination and is by no means settled. For the purposes of this section, I draw on the interpretation of romantic authorship offered by Martha Woodmansee, according to which authors are solitary geniuses who, 'blessed with unique insight, bring forth new and original works of art into the world' (Woodmansee, 1984, pp. 429–31). There has been a tendency to view some Lockean accounts of property as giving support to theories of this sort. As Netanel puts it, 'drawing upon a combination of Lockean labor-desert theory and nineteenth-century romanticism ... [it is argued that] copyright should be immune from exceptions and limitations' (Netanel, 2008, p. 21). However, we have already seen that the labour-desert theory of property, let alone authorship, is conceptually confused. And Shiffrin's account – focused as it is on the maximal use of intellectual products or works, rather than the labour of individual authors – seems far removed from anything like a romantic conception of authorship. Might the other interpretations of Locke – the creationist or the intellectualist accounts – nonetheless be connected to romantic conceptions of authorship?

To answer this question, we must return to the issue of the extent to which we might view an author's labour as dependent upon the prior labour of others; according to the definition of romantic authorship outlined above, a strong emphasis is placed on the input of the author as having created something new and unique, unencumbered by external influences. And this sort of view is not uncommon in discussions of authorship. Lawrence Becker, for example, defines authorship as an activity in which the author's labour is 'the beginning of the causal account of the product' (Becker, 1993, p. 614). Jeremy Waldron also makes a similar point:

What copyright appears to uphold are rights of pure agency, rights in something that literally did not exist in any form before the author put his mind to work (Waldron, 1993, p. 879).

The idea behind both of these claims is that holders of intellectual property rights have rights to objects that might not have come into existence at

all without their efforts. And this means that we can ask various questions about the ways in which they were invented or created, and imagine that they might never have existed in the first place. If we simply left our analysis of authorial labour at this, the most suitable Lockean theory of authorship to support it might be the creationist accounts which focuses on unencumbered acts of authorial creative labour, harmonising well with romantic conceptions of authorship.

However, although the above interpretation of authorial labour as essential to the formation of intellectual products might be an accurate description of the ways in which authors labour to produce their works, this is not to say that we should leave our analysis at that. Indeed, the two quotations by Becker and Waldron leave open the (highly likely) possibility that authors often mix their labour in ways that are dependent upon the prior labour of others. Thus, we can acknowledge that authors do indeed exercise 'agency' in producing their works, without sliding into a seemingly strong proposition that they do so entirely unencumbered by external influences. As Hettinger argues:

Invention, writing and thought in general do not operate in a vacuum; intellectual creation is not creation *ex nihilo*. Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products (Hettinger, 1989, p. 38).

Even so-called 'primary' authors are said to be transformative authors of a kind, on this view, because their writings are nonetheless dependent on a number of different background conditions, including works of authorship that might have inspired and influenced them in their writing. It is still important to have some way of recognising the extent to which a particular act of labouring has transformed some previously existing idea or ideas into something different – thereby enabling us to give recognition to that author's effort – but this is not to say that even the labour of primary authors can be separated entirely from the prior labour of others. The intellectualist account, as opposed to the creationist account, can leave room for this sense of the 'intertextuality' of authorship, since it does not focus on the nature of the work – i.e. whether it was created from nothing or from some previously existing thing – but focuses instead on the author's use of the work, and the author's labouring on it in the sense of bringing it within their legitimate plans and purposes. As such, the intellectualist account can fit a wider range of cases of authorship, and does not automatically support the questionable

view – associated with some forms of romantic authorship – that authors work in a kind of a vacuum, independently of the labour of others.

Turning now to personality theories, much of the literature assumes that they are closely allied with romantic conceptions of authorship. Palmer, for example, suggests that the traditional personality theory errs in its excessive focus on the personality of the author and in its appeal to romantic notions of creativity, which stress subjective experience and its expression, emphasising the sublime experience of the artist as opposed to the experience of the user or copier (Palmer, 1990). However, our above outline of Hegel's theory revealed a more complex picture: although Hegel argued that personality is an inalienable part of the self, he also thought that acts of expression could transform inner personality into external, alienable property. Moreover, he viewed the alienation of property as crucial for the development of personality. This has the result that Hegel's own account of authorship is not individualistic or creator-centred, but thoroughly communitarian in its outlook. As noted above, Hegel argued that 'the purpose [*Bestimmung*] of a product of the intellect is to be apprehended by other individuals and appropriated by their representation, thinking, memory, thought, etc.' (§ 69), expressing concern for the common pool of ideas, not the legal protection of any one particular author or creator. As such, the conception of authorship we should associate with Hegel is neither 'romantic' nor 'individualistic', but leaves room for the various senses in which we might speak of authorship as collective, even when understood within some kind of personality-based framework. It should be clear, then, that Hegel's writings cannot be used to give strong philosophical support to romantic conceptions of authorship. This is a view echoed by Schroeder, who argues that 'the personality theory of intellectual property that dominates American intellectual property scholarship is imbued by a romanticism that is completely antithetical to Hegel's project' (Schroeder, 2005, p. 454).

A closer reading of Hegel's account of intellectual property might also challenge scholars to rethink the ways in which the personality theory should be applied as a theory of authorship. Returning to Waldron and Jaszi's separate observations about authorship being at the nexus between individual and social defences of copyright, Hegel makes some important observations about the social goals that copyright can promote – for example, his comment that legitimate copying can be a way of learning or acquiring knowledge brings out a connection between copyright and valuable social goals such as education. As Hegel notes, the 'purpose [*Bestimmung*] of a product of the intellect is to be apprehended by other individuals ... for learning means not just memorising or learning words by

heart – the thoughts of others can be apprehended only by thinking, and rethinking is also a kind of learning’ (§ 69). And Stillman points out that people take possession of themselves, on Hegel’s account, through *Bildung* (education), ‘acquiring the capacity to think of ourselves as persons by regarding ourselves as members of a community of persons, a universal self-consciousness’ (Stillman, 1991, p. 219). Theorists looking to strengthen the connection between promoting authorship and encouraging desirable social goals such as education might therefore find support in Hegel’s writings.

Finally, does a Kantian approach help to unpack and challenge copyright’s alleged appeal to romantic conceptions of authorship? Kant’s writings on copyright illustrate that he was committed to the view that the creative process is in fact transformative; authors often use, copy and transform existing materials in order to exercise their own communicative abilities. This seems quite a different conception of authorship from the romantic conception considered above. Moreover, in contrast to the emphasis on ‘authorial genius’ we often find connected to romantic accounts of authorship, Kant mentions the role of genius in his work on public reason as an example of how genius must be independently governed and constrained by the norms of reason. Rather than being a solitary exercise of individual expression, that is, even the operations of genius must be constrained by standards and principles. This is a far cry from the traditional ideal of the romantic author-genius, sometimes thought to be responsible for so much of the rhetoric surrounding the expansion of authors’ rights. Thus, neither personality nor communicative approaches to copyright provide support for romantic conceptions of authorship, and only one particular and limited interpretation of the labour theory does so.

Collective authorship

Finally, we can turn to some questions about collective authorship. It is important to keep in mind three different models of collective authorship as we reflect on the extent to which these different justificatory frameworks might be relevant to questions about multiple authorship:

- i. *transformative authorship*, where an author or composer takes an existing work and transforms it into something else;
- ii. *multiple authorship*, where a work might be divided into separate but multiple contributions by different authors (such as an encyclopaedia, classified in copyright law as a ‘collective work’); and

- iii. *collaborative authorship*, where it is not possible to distinguish ‘isolated’ contributions, and there is joint collaboration between authors towards some shared end (in copyright law terms, a work of ‘co-authorship’).

The discussion of romantic authorship above has already addressed questions about transformative authorship; the focus in this section will be on collective authorship as either ‘multiple’ or ‘collaborative’ authorship.

At first sight, it might seem that non-proprietary accounts of authorship would apply well to collective models of authorship. But it would be a mistake to equate ‘single author’ with ‘proprietary author’. After all, property rights can be held by groups and collectives – such as corporations or co-operatives – as well as by individuals. In the case of a collaborative work of authorship, why should we assume the authors in question would be any less likely than single authors to view their efforts as requiring some kind of proprietary protection? And there may be even more of a case for allocating proprietary rights to multiple authors of the same work, since boundaries would need to be drawn up making clear which elements of the work belonged to whom, to ensure certain authors were not given undue credit, or vice versa. With cases of transformative authorship, we could see Shiffrin’s non-proprietary account having some application, but it would still be important to analyse the sort of transformation involved, and the challenge is to offer an appropriate theoretical framework for doing this, if we assume that the primary author is not the ‘owner’ of the primary work.

On the creationist account of labour, it would seem that any attempt to make sense of collective authorship would be done with a strong presumption of proprietary control to the primary author. However, with the case of a collaborative work, there is a sense in which the different authors of the work together form one ‘single’ author. It is conceivable that such a group of this kind could be viewed under the lens of romantic authorship – after all, we might describe their work as creative, and we might assume that as a group they worked together in a solitary way, in the sense that they were unencumbered by the influences of others except themselves. With cases of multiple authorship, however, the creationist account would analyse the distinct contributions of each author in a particularly slanted way: it would be unlikely to allocate a share of proprietary protection to each author equally, but would instead look to give priority to the ‘star’ or ‘lead’ author, understood as having had the truly original idea which the other contributors were merely embellishing or developing in some way. The same would apply for cases of transformative authorship, as we have seen.

According to the intellectualist account of labour, there would be no problem arguing that intellectual production was a shared enterprise, as with the case of collaborative authorship: a group could be given similar rights of self-government to individuals. But there would be no need to view groups as having produced their works ‘romantically’ or in a solitary or unencumbered fashion. With the case of multiple authorship, there would be no obvious need to prioritise the ‘lead’ or ‘parent’ author as with the creationist account, but each would depend more quantitatively on the extent of the labour involved. Finally, with regards to transformative authorship, we would consider the extent to which the transformative author had brought the (transformed) work within their own legitimate plans and purposes, rather than merely ‘free-riding’ on the labour of the primary author, thereby violating their right to self-government.

Turning now to Hegel’s account, it might seem as though the notion of personality is strongly tied to particular individuals, which makes it difficult at first sight to see how an individual’s personality could be ‘merged’ with a group or collective, whilst still retaining its personal quality. However, Hegel’s own developmental model of personality, which I discussed above, draws a connection between embodiment of personality in external objects and the development of individual personality. As Charles Taylor puts it:

[...] personhood involves recognition – that space of evaluation of the person’s existence is intrinsically and inseparably a public space ... The very struggle to gain recognition is fated to self-frustration because it can never be properly achieved until we achieve the kind of community described in the passage which ends this section [§ 195] in the *Phenomenology*: a society where the I is a we and we is an I (Taylor, 1991, p. 68).

Thus, Hegel’s developmental model of personality provides an interesting basis for personality theories of authorship to be applied to cases of joint or group communication.

Finally, Kantian standards of public reason might be applied to groups as well as to individuals – at least, there is no conceptual problem with the idea of ‘group’ communication, and no obvious bias towards individual communicators. Indeed, the point of grounding Kantian theories in principles of communication rather than individual autonomy is precisely to guard against ‘individualistic’ readings of communications as ‘expression’. For example, in cases of contested joint authorship – where one party claims authorship and another denies it – standards of public reason might be drawn upon to adjudicate between the claims. After all, copyright

requires that a contribution of joint authorship be original – and, as we have seen, this harmonises with the principle of public reason called the principle of authority. Copyright also requires there to be collaboration in the sense of a shared purpose of some kind: and this might be spelled out using the principle of consistency, which focuses on the dynamic nature of communication, and the need for an author's communication to be adjusted in light of input from others. In some cases, individuals who enable communication to be adjusted might not be 'authors' as such but rather assistants or aids to authorship. But in other cases, the input could be significant enough that two such individuals share a common design for the work, and thereby become joint authors. Thus, communicative models of authorship enable us to broaden our inquiry about authorship beyond a proprietary focus on the fixed 'work' and an exclusive focus on the 'creator's' role in its production.

Of course, further refinement would be needed to address fully the questions about which forms of communication are authorial and which are not, short of very broad principles of public reason, but the brief sketch above indicates that the communicative approach has resources at its disposal for such a project.

Conclusion

This chapter has examined some different interpretations of the writings of Locke, Hegel and Kant, under the headings 'labour', 'personality' and 'communication' respectively. It has considered the extent to which they have application to three important questions about copyright's conception of authorship: originality, the work and collective authorship in copyright law. We have seen that, under these broad headings, various conceptions of authorship seem to follow: neither the labour nor personality theories are unified, complete theories of authorship, but might be interpreted in a variety of ways; even the communicative account I have outlined is just one amongst many explanations for how copyright might be grounded in communicative norms.

Thus, as scholars from law and humanities continue to grapple with categories of 'authorship' and 'the work', they should be prepared to challenge the traditional bifurcations we tend to create in philosophical accounts of copyright. Indeed, one important overarching question to consider is whether scholarship on authorship in the humanities has anything to say about authorship as a category that can generate its own

internal constraints against so-called copyright ‘expansionism’, rather than these constraints being imposed from outside (by focusing on user privileges, for example). This article has argued that certain components of labour, personality and communication do indeed support the idea of authorship as an internally constraining process – one that may contain within its very definition the power to generate limitations on the legal rights that attach to its products. The next stage forward for researchers in philosophy is to work through the issue of how we might blend together these theoretical approaches which are so often wrongly presented as in theoretical opposition.

Notes

1. The distinction could be challenged on the basis that the material common is not completely static; people labour on land and raw materials to change and ‘cultivate’ it. But there does seem to be a difference between resources that are given to us by nature and intellectual resources that are given to us as a result of individuals creating, producing and inventing them; the difference lies, as Shiffrin notes, in the fact that the initial expanse of material resources exists ‘independently of human efforts’ (Shiffrin, 2001, p. 158). Nonetheless, it must still be noted that this construal of the common does not really explain the shared basis upon which individuals create (such as linguistic conventions and ideas), and is silent on questions about how to isolate one person’s labour from the shared basis upon which it depends. I am grateful to Mireille van Eechoud for clarifying this point.
2. I am aware that these examples only relate to individual acts of authorship: I discuss the implications for collective authorship further in the section Collective authorship.
3. Although the personality perspective has obvious application to continental systems of copyright, here I consider their application to Anglo-American copyright doctrine and their discussion in Anglo-American copyright theory. I am aware that personality theories have been discussed extensively outside of the Anglo-American context, and regret that there is not scope in this chapter to explore this literature.
4. See, for example, the collection of essays in the 2010 edition of *The Monist* (93c: 3).
5. It is not clear that courts have in fact adopted this approach (Lavik and Van Gompel, 2013). See also Lavik’s contribution in this book, especially the section entitled ‘A lack of interpretative constraint’. Regardless of its practical implementation, I mention it here to illustrate the theoretical possibility of Lockean accounts being used to support such a position.

6. For discussion of the ways in which an approach of this kind is adopted by EU and Dutch Courts, see the chapter on 'Creativity, Autonomy and Personal Touch' elsewhere in this collection by Van Gompel.
7. Peterson, J., *University of London Press Ltd v. University Tutorial Press Ltd* (1916).

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Romantic authorship in copyright law and the uses of aesthetics

Erlend Lavik

Every writer, as Jose Luis Borges says, creates his own precursors (an elegant way of saying, amongst other things, that all intellectual history is post factum).

(Seán Burke, 2008, p. 8)

Scholars of the arts as well as scholars of copyright law – especially in the US – have for decades struggled to kill off the ideology of Romantic authorship, though it is far from clear precisely what it consists of, or why and to whom it poses such danger. The situation brings to mind film historian Tom Gunning's memorable observation in a different context that the persistent attacks 'begin to take on something of the obsessive and possibly necrophilic pleasure of beating a dead horse' (1998, p. xiii).

This chapter is divided into two main parts. The first part critically examines the idea that the myth of Romantic authorship is deeply ingrained in copyright law and has propelled its expansion. The second part explores the broader but related issue of how insights from the humanities can usefully inform copyright scholarship. Taking as its starting point Roland Barthes' famous essay 'The Death of the Author' it argues that it is extremely demanding to find common ground, for even though the disciplines overlap conceptually they are fundamentally at cross-purposes epistemologically. I maintain that we must first identify where the aims and practices of aesthetics and law actually converge, and deem it to be in the area of interpretation and evaluation, which is obviously one of the core competences of scholars of the arts, and also something that courts resort to at the infringement stage.

Part I

It is widely held that the ideas of Romantic authorship that took hold in the late 18th century placed high poetic value on novelty and traced the source of originality to the mind of the author. What was new about this ideology was the degree of independence from tradition attributed to writ-

ers. The Romantic era overflows with depictions that – at least when taken in isolation – suggest that the highest forms of poetry emanate singularly from the mind or soul of the author-genius. Thus Edward Young writes in *Conjectures on Original Composition* (1759), one of the founding texts of the new ideology of the Romantic author, that ‘The pen of an *original* writer, like *Armida’s* wand, out of a barren waste calls a blooming spring’ (1918, p. 7).

It is also conventional wisdom that the rhetoric of Romantic authorship both contained and came to blend with notions of ownership and claims to rights, and that it gradually entered copyright law. How literary discourse found its way into legal discourse is a more contentious matter. On the one hand, causality is simply unspecified or abstracted: the texts of the Romantic poets are treated as a kind of conceptual incubator that somehow spread and took hold in other spheres. On the other hand, the discourse of Romantic authorship is posited as a tool strategically conceived by writers specifically in order to acquire legal recognition for, and thus profits from, the fruits of their labour. Martha Woodmansee, for example, writes that the modern concept of the author:

[...] is the product of the rise in the eighteenth century of a new group of individuals: writers who sought to earn their livelihood from the sale of their writings to the new and rapidly expanding reading public. In Germany this new group of individuals found itself without any of the safeguards for its labors that today are codified in copyright laws. In response to this problem, and in an effort to establish the economic viability of living by the pen, these writers set about redefining the nature of writing (1984, p. 426).

There is evidence to suggest that the latter instrumentalist account is somewhat overstated, as the ideology of Romantic authorship arose in response also, or even predominantly, to non-legal developments. Jessica Millen, for example, notes that it was also a reaction against the advent of mass production. Industrialisation and commodification brought on mechanical reproduction as an extreme form of standardised and automated imitation against which the uniqueness and authenticity of human creativity stood out (2010, p. 93).

A much challenged influence

The extent to which the ideology of Romantic authorship actually informed copyright doctrine has also been challenged. Trevor Ross argues that the

1774 decision to reject the booksellers' claim for perpetual copyright represented a rejection of Romantic theories, and that it represents 'a growing awareness of the status of English literature as a 'tradition', one whose artistic vitality, it was felt at the time, could only be maintained by restricting the material privileges of authors' (1992, p. 3). Similarly, Simon Stern notes that: 'Although some commentators on aesthetics treated literary creativity and ownership as intertwined concepts, that linkage finds no corollary in contemporaneous legal doctrine' (2009, p. 69), and that: 'Once one looks for evidence of a link between aesthetic theories of creativity and legal theories of literary property, it is striking how rarely anyone invoked the concept of aesthetic originality during the eighteenth-century copyright debates' (ibid., p. 83).

For Oren Bracha the conventional wisdom that copyright law absorbed the literary concept of authorship has a grain of truth, but such accounts tend to be 'incomplete or flawed' (2008, p. 192). Examining the period in the 19th century in which the concept of originality was embedded in US copyright law, he finds that it was mobilised in highly contradictory ways. One line of cases treated it as a substantial threshold requiring novelty or merit. Another line of cases treated originality as a minimal requirement on the anti-Romantic grounds that culture is inevitably cumulative in nature (ibid., pp. 200–208).

Moreover, just as the literary notion of originality was shaped by developments outside of aesthetics, so the notion of originality in copyright was shaped by developments outside the legal sphere. Bracha convincingly argues that economic interests, especially, exerted a constant force against demanding originality restrictions, but also that changing notions of the legitimate role of government and the appearance of a market conception of value played their part.

More contentious still is the assertion that Romantic authorship ideology has continued to dominate copyright doctrine to this very day, and has been a, possibly even *the*, driving force in the expansion of copyright ever since.² It is even more vulnerable to the same two main objections that have been raised against the claim that copyright law adopted key tenets of the ideology of Romantic authorship in the 18th and 19th century: First, that important doctrinal structures of contemporary copyright law simply are at odds with Romantic authorship, and second, that there are other and better explanations for copyright's expansion.

The first critique has been put forward by Mark A. Lemley, who points out that the rules regarding the ownership of intellectual property rights frequently privilege the interests of corporations rather than individual

authors. The US work-for-hire-doctrine, according to which the commissioner rather than the creator of the work is deemed the author, is the most obvious example,³ but doctrines of assignment and transfer too serve to steer copyright from individuals to corporations (1997, pp. 882–883). He also points to the idea-expression dichotomy and the fair use doctrine to make the more general observation that ‘many of the fundamental issues in intellectual property law are shaped not by romantic authorship, but by the desire to protect intellectual property adequately without overprotecting it’ (*ibid.*, p. 890).

The second objection has been most forcefully raised by Lionel Bently, who injects a heavy dose of *realpolitik* into the claim that Romantic authorship has been the prime mover in copyright’s expansion. The most obvious alternative explanation for Bently is the lobbying efforts of corporate interest groups to gain copyright protection for new categories of works, and to obtain stronger protection for works that are already eligible for protection (2008a, pp. 26–41). Moreover, he notes that internationalisation, particularly the establishment and enforcement of international norms through treaties such as the Berne Treaty, and regional harmonisation, such as the effort to create a European internal market, have played a key role on the extension of copyright law (*ibid.*, pp. 45–57). While there is nothing intrinsic about either process that requires copyright protection to expand rather than decrease, Bently lists a number of practical and political reasons why internationalisation and regional harmonisation very clearly tend to pull in just that direction.

Bently also breaks down how national economic and trade interests and the rise of neo-liberal economic theory have given rise to stronger copyright protection (*ibid.*, pp. 57–62), and mentions other likely aiders and abettors, such as resistance to unfair competition law, commitments to natural rights conceptions, and the inclination to equate labour or value with property (*ibid.*, pp. 62–63). Finally, Bently offers several historical case studies of copyright expansion, and finds that even at its height in the 19th century the rhetoric of Romantic authorship was counterbalanced by an awareness of the cumulativeness of culture and concerns for the public good, and hence ‘did not carry sufficient persuasive power to win the day’ (*ibid.*, p. 78). In the 20th century, he argues, the main reasons for copyright’s expansion largely lie elsewhere, as the influence of the ideology of Romantic authorship seems to have been increasingly marginal. Bently thus persuasively concludes that among the causes that have led to copyright’s overbreadth ‘The romantic author was, at most, a minor accomplice’ (*ibid.*, p. 21).

In the following, I turn to the methodological difficulties that ensue from the proposition that we can construct historical explanations by tracing the influence of prevalent ideas as they somehow wander from one domain (like the literary) to another (like the legal). I will call the argument that copyright law has become infused with, or come to mirror, the ideas of Romantic authorship propounded in the 18th century the ‘reflectionist hypothesis’.

‘Influence’ as historical explanation

Philosopher Quentin Skinner has pointed out that the enterprise of ‘isolating leading influences and tracing out connection in terms of them ... seems a good means of abridging the enormous range of facts with which a historian ... is typically confronted’, but that the logical form of the proposition that one idea influenced another idea or event is nevertheless ‘somewhat peculiar’ (1966, pp. 203–204). On the one hand, the historian must establish a relationship close enough to dissociate similarities from pure chance and, on the other, loose-limbed enough to separate the connection from brute causality:

The historian is not expected to provide a totally determined account of any situation, but to allow both that his assessment of the influences at work could always be disputed by the interpretation of another historian, and that his own explanation could always in principle be upset by the discovery of new facts. It seems, then, to be intended to point out something at once rather obvious and yet curiously difficult to grasp – that one idea or event is in some sense dependent on another yet not entirely dependent; and that they are thus alike yet not exactly alike (ibid., p. 204).

This is a challenge that faces all historical explanations, but it is one that seems to be particularly acute in the case of Romantic authorship’s migration from aesthetics to law. Skinner notes that: ‘The judgment that [one idea or event] P₁ influenced [some other idea or event] P₂ seems in effect to entail that we see repeated in P₂ the elements which also give to P₁ its characteristic form’ (ibid., p. 207). One obvious problem facing the claim that the Romantic ideology of authorship has influenced copyright law is the glaring divergence between literary and legal conceptions of originality. Fundamental tenets of the Romantic era – for example that originality is tied to aesthetic novelty and genius; to individual sincerity, to the ‘spontane-

ous overflow of powerful feelings', in Wordsworth's famous phrase; that the poetic gift is possessed only by a select number of individuals; and that the poet is merely a vessel for creative energies beyond his control – are simply absent from the legal discourse. This begs the question: Exactly what are the core characteristics of Romantic authorship that have manifested themselves in copyright law?

Skinner notes that the commonsense view assumes that it is a fairly straightforward and uncontentious task to identify the key features or doctrines of idea P₁, but that:

[...] there is an obvious though apparently elusive sense in which such an assumption is bound to be false. To see historical relationships in terms of repeated patterns of thought or action is to imply not merely that thinking or acting are uniformly purposive, but that they do characteristically result in patterns. There is thus a very strong predisposition, particularly evident in histories of thought, to ignore the difficulties about proper emphasis and tone which must arise in making any sort of paraphrase of a work, and to assume instead that its author must have had some doctrine, or a 'message', which can be readily abstracted and more simply put (*ibid.*, p. 209).

As the final sentence suggests, Skinner thinks that the problem persists even when the historian sets out to explain how the ideas of a single individual influenced those of another, and even when they are engaged in the same enterprise in the same domain: 'The proposition that P₂ was influenced by P₁, based on corroborating their characteristics, cannot in principle explain P₂ with any degree of proof. It will always remain open to the sceptic [...] to claim that the correlations are random, that the features of P₁ have been repeated in P₂ by chance, that no necessary inner connection has been demonstrated at all' (*ibid.*, p. 208). The historian is ultimately 'committed irreducibly to the language of betting and guessing' (*ibid.*, p. 211).

The problems Skinner highlights are compounded manifold in the reflectionist hypothesis, as it is pitched at such a high level of generality. It concerns not the influence of one thinker upon another, but rather a whole group of thinkers upon another group of thinkers, who are, moreover, engaged in a rather different enterprise, that of ruling in matters of the law as opposed to investigating the origins and nature of poetic originality. Accordingly, it is even more awkward to extrapolate the core characteristics of P₁, the doctrine or message that exerts some influence on P₂, for the

core 'theory' they allegedly share is buried under so much multiteity. There is always a danger that the historian not merely extracts the essence of some coherent and pre-existing intellectual position 'out there', merely awaiting discovery, but actively constructs it through the careful selection and arrangement of compatible parts.

There are also tensions between various conceptions of Romantic authorship. For example, the presumption that poetic originality emanates from within the author is hard to fully reconcile with notions of divine inspiration, yet these ideas coexisted in the Romantic period. Moreover, whenever the writings of individual Romantic poets or philosophers are analysed in greater detail, much more complex, contradictory, and idiosyncratic points of view tend to appear. For example, Mario Biagioli argues that the influential German philosopher Johann Gottlieb Fichte's concept of genius focused on general processes of thought rather than on singularly original textual objects. He thus uncoupled genius from notions of aesthetic quality and novelty, and conceived of it as a trait shared by all. Fichte's position is quite similar to the modern notion of 'personal expression' in copyright law, except that he attributed personal expression not just to authors, but also to readers.

Thomas McFarland, meanwhile, writes that: 'It is not the case, as one sometimes hears, that earlier writers [i.e. before Romanticism] were not concerned with originality; they were concerned, but not so deeply and not so insistently as were the Romantics. It is merely a note of special intensity that is sounded, not one without any cultural precedent whatever' (1974, p. 450). And though he finds that *Conjectures on Original Composition* most unmistakably signals this shift in emphasis, even for Edward Young originality 'is not an isolated conception, but one that occupies a place in the relationship of individual to tradition. Originality is seen in fact as a variant of imitation' (ibid., p. 452).

Indeed, an awareness that pure originality is inconceivable, that to rob and borrow is not only fair, but inevitable, surfaces throughout history, among theorists as well as artists. In the 16th century, Italian poet Marco Girolamo Vida called:

Come then all ye youths and, careless of censure, give yourselves up to STEAL and drive the spoil from every source! Unhappy is he [...] who, rashly trusting to his own strength and art, as though in need of no external help, in his audacity refuses to follow the trustworthy footsteps of the ancients, abstaining, alas! unwisely from plunder, and thinking to spare others (quoted in McFarland, 1974, p. 472).

In his conversations with Eckermann, Goethe said that:

People are always talking about originality; but what do they mean? As soon as we are born, the world begins to work upon us, and keeps on to the end. What can we call ours except energy, strength, will? If I could give an account of what I owe to great predecessors and contemporaries, there would be but a small remainder (Eckmann, 1839, p. 147).

Thus he found the effort to trace the sources of a poet's originality absurd, for 'we might as well inquire, when we see a strong man, about the oxen, sheep, and swine, which he has eaten, and which has contributed to his strength' (ibid., p. 266).

Henry Fielding wrote in 1749 that 'the ancients may be considered as a rich commons, where every person [...] hath a free right to fatten his muse' (Fielding, 1832, p. 275); Emerson in the 1830s that 'There never was an original writer. Each is a link in an endless chain. To receive and to impart are the talents of the poet and he ought to possess both in equal degrees (Emerson, 1959, p. 284); Mark Twain in 1903 that 'substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources, and daily used by the garnerer with a pride and satisfaction born of the superstition that he originated them; whereas there is not a rag of originality about them anywhere except the little discoloration they get from his mental and moral calibre and his temperament, and which is revealed in characteristics of phrasing' (quoted in Vaidhyanathan, 2001, p. 64).

These sentiments are of course prevalent among contemporary artists as well. In 2005 filmmaker Jim Jarmusch noted that:

Nothing is original. Steal from anywhere that resonates with inspiration or fuels your imagination. Devour old films, new films, music, books, paintings, photographs, poems, dreams, random conversations, architecture, bridges, street signs, trees, clouds, bodies of water, light and shadows. Select only things to steal from that speak directly to your soul. If you do this, your work (and theft) will be authentic. Authenticity is invaluable; originality is nonexistent. And don't bother concealing your thievery – celebrate it if you feel like it. In any case, always remember what Jean-Luc Godard said: 'It's not where you take things from – it's where you take them to (2004, n.p.).

It would be possible to put together a sizable volume of quotes from artists, critics and theorists expressing similar sentiments. When the ideology of

Romantic authorship is such a popular and easy target of criticism, then, it is in large part because its detractors tend to attack a caricature or, as Andrew Bennett calls it 'a fiction of subsequent critical reception, a fantasy, a back-formation or 'retrojection' produced through a partial reading of Romantic poetics since in fact Romantic thinking around authorship is precisely constituted in and by conflict, paradox, instability' (2005, p. 71). There is no reason to think that the Romantics believed that poets literally created *ex nihilo*, or had made a clean break with art history, with generic and linguistic conventions and traditions. Neither is there any reason to think that such ideas have literally taken root in copyright law. As Oren Bracha points out, to say, as Martha Woodmansee does, that 'today a piece of writing or other creative product may claim legal protection only insofar as it is determined to be a unique, original product of the intellection of a unique individual' is 'simply dead wrong' (2008, p. 195).⁴

Here the present discussion too comes up against the 'difficulties about proper emphasis and tone which must arise in making any sort of paraphrase' that Skinner perceived, for it is certainly the case that the copyright historians who claim that the ideology of Romantic authorship has found its way into legal doctrine are also aware of these tensions and contradictions. Consequently, in order not to create a straw man version of the reflectionist hypothesis, we must acknowledge that its advocates also do not consistently construct a straw man's version of the Romantic author. They do seem to do so on occasion, however, but the more deep-rooted problem is the rhetorical contortions that ensue when they do not. For example, Peter Jaszi's commitment to the notion that 'British and American copyright presents myriad reflections of the Romantic conception of "authorship"' leads him to admit that these reflections do at times 'remind one of images in fun-house mirrors' (1991, p. 456). What Jaszi strives to come to grips with here is of course the discrepancies between legal and aesthetic conceptions of originality that threaten to undermine his account. Clearly, the obvious objection to his theory is this: If copyright law has adopted an idea of originality premised on notions of poetic creativity as a gift bestowed on a few geniuses, then surely we would expect it to be exceedingly difficult to obtain copyright protection, yet the problem is precisely the opposite: it is granted remarkably easily.

As Skinner points out: 'There is a tendency in all historical discourse for coincidences to be raised to the level of positive connections at any point where explanations seem hard to find. When it is known in advance that particular events did happen, or that particular ideas were cherished, it is always easy to think of many possible connections to explain them' (1966,

p. 208). This observation is especially pertinent to the present analysis, as contradictory notions of authorship and originality have coexisted for centuries. Indeed, the concept of originality only acquires meaning when it is understood in relation to some norm, to tradition, to imitation; similarly, we cannot think of conventions *as conventions* absent an awareness that it is possible to bend or break them, at least to some extent. McFarland comes at what he calls 'the originality paradox' from a similar angle when he notes that:

We cannot think of man except by invoking simultaneously the opposed categories of individual and society. The 'pivotal point', insists Simmel, of the 'concept of individuality' is that 'when man is freed from everything that is not wholly himself, what remains as the actual substance of his being is man in general, mankind, which lives in him and in everyone else (1974, p. 447).

The point is that authorship necessarily straddles both halves of the equation, and I want to argue that the writings of the Romantics could just as easily, and possibly more easily, serve to explain a radically different, severely restrictive, copyright doctrine. This begs the question: What parts of the ideology of Romantic authorship are reflected in copyright law? It is in trying to answer this question that the cracks in the reflectionist hypothesis really come to the fore.

Unsurprisingly, moral rights are offered as an example of the Romantic ideal's presence in copyright law, especially the right of integrity, which quite explicitly treats artworks as extensions of the creator's innermost being (Jaszi 1991, p. 497). However, when the notion of personal expression is dissociated from genius and applied to trivial works, scholars disagree whether or not to see it as an instance of Romantic authorship. Jaszi finds that the decision in *Bleistein v. Donaldson Lithographing Company* (1903) plays down the author's creative input when it posits that: 'Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone' (quoted in Jaszi, 1991, p. 483). This line of reasoning, for Jaszi, both eradicates and generalises authorship, draining the concept of meaningful content and of its traditional connotations, and in effect sanctions copyright's subsequent overbreadth (*ibid.*, p. 483). Jaszi actually seems to suggest, then, somewhat counter to his main thesis, that copyright's expansion resulted from a *rejection* of Romantic authorship. He does recognise, however, that other scholars may take the facts to mean

something rather different; for example, he refers to 'a contrary interpretation' by Benjamin Kaplan, for whom Holmes's insistence on individuality and personality has 'an echo in it of the Romantic gospel' (*ibid.*, p. 483).

The confusion is most pronounced in *Alfred Bell & Co. v. Catalda Fine Arts* (1951), which pushed the idea of the author's irreducible individuality to its very limit. The case concerned the copyrightability of reproductions of various 18th and 19th century paintings in the form of mezzotint engravings. Even though the author merely tried to faithfully replicate old masterpieces, the court found that there was still a distinguishable variation from the underlying works attributable to human agency. Judge Frank reasoned that even if the discrepancy had been accidental, it would still bear the imprint of the author's personality and hence be eligible for copyright. For Jaszi, this opinion is work-centred because it highlights material variation, not the author's substantive creative contribution, and hence it 'implicitly rejected the traditional vision of "authorship"' (1991, p. 483). Ryan Littrell, by contrast, identifies a different strand of scholarship, which sees *Catalda* as perfectly in line with Romantic subjectivity, because the notion of a distinguishable variation does not really focus on the work as such, but on the physical manifestations of the author's singularity (2002, p. 220).

Because they latch on to different parts of the myth, different scholars also come to very different conclusions on whether the famous case of *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) represents a return to or a rejection of Romantic authorship. Jaszi sees the Supreme Court's decision to deny copyright to a white pages book of residential phone numbers arranged alphabetically by surname as a resurrection of Romanticism. He finds that the court's rhetoric 'proceeds from unreconstructed faith in the gospel of Romantic "authorship"' (1994, p. 38). Similarly, Elton Fukumoto considers *Feist* 'the high water mark for the author ideology in American case law' (1997, p. 908). Littrell, however, sees it as a critique of the Romantic ideology's faith in pure authorial subjectivity, and as a gradual acceptance of modern literary theories' view of authorship as a more modest achievement (2002, pp. 222–223).

The fundamental disagreement about where and how the myth of Romantic authorship manifests itself in copyright law should lead us to take the conclusions with a pinch of salt and, more generally, to look with some suspicion upon historical investigations based largely on analogy. The main problem is that there is a huge gap in these copyright scholars' accounts in that they do not seek to spell out the mechanisms by which aesthetic thinking about authorship finds its way into legal thinking about authorship. The evasion of this issue means that the nature of the connec-

tion between the two is highly elusive. As we have seen, there seems at times to be an implication that there is a causal relationship of some sort, as when Jaszi and Woodmansee describe the Romantic authorship construct as 'the chief engine' of copyright expansion (1995, p. 772). At other times, the connection appears to be considerably less strict, so that the aim of the analyses is rather to trace terminological reverberations and reflections. Thus Jaszi writes that he seeks to 'draw out homologous relationships in law and developments in literary culture – without insisting that one is somehow determined by the other' (1991, p. 457).

However, there is no way to convert observations about conceptual analogies between literature and law into evidence about causal connections or influences. And the looser formulation, the suggestion that 'the relation between P1 and P2 is one of vague hints, echoes, reminiscences' as Skinner puts it, is 'simply without content' (1966, p. 211). To let go of the insistence that P1 is a necessary source of influence on P2 is to concede that the similarities may just as well be down to chance. After all, an infinite number of similarities hold between different phenomena, and it is hardly surprising that from the fabric of historical facts and discourses can be woven all kinds of symmetries and stories. But to privilege one selection of semblances is arbitrary, and as Skinner writes, merely demonstrates 'something that the historian must already have known: that similar situations or interests tend to presuppose similar language or directions of effort, and that apparent but perhaps quite illusory historical patterns will tend in consequence to arise' (*ibid.*, p. 212). Consequently, 'the claim to have discovered an influence of P1 on P2 becomes [...] a remark neither about P1 or P2, but about the observer himself. The observer in effect asserts that in studying P2 he is sometimes *reminded* of P1' (*ibid.*, p. 212).

This seems to be an apt description of what is going on in the reflectionists' accounts, especially seeing as the authorship arguments in aesthetics and in copyright law are not actually all that similar, but require a certain degree of abstraction, stretching, and paraphrase to appear analogous. It is also worth noting here that Skinner's scepticism towards historical explanations based on notions of intellectual influence is largely related to its tendency to overemphasise biography. Thus in addition to demonstrating that the most central ideas of philosopher A appear to show up in the writings of philosopher B, historians will strive to pile up ever more proof of the influence. They will, for example, seek to provide independent testimony, or to show that philosopher A owned the works of philosopher B, and read them, and talked frequently about them, and so on, in the hope that the account sooner or later reaches a point at which the amount of

circumstantial evidence renders the influence self-evident and its denial absurd (*ibid.*, pp. 208–209). Though Skinner finds this claim far from obvious, what is interesting for our purposes is the virtually complete absence of such corroborating evidence in the studies of the influence of Romantic authorship ideas on legal doctrine. They rely exclusively on analogy, on tracing in P₂ (copyright law) the most characteristic features of P₁ (the ideology of Romantic authorship) – often in severely distorted form.

The constructedness of authorship

Because the nature of the relationship is unspecified it is also rather ambiguous what problem is posed by the law's adoption or acceptance of Romantic authorship ideas. On the one hand, it seems to throw up certain practical difficulties, as copyright's notion of authorship fails to accommodate non-individualistic creative efforts, such as folkloric works without identifiable authors and serial collaborations (Jaszi, 1994, pp. 38–40). On the other, it is implied that the Romantic authorship ideology somehow misrepresents and misleads, because it provides an inaccurate account of how cultural creation typically comes about. A recurring aim of the studies of Romantic authorship is to show that it is a social and rhetorical construct, and hence historically contingent, rather than some neutral, natural category (Boyle, 1996, p. 114; Jaszi, 1991, p. 459).

The point of historicising the concept of authorship is in other words to de-naturalise it in order to enable change. When we come to realise that very different notions of authorship have existed in different places and at different points in time, it becomes clear that our current conceptions are not inevitable and immutable, but dependent on the context we inhabit, on the presumptions we carry, and on the perspectives we bring to bear on authorship practices. Once we become aware of these contingencies, any inclination to think that our beliefs about authorship conform to its true nature loses its grip.

I find this argument indisputable, but I am not sure who needs convincing that authorship does not possess some timeless quintessence independent of human perspectives and purposes. It is no doubt the case that copyright law is full of inconsistencies and paradoxes, and 'fails to achieve a stable vision of authorship' as Jaszi puts it (1991, p. 463). But scholars of literature are no closer to such stability, so it is hardly surprising that everything does not add up neatly in a system that is supposed to encompass poetry and emails, paintings and computer code, movies and maps.

I also find the implication that courts and copyright scholars fail to recognise the authorship construct's 'constructedness', and mistake it for

‘a real or natural [category]’ (Jaszi, 1991, p. 459) dubious. In fact, it is hard to think of a better cure for the inclination to think that language cuts the world at the joints (to borrow Richard Rorty’s phrase) than to engage in the enterprise of trying to apply the same conceptual framework – specifically the terms *author*, *originality*, and *work* – to everything from newspaper headlines to mobile phone design to film screenplays to photography.

Moreover, the fact that the categories of works that fall within copyright’s sphere of influence keep changing over time, and that some categories – databases, say – are copyright-protected in some countries yet not in others, are unambiguous signs that copyright law clearly has not hit upon the true nature of authorship. And the legal procedures that come into play at the infringement stage are liable to call further attention to the artifice and arbitrariness of copyright’s notion of authorship. After all, it seems reasonable to think that those who are charged with the task of operationalising copyright’s key concepts and distinctions – to separate idea from expression, say, or creativity from know-how, or functional from expressive elements – in numerous difficult limit cases, will develop an acute awareness of just how intensely pragmatic and non-natural these borders are. I see no reason to doubt Judge Hand’s pronouncement on behalf of copyright’s custodians in *Nichols v. Universal Pictures Corp.* (1930) that ‘we are as aware as anyone that the line [between idea and expression], wherever it is drawn, will seem arbitrary’ (quoted in Cohen, 1990, p. 221).

As I will argue in part II, though it does resemble one in certain respects, copyright doctrine is not a philosophical treatise, as it *also* aims to accomplish specific objectives. While there is little agreement on copyright’s main objective – as Diane Leenheer Zimmerman notes, some see it ‘as an acknowledgement of the value of human authorship as an endeavor’; others find that it is ‘to structure a sector of the economy’; and still others give emphasis to copyright’s social benefit, that of ‘providing an adequate supply of new works to the public’ (2005, pp. 189–190) – it is decidedly *not* to capture the finer nuances of authorship in a philosophical sense. This means that copyright policy is not necessarily an accurate or appropriate reflection of actual theoretical propositions and beliefs.

Personally, for example, I find that copyright law’s originality requirement,⁵ especially the idea that authors leave some unique personal imprint even on trivial works, quite dubious from a philosophical perspective. Nevertheless, I think the originality criterion makes sense from a legal perspective – not because it is anywhere close to perfect even from a purely pragmatic point of view, but because I think alternative standards would create even greater difficulties.⁶ The fact that I largely agree with the current

originality requirement – and so assume a position that can be made to look somewhat analogous to parts of the ideology of Romantic authorship, for example through selective interpretations of Fichte – is merely a sign that I consider it the lesser of several evils, and not a reflection of some philosophy that exists outside of the legal context.

Copyright law simply covers so many radically divergent types of works and authorial practices that we are never going to come even remotely close to finding an ontological framework that accommodates all equally satisfactorily. Moreover, it is calibrated to serve several purposes at once, so it is hardly surprising that copyright's vision of authorship is unstable. The problem is that whenever we try to recalibrate copyright doctrine so that it redresses an imbalance, it tends to create a new one somewhere else. Thus the inconsistencies that look like flaws from a philosophical perspective might, from a legal perspective, simply be the wriggling room courts need to align copyright law with its diverse set of practices and purposes.

This is not to say that there is no room for improvement, of course. We should seek to make copyright as coherent and predictable as possible, and continually discuss and analyse its philosophical underpinnings as well as the usefulness of its purposes. Consequently, I am not suggesting that there is – or ought to be – no traffic at all between legal and literary thinking about authorship. I will return to this complex issue in part II, but first highlight some further problems with the reflectionist hypothesis by trying to unpack just how ideas from literature might find their way into law.

A lack of interpretive constraints

As we have seen, the studies which maintain that Romantic notions of authorship have shaped, and continue to shape, legal attitudes to authorship do not seek to trace the steps of the ideology's migration in specific cases, except by analogy: Typically, some copyright decision is shown (or made) to resemble some aspect of Romantic authorship, which is taken to suggest some indefinable form of influence.

However, as long as the evidence of the influence remains at the level of structural homologies there are hardly any interpretive constraints on the enterprise. It is possible to identify resemblances between many things, but that does not necessarily entail any kind of influence. When film scholars talk about 'Alfred Hitchcock's *Psycho*' it might suggest some Romantic inclination, but not necessarily. Even film historians who flatly reject the auteur theory and insist that film is a thoroughly collaborative art form are liable to talk like that, either as a form of shorthand or simply by habit

or convention. When political commentators speak of 'President Obama's health care reform' they are certainly not implying that it was his idea alone. One reason the Romantic author appears to be such a powerful and persistent foe is that once one starts looking for signs of his reflection at the level of analogy, his mirror image will inevitably crop up all over the place.

Now, no one has alleged that there is a straightforward causal connection between literary and legal discourses; the argument seems to be that the nature of the influence is rather like that of a *Zeitgeist*, and that certain ideas and beliefs emerge and catch on in one area, and then gradually seep into others as they begin to resonate and persuade. In a more recent article which speculates that the ideology of Romantic authorship is finally starting to give way to postmodern ideas of authorship in US copyright law, Jaszi emphasises that while lawyers and judges who work on copyright are not 'literally disciples of Lyotard' or 'self-conscious trend followers', they are still 'participants in a larger cultural conversation, and what they derive from it ends up influencing copyright discourse in various ways' (2009, p. 106). Clearly, it is practically impossible to reconstruct who says and hears what, and to weigh the relative importance of all the contradictory and crisscrossing voices in order to explain the nature of the influence. Still, the typical procedure – to extract from the cacophony a few legal decisions, and then to read them either as synchronic symptoms of collective beliefs or as diachronic signs of the conversation's general direction – seems to me especially problematical. It examines copyright through a very narrow prism that, despite cautious qualifications, constantly risks bringing to light spurious correlations, and it is easy to find support for any number of contradictory hypotheses.

There is something awkward about an explanatory framework with a striking gap we are not supposed to contemplate or describe in any detail. Jaszi's observations on Judge Posner's much-maligned decision in *Gracen v. Bradford Exchange* is interesting in that they go beyond the mere identification of similarities between the decision and the ideology of Romantic authorship to include also a little bit of context. In *Gracen* Judge Posner rejected the copyright claims of an artist who painted porcelain plate images drawn from still images from the film *The Wizard of Oz* on the grounds that they were not original. Jaszi sets up his analysis by quoting Jessica Litman's contention that 'To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined' (1991, p. 460). The point, it seems, is to hint that even though we moderns think we have come to recognise culture's cumulative nature, this is not quite the case. Jaszi goes on to analyse possible

justifications for the decision and finds that none of them really hold up, but concludes that it ‘does make sense, however, when viewed in light of the Romantic “authorship” construct, with its implicit recognition of a hierarchy of artistic productions’ (1991, p. 462), which leads him to conclude that Romanticism ‘has a continuing grip on the legal imagination’ (ibid., p. 463).

While I agree with Jaszi’s misgivings about the decision, I find the effort to link it to Romantic authorship troublesome. First, the ideology is abstracted to the extent that it comes to equate simply the recognition of an artistic hierarchy. This seems to me such a basic notion that it is an exaggeration to take it as a clear manifestation of Romantic authorship ideology. I do not think that the assumption that some works of authorship are either more original or more derivative than others automatically implies some kind of endorsement of Romantic authorship. It is only from the point of view of poststructuralist theory – which radically challenges the very concept of originality, and which Jaszi explicitly invokes – that such a commonsensical claim appears disturbing, a position I will return to in part II.

Second, it is interesting to consider how Jaszi’s analysis deals with biographical evidence that does not match the hypothesis. Jaszi concedes that Judge Posner elsewhere has spoken out against the Romantic notion of authorship, but merely remarks that Posner’s failure to practise in *Gracen* what he preaches ‘reflects the inability of the law to achieve a stable vision of “authorship”’ (ibid., p. 463). Thus he does not try to rationalise the inconsistencies in the judge’s thinking, probably because the only explanation available when a court decision is viewed through the optic of Romantic authorship ideology is the awkward one that Posner is somehow – against his own better judgment – beholden to or misled by the myth of Romantic authorship. I take this to be an indication that the persuasiveness of the hypothesis calls for an absence of reflection upon the nature of the influence; once we try to flesh out the gap between analogies, the premise comes to seem vaguely conspiratorial and not-so-vaguely improbable.

We should also note that the reflectionist hypothesis – the idea that the myth of the Romantic author was so to speak inscribed into copyright’s DNA from the start – tends to function as a self-fulfilling prophesy. The reason is that mere basic assumptions about authorship – for example that it involves creativity, and that it is possible to identify the efforts of the individual or individuals who exert the most control over the final product – are seen as evidence of Romantic authorship’s persistence.⁷

The problem here is that the very premise of the hypothesis – that Romantic authorship ideology lies at the core of copyright, and subsequently shows up in ‘curiously distorted’ versions, as Jaszi puts it (1991, p. 488) – makes

virtually any reference to authors and authorship a vestige of Romanticism. In other words, the analytical framework evens out the difference between Romantic authorship and authorship *per se*, and thus leaves very little, if any, room for positions that seek to heed both sides of the originality paradox, i.e. to be sensitive both to the contributions of individuals *and* to their debt to tradition. Elsewhere, after all, it is quite possible to hold that authors do innovate even as nothing comes from nothing; from within the reflectionist point of view, however, signs of the first part of the equation are taken, by a kind of hermeneutics of suspicion, as misshapen surface manifestations of copyright's primordial essence: Romantic authorship.

Of course, if one accepts that the rhetoric of the literary property debates that began in the 1730s were Romantic, it could be argued that the ideology of Romantic authorship has shaped copyright ever since, in the more modest sense that it handed down a conceptual and terminological framework within which subsequent developments have played out. However, the existence of such a framework would not by itself compel legal doctrine to change in any particular way, or even to change at all, which leaves us no particular reason to think that Romantic authorship has been a factor in copyright's expansion. Consequently, the reflectionist must commit to the stronger view – however cagily put – that we somehow believe in, and are in some sense deceived by, the ideology of Romantic authorship. Thus Jaszi is keen to stress that 'law is derivative of cultural attitudes' (2009, p. 109) while Boyle insists that 'the idea of the original, transformative creator is coded deep into our speechways and our patterns of thought' (1996, p. 158).

Now, it would be pure folly to insist that the law exists in some kind of vacuum, and remains completely unaffected by surrounding dispositions and discourses. But to concede that copyright necessarily interacts with other conversations in some way, and that some notion of authorship is ingrained in the way we think about culture, art, and communication, is not to consent to the claim that Romantic authorship ideology has infused copyright law and led to its expansion. Indeed, it is not clear that it makes much sense to try to convert the innumerable possible connections and interactions between copyright law and society at large into philosophical approaches to authorship. It seems to me that any effort to spell out how the larger conversation has shaped copyright law would appear – in words Richard Rorty once used in a very different context – 'much more like somebody's description of how he or she managed to get from the age of twelve to the age of thirty (that paradigm case of muddling through) than like a series of choices between alternative theories' (1991, p. 69).

In other words, the nature of the influence is far too complex and accidental to allow for meaningful general descriptions. The reflectionist approach is to take samples from the legal record at different historical moments and then to examine copyright doctrine or case law through the prism of authorship, often in terms derived from literary theory. But the cultural, political, aesthetic, and social conversations that have no doubt shaped these legal outcomes are made up of countless random ingredients: debates about new technological products and practices; the things that critics have had to say about new artistic practices; or whatever IP-related issues major media outlets happened to pick up at a certain point in time, to name just a few. In addition, of course, all the alternative explanations listed at the outset have also affected copyright. The reflectionist seeks to apply terms drawn from academic discourses – ‘Romantic’, ‘modernist’, ‘postmodernist’, or ‘poststructuralist’ – to the samples. To my mind, however, these are not so much names of cultural attitudes and beliefs that have suffused and then shaped copyright law as simply descriptive labels that designate what the legal decisions – i.e. the outcome of all the actual influences – may be said to look like from the point of view of someone versed in academic authorship theories.

A more panoramic lens

Unfortunately, there is no quick and easy way to make sure that we get at ‘real entities [...] rather than linked abstractions’, as Skinner puts it (1966, p. 215). The solution he proposes is a decent starting point, however, namely to ‘describ[e] as fully as possible the complex and probably contradictory matrix within which the idea or event to be explained can be most meaningfully located’ (ibid., p. 213). Of the alternative accounts mentioned at the outset, it is probably Bracha’s that comes closest to such an approach. He shows, for example, how copyright law interacted with changing ideological views of government and the judiciary, and he outlines the ways in which the development of new markets, new industries, and new interest groups seeking to gain market advantages helped shape legal doctrine.

The advantage that Bracha’s account has over the reflectionist explanation is that it examines copyright cases and statutes from a much broader perspective, and dispels any notion that legal concepts of authorship and originality are signs that we are still in thrall to the old romanticist myth. Bracha clearly states that even though copyright law can be considered a ‘mystification’ in the sense that parts of it are removed from the realities of authorship, ‘the point [...] is not that anyone is being deceived’, but rather that

copyright as a conceptual field 'enables us to maintain deeply conflicting images, commitments, and modes of argument' (2008, pp. 266–267). Thus he substitutes for the reflectionist account a purely functional explanation.

Of course, this is not to say that misconceptions about authorship and originality do not exist. Undoubtedly, many people in all walks of life sometimes hold too rigidly romantic beliefs about authors and their works, and it is important to seek a richer and more nuanced understanding by calling attention to the other half of the originality paradox as well. However, it is something else entirely to see ideas and intuitions about authorship outside of the legal domain as an essential and recognisable agency in copyright's historical development. And even if we agreed, for the sake of argument, that Romantic authorship ideology – either as an article of faith, or a form of naivety, or false consciousness, or some amalgamation of these ingredients – did exert an influence, it still seems ill-equipped to explain both copyright's expansion and the peculiar legal definition of the key criterion: originality.

This is precisely where Bracha's analysis excels. It does away with the notion that whatever 'theories of authorship' we become aware of in copyright law on the basis of hermeneutic theories are meaningful reflections of actual beliefs and assumptions 'out there'. While early copyright statutes might arguably have been informed by contemporary ideology, ensuing doctrinal developments and adjustments seem a highly deficient barometer of changes in social attitudes (copyright's originality threshold, for example, is pretty much out of step with any understanding of the term outside of the legal context). Rather, the initial concept of authorship is principally important because it established the conceptual framework – the 'language game', we might say – within which subsequent contests over, and transformations of, copyright have taken place. Bracha argues that once authorship rhetoric had taken hold, agents motivated by commercial purposes who sought to make their case in public needed to avail themselves of the same vocabulary and rationale. 'The result', he writes, 'was that the preexisting ideology of authorship was reshaped by interested parties in order to fit their concerns', though their arguments 'were constrained by the need to use terms and concepts taken from the lexicon of authorship' (2008, p. 201).

Clearly, there is a lot of detail and data for future historians to fill in yet in this narrative, but as a working hypothesis it seems much better equipped to contend with copyright's features and developments, such as the curious rhetorical insistence on the significance of originality and the simultaneous reduction of the term to a well-nigh technical minimum requirement in practice. Similarly, Bracha convincingly argues that the concept of 'the

work' as well as the idea/expression dichotomy in US doctrine can be shown to belong to the language game of authorship, while at the same time allowing copyright to extend its reach. He also observes that copyright as a conceptual field is highly flexible, and thus serves to alleviate tensions between conflicting assumptions and arguments (2008, pp. 267–270).

Bracha's functional approach to, and bird's-eye view of, history provides a more persuasive account both of copyright's conceptual transformations and characteristics, and of the mechanisms that underlie copyright's expansion. The reflectionist hypothesis rests on an intuitively reasonable premise – that copyright is shaped by surrounding attitudes and discourses – but upon closer reflection the alleged connection turns out to be extremely hard to spell out in a convincing manner. The method of looking for analogies through the somewhat arbitrary and quite narrow prism of literary-philosophical notions of authorship generates results, but their reliability is disputed, for once one signs off on the hypothesis and locks into its optic, copyright history tends to appear brimming with distant reverberations and contorted reflections of Romantic authorship. Those same phenomena might well look rather more like straightforward representations through a more panoramic lens.

Part II

I want now to return to the role of literary-philosophical approaches to authorship in copyright law and copyright scholarship. I have argued that copyright doctrine does not constitute a philosophy of authorship comparable to those we find in the humanities, and that to map one onto the other may confuse more than clarify. However, to say that copyright law is not a philosophy of authorship is not to say that it is nothing like it at all. It is in many respects reminiscent precisely of a philosophical system in that it necessarily expresses and embodies certain general and systematic beliefs and assumptions about the nature of creativity and creations, about the properties of and interrelationships between works of authorship from which concepts and categories are drawn, then defined and aligned so as to be as internally coherent as possible.

However, unlike standard philosophical investigations, copyright's elaboration of things like authorship and originality does not – or rather, not solely – flow from the pursuit of knowledge for its own sake. For while copyright doctrine ought to rest on disinterested contemplation of the nature of the phenomena it covers, the relevant results of that activity – i.e.

of doing philosophy proper – must not necessarily be incorporated indiscriminately, as there are numerous practicalities to consider that might be hard to reconcile with the fruits of investigations conducted simply for the love of wisdom. For example, copyright cannot hold as many fine-spun distinctions as philosophical investigations because the amount of exceptions would be unmanageable. Also, the most philosophically refined concepts and distinctions are not liable to lend themselves to legal implementation.

It is thus easy to see why literary studies might appear considerably more discerning than copyright law. Literary scholars are free to explore inherent rhetorical presumptions or tensions, to critically examine the hidden values upon which a dichotomy rests, and to interrogate terminological and philosophical inconsistencies and ambiguities. As Judge Hand reasoned in *Nichols v. Universal Pictures Corp* the arbitrariness of the line between idea and expression ‘is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases’ (ibid., p. 221). So while courts too must make philosophical distinctions, they are also expected to actually apply them in the trickiest circumstances imaginable: either to borderline cases or to new categories of works that did not exist at the time the distinction was devised.

Humanities scholars also have the luxury of limiting their field of study as they see fit, and may choose to simply avoid the fuzzy borders of the categories and concepts they explore, or simply criticise the fuzziness without proposing a fully-fledged alternative. Judges must apply copyright’s concepts and distinctions not just to the central examples that make them seem sharp and distinct, but also – and especially – to all the inevitable peripheral examples that make them seem problematical, sometimes even perverse. They must, in short, draw the line precisely where it hurts the most, where it is most awkward and inelegant.

Copyright is also different in that it is constrained by legal precedent and standards of interpretation: Unlike philosophers, judges are not simply free to follow their intellectual conviction wherever it leads them, for they are bound by the terminology and definitions laid down in law and elaborated by their predecessors. While philosophers are at liberty to revise, or even to devise from scratch, their ontological systems, courts must take into account how any changes affect the real-world cultural and economic infrastructure which has sprung from the current legal framework.

Finally, in order not to undermine the authority of law, judges must probably convey a certain confidence in their own verdicts. They cannot afford to follow the example of philosophers and literary theorists who make a virtue of the inability to arrive at universally consistent concepts and distinctions, and who make do with uncovering cracks and contra-

dictions by self-reflexively foregrounding the radical indeterminacy and contingency of all meaning.

Clearly, then, copyright law is not designed to make those who practise it look good. But even though the definitions and distinctions judges are required to make sometimes seem naïve or even a little farcical *from the point of view of literary theory*, they are not necessarily any less accomplished, for copyright law is by and large geared towards different purposes. In other words, copyright law forever straddles the divide between ontology and utility: On the one hand, it must seek to weave a suitably tight-knit web of assertions and assumptions about authorship without any gaping holes in it, to devise an intellectually subtle and internally coherent conceptual framework attuned to the realities of authorial products and practices; on the other, it must keep in mind what is feasible and functional. The second consideration is frequently irrelevant in literary theory and philosophy; these fields meanwhile, tend to have their own uses and idiosyncrasies. So while there is a lot of legal scholarship based on the assumption that literary theory has made important discoveries about the nature of authorship that copyright law has failed to take into account, we must keep in mind that what has cash value in the humanities (or some enclave of the humanities) may be no good in the legal domain.

All of this begs the question: What is the relationship between, on the one hand, copyright law's notion of authorship and originality and, on the other, the ways in which the same concepts are mobilised and theorised in fields like philosophy, aesthetics, comparative literature, musicology, or film studies? It is one thing to argue, as I have so far, that copyright law can neither ignore philosophy nor mindlessly mirror it – but can we spell out the connection more positively, and in greater detail? I doubt that it is possible to answer such questions meaningfully at a general level, as there are simply too many variables to consider. We must instead proceed more or less on a case-by-case basis, scrutinising the relevance and usefulness of specific concepts and theories in specific contexts.

I want to highlight how challenging it is to bridge the gap between these academic disciplines by offering some observations on the approach that seems to be most often invoked in copyright debates about the persistence of Romantic authorship ideology, namely post-structuralism. The more specific aim is to call attention to the importance of recognising the distinctive protocols and purposes that guide investigations into authorship in different fields and sub-fields, and to provide a starting point for more general explorations of the value of perspectives from the humanities to copyright scholarship.

Raising the stakes – the death of the Author, of God, and of man

We should note at the outset that post-structuralism is not integral to the argument that the ideology of Romantic authorship informs copyright law. Boyle, for example, emphasises that he wants to separate his project from post-structuralism's 'full-court author-bashing' (1996, p. 59). Jaszi, however, explicitly cites the influence of poststructuralist approaches (1991, p. 457), and several commentators link the persistence of Romanticism to a gap between legal and literary thinking, and especially to copyright's failure to take on board relevant insights from literary theory, in particular theories that give emphasis to the intertextual relationships that necessarily hold between all works.⁸

The most radical formulation of this vision of authorship appeared in the 1960s in the work of a group of philosophers and literary critics based in France, especially Roland Barthes, Julia Kristeva, Michel Foucault, and Jacques Derrida. It is important to keep in mind that the writings of these thinkers do not add up to a single coherent theory (nor, indeed, do their individual oeuvres). In order to make the analysis somewhat manageable, then, I will focus mainly on the work of Roland Barthes, particularly his 'The Death of the Author'. While the article is not representative of some unified poststructuralist position, it is arguably the most well-known text on authorship of the 20th century, it has often been alluded to by copyright scholars, and its epigrammatic style is particularly well-suited to point out the rhetorical and epistemological differences between poststructuralist and legal scholarship.

Barthes' image of the author, or 'Author-God' as he calls it, is very much a caricature, as is his description of literary culture and criticism as 'tyrannically centred on the author' (2002, p. 5). The essay completely ignores the many approaches prior to its publication that not at all deified the author, but explicitly sought to bracket authorial subjectivity, such as Anglo-American New Criticism, Russian formalism, and Prague structuralism. This is not to say that poststructuralist authorship theories simply added a heavy dose of hyperbole to old truisms. Earlier anti-authorial movements argued that the study of literature ought to focus on the immanent properties of texts, and were thus strictly limited to literary interpretation. Post-structuralism too waged war on biographical positivism, as when Barthes laments that:

[...] criticism still consists for the most part in saying that Baudelaire's work is the failure of Baudelaire the man, Van Gogh's his madness, Tchaikovsky's his vice. The *explanation* of a work is always sought in the

man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author* 'confiding' in us (2002, p. 4).

But at the same time, poststructuralist explorations of authorship were part of a far more encompassing philosophical-political project at 'the intersection between phenomenology and structuralism [which] produced an iconoclastic and far-ranging form of anti-subjectivism' (Burke, 2008, p. 13). This means that:

Barthes, Foucault and Derrida were not content with simply sidelining the authorial subject as in earlier formalisms. A phenomenological training had taught them that the subject was too powerful, too sophisticated a concept to be simply bracketed; rather subjectivity was something to be annihilated. Nor either could they be content to see the death of the subject as something applying merely to the area of literary studies. The death of the author must connect with a general death of man (*ibid.*, p. 14).

Barthes' essay is mostly devoted to literary matters, but does link the reading strategy it promotes to broader issues, as when Barthes writes that 'by refusing to assign a "secret", an ultimate meaning, to the text (and to the world as text), [literature] liberates what may be called an anti-theological activity, an activity that is truly revolutionary since to refuse to fix meaning is, in the end, to refuse God and his hypostases – reason, science, law' (2002, p. 6). Such grandiloquence lends poststructuralist writings a remarkable sense of urgency, a feeling that just about everything is at stake, but it is not at all clear whether, or how, such statements are relevant to copyright law.

Post-structuralism's strategic ambivalence

Part of the problem, then, is that poststructuralist works are inclined to point in many directions at the same time. Of course, scholars are under no obligation to adopt Barthes' ideas wholesale; they may circumnavigate the philosophical context that 'The Death of the Author' emerged from and addressed, and pick up the ingredients that are relevant for their concerns. Still, even the parts that are most narrowly focused on literature are highly idiosyncratic and problematical to bring to bear on legal matters.

There are two related and vaguely formulated ideas in the essay that at a glance seem of relevance to copyright law. First, as Woodmansee and Jaszi note, Barthes inverts the conventional relation between author and

reader, as when he reasons that 'a text's unity lies not in its origin but in its destination' (Barthes, 2002, p. 7) and they seem to regret that this message 'has gone unheard by intellectual property lawyers' (Woodmansee and Jaszi, 1994, p. 8). I must admit, however, that I have no idea what it would mean for courts to take on board this idea.

As so often in the work of the poststructuralists, it is possible to follow Barthes' suggestive observation down two very different paths. On the one hand, it seems to restate the, at least by now, rather commonplace notion that meaning is not simply found but made by the reader. On the other hand, and more speculatively, it is possible to relate it to the much more radical idea that the critic takes priority over the author, which is most explicitly formulated in Derrida's deconstructive readings. Curiously, though, as Burke explains, this approach is not nearly as anti-authorial as is commonly presumed, and does not even heed the New Critical dictum to ignore intention on the ground that it is irrelevant and unknowable:

If authorial intentions are to be deconstructed it must be accepted that they are cardinally relevant and recognizable. The deconstructor must assume that he or she has the clearest conception of what the author wanted to say if the work of deconstruction is to get underway. The model of intention culled from the text must be especially confident and sharply defined since the critic undertakes not only to reconstitute the intentional forces within the text, but also to assign their proper limits. It is only in terms of this reconstitution that the deconstructor can begin to separate that which belongs to authorial design from that which eludes or unsettles its prescriptions. Accordingly, deconstructive procedure takes the form of following the line of authorial intention up to the point at which it encountered resistance within the text itself: from this position the resistance can then be turned back against the author to show that his text differs from itself, that what he wished to say does not dominate what the text says, but is rather inscribed within (or in more radical cases, engulfed by) the larger signifying structure (Burke, 2008, p. 136).

Whichever path we take – the well-trodden one in which Barthes seems to merely affirm 'with supremely French intelligence, the pieties of English 101' (Clairborne Park, 1990, p. 390), or the bolder one in which 'the critic sets out to show that he or she is a better reader of the text than its author ever was' (Burke, 2008, p. 137) – Barthes is making an argument about interpretation so far removed from the concerns of copyright as to be of no relevance.

The other element of 'Death of the Author' that seems pertinent to intellectual property scholarship is the challenge it poses to the notion of originality. Barthes writes that 'The text is a tissue of quotations drawn from the innumerable centres of culture', and that 'the writer can only imitate a gesture that is always anterior, never original' (2002, p. 6). This observation too can be traced to either a highly orthodox or a highly unorthodox conclusion. On the one hand, it is often seen simply as the idea that all texts necessarily build on previous texts.⁹

This, however, makes 'The Death of the Author' just an esoteric paraphrase of the old notion, long familiar, as we have seen, to critics as well as artists, that no one creates from nothing, that all art is derivative, that 'masterpieces are not single and solitary births [for] the experience of the mass is behind the single voice', as Virginia Woolf put it.

Understood thus, post-structuralism offers nothing new, but merely obsesses over the opposite part of the originality paradox that McFarland described. Both extremes are equally flawed, and it seems inconceivable that anyone would seriously commit fully to one side of the equation. It is as absurd to deny that all authors draw on certain linguistic and generic resources that are not of their making as it is to reject the idea that some writers avail themselves of these assets more inventively than others.

But this commonsensical view is not – or not only – what Barthes has in mind. He takes it upon himself to promote a way of reading that endorses play and polyphony and resists closure. He proposes to attend to the surface of the text, to stop trying to plumb its depth, or to listen to the voice 'behind' it. To understand what is at stake, though, we must read 'The Death of the Author' in the context of other works by Barthes (which is itself testament to the indispensability of the traditional notion of authorship). For when Barthes deals with more experimental, non-representational avant-garde texts, he has no issue with authors or intentions: 'If a text has been "unglued" from its referentiality, its author need not die; to the contrary, he can flourish [...] What Roland Barthes has been talking about all along is not the death of the author, but the closure of representation' (Burke, 2008, p. 45).

Here we must keep in mind Barthes' distinction between 'work' and 'text'. The former has substance and exists in physical space whereas the latter is 'a methodological field' (1979, p. 74), a space within which readers can themselves become writers. This comes easiest when we encounter challenging modernist literature, what Barthes calls writerly texts, which do not purport to be vehicles of referential meanings and authorial messages, as in the classical-realist novel, the prototypical example of Barthes' so-called readerly text.

The distinction between work and text is linked to the distinction between 'author' and 'scriptor'. The former term corresponds to the traditional conception of the author as 'the past of his own book: book and author stand automatically on a single line divided into a before and an after. The Author is thought to nourish the book, which is to say that he exists before it, thinks, suffers, lives for it, is in the same relation of antecedence to his work as a father to his child' (Barthes, 2002, p. 5). The scriptor, by contrast, 'is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as predicate; there is no other time than that of the enunciation and every text is eternally written here and now' (ibid., p. 5).

The death of the author, then, obviously does not refer to an empirical fact. It is, as Burke notes, 'a call to arms and not a funeral oration' (2008, p. 27). Barthes urges us to approach literary works in a new way: We should seize the initiative as readers and not grant the biographical author mastery of the text. We should think of all of literature as one massive text, an interlinked fabric with threads to be traced in all directions, rather than some chronology of distinct works with precise meanings we can unearth one by one with the aid of each creator's life and design.

This is a rather counterintuitive form of reading, however, and Peter Lamarque is surely right that it tends to be 'more interesting, more demanding, more rewarding for understanding, to consolidate meaning, to seek structure and coherence, to locate a work in a tradition or practice', and that this preference 'has nothing whatsoever to do with reinstating some bullying authoritarian author. But then that figure was always just a fiction anyway' (2002, p. 91).

Even if we grant that the approach to reading that Barthes advances might sometimes have its uses in a purely aesthetic context, it is surely diametrically opposed to the concerns of copyright law. After all, the active reader-writer's effort to bring to light the plurality of texts within any one text are not bound by the protocols of empirical and historical investigation: 'Intertextual analysis is distinguished from source criticism both by its stress on interpretation rather than on the establishment of particular facts, and by its rejection of a unilinear causality (the concept of 'influence')' (Frow, 1990, p. 46). To study an author on this view is to cast aside concerns about progress and development and rather traffic freely between works: 'No longer a forward march from fledgling texts to mature thought, the oeuvre becomes an arena or ellipse in which everything is rhapsodic, nothing sequential' (Burke, 2008, p. 35).

Intellectual property requires precisely the mindset that 'The Death of the Author' wants to do away with, which sees authors as identifiable

historical beings and works as their more-or-less distinct creations. That basic premise does not mean that we swear allegiance to some supreme Romantic Author-God; there is plenty of room for us to worry about the inescapable porosity of terms like 'author' and 'originality'. It is certainly possible to adopt a different optic in the aesthetic domain, to think of authors as scriptors and works as texts. It is not, however, a 'theory' that can be 'implemented' in the legal sphere, at least not in a way that would preserve copyright in even vaguely recognisable form.

Avant-garde theory

The reason poststructuralist theories of authorship have caused so much confusion is that they tend to blur the distinction between methodology and ontology. As Burke notes they 'promote authorial absence as an inherent property of discourse rather than as merely one approach amongst others to the problems of reading and interpretation' (2008, p. 167). The argument of 'The Death of the Author' only makes sense if we think of it as something along the lines of a suggestion, an invitation, a manifesto, a strategic hypothesis, or speculative experiment, yet it is largely framed as a statement of fact. For example, Barthes writes assertively, as if he were announcing a philosophical breakthrough, that 'We now know that a text is not a line of words releasing a single "theological" meaning (the "message" of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash' (2002, p. 6), that 'it is language which speaks, not the author' (ibid., p. 4), and that 'a text's unity lies not in its origin but in its destination' (ibid., p. 7). Burke is right, however, that 'the decision as to whether we read a text with or without an author remains an act of critical choice governed by the protocols of a certain way of reading rather than any "truth of writing"' (2008, p. 169).

Copyright law's utilitarian function means that 'ought' and 'is' are reasonably distinct most of the time, and we can bring either dimension into sharp focus: First, we can adopt a normative perspective, and reflect on what copyright's primary purpose(s) should be, or on the fairness or effectiveness of a certain provision. Alternatively, we can look at it simply as what is. From this point of view, to analyse copyright is to consider what is and is not allowed, which is to say that it corresponds to the mindset of a lawyer in court, or any citizen charged with some infringement. 'The Death of the Author', by contrast, merges the two perspectives. As Lamarque notes, it 'can be read either as a statement of fact or as wishful thinking' and 'waver[s] on the question of description and prescription' (2002, p. 83).

Post-structuralism is an especially boundary-breaking approach, a kind of avant-garde theory that seeks to challenge received wisdoms, push ideas to their limit, and transcend disciplinary conventions and distinctions. Often it interrogates even the distinction between scholarly and artistic practices. This is particularly evident in the case of 'The Death of the Author', as it first appeared in *Aspen*, an American multimedia art and lifestyle magazine published irregularly from 1965 to 1971.¹⁰ The double issue in which Barthes' essay appeared was edited by the conceptual artist Brian O'Doherty¹¹ and was distributed to some 20,000 subscribers in the form of a white box containing 28 items. Among them were experimental super 8 films by Hans Richter and Robert Rauschenberg, phonograph recordings of William S. Burroughs and Alain Robbe-Grillet, a conceptual poem by Dan Graham, and a musical score by John Cage on transparent sheets with dots and lines that could be rotated over a piece of graph paper so as to enable different performances of 'the same' work.

It is this avant-garde impulse which makes it so hard to pin down Barthes' writings, to find in them a stable and coherent argument. In 'The Death of the Author' and related works the scribe seeks to 'perform' what he preaches, to create a writerly text that eludes closure, that undermines its own status as authorial and authoritative communiqué. As Dale Townshend (1998) has shown, in his increasingly experimental efforts Barthes would go on to tirelessly rename the central distinction between work and text in metaphorical and ambiguous ways. His writings, individually and collectively, are like puzzles with too many pieces; the reader is free to assemble them in multiple ways, but there is always something left over.

A pragmatist perspective

'The Death of the Author' is an extreme example, of course, but it serves to bring out with particular force a more general point about analyses of authorship and works of authorship in the humanities, namely their penchant for addressing multiple issues at once. Even far more conventional and less intellectually ambitious efforts than those of the poststructuralists tend to engage multiple and overlapping perspectives simultaneously, to blend – explicitly or implicitly – descriptive, analytical, philosophical, evaluative, political, ideological, ethical, historical, or biographical questions and discourses. Their relevance to copyright law, however, is simply off the radar.

By far the most dominant authorship issue in the humanities is the role of the author in hermeneutics: Does the creator's life and/or intention provide

a privileged point of access to what the work is up to? Does it determine what the text 'really' means, or at least impose certain constraints on what it can say, or is it of no consequence at all? Is textual coherence a function of intrinsic properties or something readers impose? Does it invalidate the work if the author fails to achieve his or her intention? Is it not the case that there is always more in the text than what its author had in mind? And is the author's intent even accessible to us, or even to him- or herself in the first place? Such questions – and the above are only the tip of the iceberg – are mostly wholly irrelevant to copyright law, but I want to argue that certain similar inquiries can be made relevant. First, however, we need to realise that they are futile absent of some human interest, goal, or preference.

Often these theoretical explorations rest – sometimes knowingly; sometimes, I suspect, unknowingly – on more specific questions, usually 'What is the proper (or most rewarding) function of criticism?', though also 'What is art (or literature, or film, or drama)?', that remain unexposed. This is to clothe a matter of opinion in the garments of ontology (which by and large is what Barthes does in 'The Death of the Author'). When no such context is present even as an undercurrent scholars seek to locate an essence where there is none.

It is not just that authorial practices and products, as well as the hermeneutic exercises they engender, are far too varied to bring under a general description (though that alone should be enough to put us off the effort). More importantly, the questions about authorship and interpretation that scholars in the arts typically pursue cannot be answered in the abstract, for the phenomena do not possess some immutable essence. Here I am heavily indebted to Richard Rorty's neopragmatist philosophy, which sees language as analogous to a set of tools, and knowledge not as a matter of getting reality right, but of acquiring habits of action for coping with reality (1991, p. 1). While often accused of relativism, Rorty's ideas are more properly understood as anti-essentialist. He does not deny that the world and its phenomena can cause us to hold beliefs, only that it cannot suggest beliefs for us to hold. Objects and practices do not insist on being described in a certain way, their own way (*ibid.*, p. 83). This does not mean that we are free to say or believe anything we like, for what we say and believe must still add up – nonsense is still nonsense, and stands little chance of being adopted by others unless it carries persuasive force, i.e. unless it chimes with related beliefs and can be shown to be useful for some purpose.

Consequently, pragmatism itself does not provide any predefined answers to difficult problems; it is therapeutic rather than programmatic. It makes the inclination to think of language as a mirror of an antecedently

determined reality loosen its grip, and helps us to stop asking questions that lead down blind alleys. It is not that dead-end investigations are devoid of meaning; even the endeavour to identify the true nature of interpretation has meaning 'if you give it one. To give meaning to an expression, all you have to do is use it in a more or less predictable manner – situate it within a network of predictable inferences' (Rorty 2007, p. 34). Rather, the sense in which such debates are meaningless is that they have no bearing on practice *except by reference to some human interest*.

Whether or not to bracket the author's intention is not an issue that can be settled philosophically. It is not just that some are persuaded by Barthes' assassination attempt while others are uncomfortable with it¹², or that some approve of the kind of overreading that thinkers like Derrida, Deleuze, and Žižek engage in, which wilfully and flagrantly exceed the meanings supported either by the text or its author, while others find it silly.¹³ It is also that it is virtually impossible to remain faithful to one's philosophical ideas about authorship on the ground, in practical criticism. To insist that the author's intention is always irrelevant is to deprive criticism of a potentially valuable resource; to insist that it is paramount all the time is to treat the text as a kind of code to be deciphered that is sure to produce barren readings. In practice, no one sticks to a single 'theory of authorship'. Even the staunchest anti-auteurists tend to drop their guard when they move from philosophy to criticism. They mostly write about canonised authors and, as Colin Davis has shown, frequently regard them 'as prestigious individual thinkers with opinions and intentions. In other words they are *authors* in a quite old-fashioned sense [...] The basic principle is: if it helps, use it; if it doesn't help, a discreet veil may be drawn over it' (2010, p. 182).

I am not suggesting that metaphysical debates about authorship have had no consequences whatsoever; no doubt a text such as 'The Death of the Author' has inspired many critics to produce bolder interpretations of poems and novels than they would have done had they never read it. But that, I want to argue, is because they have been persuaded by the profits of reading without the author, not because Barthes disclosed the true nature of authorship or interpretation. The phenomena 'in themselves' will not recommend the appropriate approach for us; that only emerges when we put them to use for some purpose.

This can be hard to see, however, for scholars interpret works of authorship for a remarkable variety of reasons, and usually for several reasons at the same time, and they are not necessarily fully present or fully articulated either in the analysis or even in the mind of the hermenut. Some might read a text for coherence and persuasion, others to see what it can yield, by

any means, philosophically; some analyses are aimed at understanding or historical contextualisation, others serve as ideological or political interventions. Indeed, the term 'purpose' frequently sounds too crude to describe what motivates aesthetic investigations; their motivation may be highly elusive – to somehow enrich experience or provoke reflection, say – in which case it may be more appropriate to talk of 'interest' or 'predilection'. Of course, a philosophical or theoretical superstructure may inform a given reading. The point is that philosophy and theory may provide traction for some purpose, but it cannot select a purpose for us by granting access to how the phenomena *themselves* really are, or really want to be or ought to be described and employed.

Lessons

Now, what can all of this tell us about the role of aesthetics in copyright law? First, and most generally, it serves to illustrate just how hugely challenging it is to 'apply' aesthetic concepts and theories in the legal domain, for the endeavour requires of those who undertake it to master two highly complex and specialised language games. 'The Death of the Author' is a particularly enlightening example of the confusion that may ensue, because it is particularly obscure about its intentions. It offers itself as a kind of general theory of authorship but is, I believe, much more like a lobbying effort for one approach to, or perspective on, authorship, interpretation, and literature.

I think legal scholars realise more clearly than their colleagues in the humanities that their concepts of authorship and originality are contingent, for they are more obviously constrained by utility and compromise. They look, it seems, at the more sophisticated and intricate explorations that take place in humanities departments, and become tempted to indulge in the fiction that the philosophical-theoretical dissections there might allow them to get in touch with the true nature of the concepts they have in common. They read Barthes and take from his concept of intertextuality that all works build on previous works, not realising that they have in the process adapted it to their own purposes (which are rather different from those Barthes had in mind), and end up restating what they already knew in more esoteric terms.

This brings us to the second, more specific and interesting point for the present discussion about how the humanities may be of use to copyright scholars: We need to recognise that philosophy and aesthetics will not provide courts with the means to ground law or legal decisions in foundational

principles uncorrupted by historical context or human interests. To be sure, one does not have to subscribe to Rorty's pragmatism to reject the notion that there is some magical metaphysical algorithm that may disclose the way phenomena are 'in themselves'. But this approach pushes further the idea that we should think of concepts as tools for particular purposes, and that to start with philosophy – with, for example, the theories of Locke, Kant, and Hegel, to name three thinkers frequently cited by copyright scholars – is to put the cart before the horse. The more specific problem with aesthetic concepts and theories is that they are not designed to resolve legal issues in the first place. They gravitate towards interpretation and evaluation, and are generally better at putting things in question than at asking 'What's the problem?' If they are to be of any use outside of their own domain, that is precisely where the inquiry should begin: Only by asking 'How may this or that concept or approach serve this exact legal purpose?' can we begin to say something meaningful about the role of aesthetics in copyright law. This means that it is important to be clear about the purposes of copyright. For example, if we think it is to reward those who deserve it the most through their creative contribution, it would make sense to look to sociological or anthropological studies of film, television, music, and theatre production.

But what about aesthetic concepts and theories? Is it at all possible to align their disciplinary purposes with the purposes of copyright law, given that courts expressly and deliberately seek to refrain from artistic interpretation and evaluation? In fact, while there are weighty reasons why we should not make it the business of judges to rule on the meaning or merit of works of authorship, I want to argue that aesthetics has most to offer legal scholarship precisely as a set of hermeneutic and evaluative tools, but only on the precondition that we take the purpose (or at least *a* purpose) of copyright law to be something like the facilitation of cultural flourishing.

An enormous amount of legal scholarship already draws on work in aesthetics to argue that some form of borrowing is both inescapable and more historically prevalent than we tend to assume. Such studies are eminently sensible and highly valuable, but it seems to me that the humanities first and foremost helps legal scholars come up with ever more examples of a general observation that by now is quite uncontroversial, and that is in fact already clearly recognised by copyright law. Different national legal frameworks take various measures to safeguard the public domain, for example by striving to separate ideas and expression (and only granting protection to the latter), through concepts such as *scene a faire*, or by creating exceptions for parody and criticism. It is precisely because it would constrain the creative

efforts of subsequent creators that such things as genres, styles, and stock characters are non-protectable.

The cumulative nature of cultural creation is a crucial point that is important to keep pressing, but unfortunately the problem is not that this is some insight that judges have failed to grasp and simply need to be reminded of.¹⁴ Being or becoming aware of intricate connections between works of authorship does not in itself suggest some better solution. I am afraid that humanities scholars are unlikely to have anything in their toolbox that would improve the situation. No doubt, philosophers could call into question the distinction between ideas and expression in impressively sophisticated ways, and literary scholars could easily demonstrate how awkward it is to tell lawful uses of routine story elements from the unlawful copying of original plot instantiations. This, however, is not the problem; rather, it is to come up with more effective concepts, definitions and distinctions for the purposes of copyright law. Sadly, those that humanities have devised for themselves are not designed to separate copyrightable from non-copyrightable subject-matter, or legitimate from illegitimate uses of existing works of authorship.

Take, once more, the poststructuralist notion of intertextuality. While it very much defies any easy summary, we might say that what makes it something more than just a cryptic paraphrase of the old truism that all works build on previous works is its insistence that this holds true *even when we are completely unaware of it*. The fact that some particular text took inspiration from, or alludes to, some other particular text, or that it belongs to and draws on certain generic conventions is too trivial to merit attention, and is why it is so important for its theorists to distinguish intertextuality from the study of sources, influences, and biographical details. Instead, the idea is that everything is intertextual, even the very building blocks of language. Thus, at the beginning of 'The Death of the Author' Barthes quotes a line from Balzac's short story *Sarrasine* describing a castrato disguised as a woman: 'This was woman herself, with her sudden fears, her irrational whims, her instinctive worries, her impetuous boldness, her fussings, and her delicious sensibility' (2002, p. 3). As Graham Allen observes, when Barthes goes on to ask 'Who is speaking thus?', his point is that Balzac's sentence 'does not express a single meaning stemming from an originary author; rather, it leads the reader into a network of possible discourses and seems to emanate from a number of possible perspectives' (2000, p. 13). The text itself does not determine who speaks, Barthes argues, for it is conceivably either the thoughts of the protagonist, unaware that the woman is really a castrato; the philosophy of Balzac the author; or a

universal wisdom concerning women. Indeed, the single word 'sensibility' extends to numerous intertextual discourses beyond authorial intention; it can relate 'to psychology, eighteenth-century medical discourses, notions of Romantic love, of ethical and social concerns, ideological commitments and conflicts, literary conventions such as the novel of sentiment and sensibility and so on' (Allen, 2000, p. 13).

Similarly, Julia Kristeva, who coined the term intertextuality, argues that all texts are made up of what she calls the social text, which consists of pre-existing ways of speaking and thinking. As Allen argues, her point is that language always already embodies social struggles over the meaning of words: 'If a novelist, for example, uses the words "natural" or "artificial" or "God" or "justice" they cannot help but incorporate into their novel society's conflict over the meaning of these words. Such words and utterances retain an "otherness" within the text itself' (2000, p. 36).

The only significant distinction that emerges from these ideas runs between 'conventional' texts and the kind of avant-garde texts that Kristeva and Barthes champion: experimental writings that are self-conscious about their own intertextuality, that foreground their own non-originality, that so-to-say strive to think outside of ordinary language (which is one reason their own texts burst at the seams with neologisms). I have no idea, however, how the notion that the vast majority of texts reverberate with meanings outside of themselves can serve any meaningful purpose in copyright law.

Aesthetic evaluation in law: pastiche and parody

Again, the poststructuralist perspective on authorship and originality is extreme and much disputed. Often intertextuality is understood more restrictively, as a catch-all term for the more direct ways in which texts commonly interact with each other. Some terms are mostly descriptive, like quotation, collage, sampling, adaptation, and rewriting; others are more expressive, like homage, satire, pastiche, and plagiarism. These latter terms are more likely to be of use in copyright law, for they suggest something about the character and purpose of one work's appropriation or evocation of some other work or works. Indeed, several of them are listed explicitly in various legal frameworks under the rubric of exceptions and limitation. I believe they are of great value to copyright law, but primarily for their ability to shed light on the kinds of practices that are *worthy* of protection rather than for their ability to provide clear guidelines on *how* to protect them.

I want to clarify my reasoning by commenting upon a specific suggestion that I find useful, partly because it makes some enlightening observations,

and partly for the ways in which I believe it is somewhat misguided. In “Po-mo Karaoke” or Postcolonial Pastiche’ Zahr Said Stauffer discusses the case of *Suntrust Bank v. Houghton Muffin* (2001) in which author Alice Randall’s *The Wind Done Gone*, a rewriting of Margaret Mitchell’s famous novel *Gone With The Wind* from the slaves’ point of view, was found to be parodic and hence fair use. Stauffer’s conclusion is that the court’s finding of fair use was correct, but that the reasoning behind the decision was wrong, as *The Wind Done Gone* is not really a parody. To classify it as such ‘puts too much pressure on both legal and literary definitions of parody, and risks diffusing the category beyond recognition’ (2007–2008, p. 44).

I find these observations convincing, and Stauffer provides a detailed and astute analysis of Randall’s work in which she argues that the novel’s value emerges more clearly and persuasively through the lens of postcolonial literary studies. From this perspective, *The Wind Done Gone* can be seen to belong to a tradition that seeks to ‘control the direction of cultural representations in the future and to correct those representations deemed to be tarnishing or misrepresenting the past [...], to take the dominant figure’s language and use it, verbatim, in a context that channels power back to the previously oppressed figure’ (ibid., p. 68).

This is clearly a hermeneutic argument, but at the infringement stage courts frequently engage in both evaluation and interpretation already. For example, in the case of *Geva v. Walt Disney* (1993), concerning an alleged parody of Donald Duck, the Israeli Supreme Court found the appropriation ‘attractive and funny’ rather than producing “artistic-satiric value” (quoted in Bently, 2008b, p. 371). In *Campbell v. Acuff-Rose Music Inc.* (1994) concerning a rap parody of Roy Orbison’s *Oh, Pretty Woman*, the US Supreme Court observed that ‘[the defendant] 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from parental responsibility. The later words can be taken as a comment on the naivety of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies’ (ibid., p. 381). This is clearly an interpretation of the work, and would not look out of place in an academic humanities journal.

Indeed, merely categorising a work as parody (or satire or homage, for that matter) inevitably comprises some measure of interpretation. It is not like finding that a poem is composed in iambic pentameter or follows a certain rhyming pattern, for it involves making a conjecture about what the text is up to, and why. Sometimes this is entirely straightforward, in which case it will seem that we are simply understanding what is clearly there. Other

times a parody will be more subtle or ambivalent, and thus not lend itself so easily to intersubjective agreement. Then we must spell out what we believe the work takes aim at, how it goes about it, and to what purpose, in which case we are more obviously making an interpretation (it is this kind of account of non-obvious meaning the court made in the *Campbell* case).

The purportedly more objective alternative is to focus on quantitative overlaps between the original and the allegedly infringing work. However, this does not rule out either uncertainty or subjectivity, for so-called 'substantial similarity' cannot always be measured precisely, especially when we are dealing with complex, multidimensional works like films or plays. More importantly, Stauffer's analysis convincingly argues that *The Wind Done Gone's* critique of Mitchell's classic novel, and of a more widespread tendency in US culture to marginalise African-American voices and perspectives, rests not just on the borrowing (and subsequent recontextualisation) of significant parts of the underlying work's setting, characters and story, but also of pieces of dialogue, i.e. of its protectable expression.

I am not quite as worried as Stauffer, however, that judges are 'trying to reinvent the literary wheel' (2007–2008, p. 47), for 'producing their own literary criticism' (ibid., p. 48), for creating 'their own sometimes procrustean literary categories' (ibid., p. 50), and for 'using idiosyncratic terms and tools' (ibid., p. 52). She provides two examples of this. First, she claims that copyright law draws a non-literary distinction between parody and satire (ibid., p. 44). She points out that: 'According to *Campbell*, parody targets an underlying work, whereas satire targets something broader than a single work, like an institution, a society, or an era' (ibid., p. 45). This, however, is pretty much how the terms are commonly used in aesthetics as well. Admittedly, a parody does not have to target a specific underlying work; it is possible to parody some aspect of a genre, for example, without invoking any individual work in particular, but such cases are unlikely to raise any legal issues since no recognisable work is being infringed upon.

Stauffer notes that *Campbell* did not actually specify how much latitude, if any, satires should receive under copyright's fair use analysis (ibid., p. 45), but even though Justice Souter 'may not have intended to draw a sharp line between parody as non-infringing and satire as infringing, courts have tended to interpret *Campbell* in those stark – and somewhat illogical – terms' (ibid., p. 46). The problem, then, is not so much that US judges have failed to define parody and satire properly, but rather that they have failed to take into account that works sometimes borrow from other works for satirical purposes, and that some such borrowings may be socially valu-

able and so ought to be considered non-infringing. This is most obviously the case when we are dealing with very famous works that have become common frames of reference (like *Gone With the Wind*), where a critique of the underlying work serves as a critique of what it represents more broadly (like softening the cruelty of slavery, or keeping a lid on the perspectives of the oppressed).¹⁵

Stauffer mentions a second example in passing, the (legal) concept of transformative use,¹⁶ which is 'based not on any literary criticism as such, but on the work of another judge' (ibid., p. 52). But as we have seen, critics and creators have long appreciated that it is necessary to draw on previous works, sometimes quite explicitly, and that the purpose of such borrowing is not merely to take what is valuable from another author's work, but to alter it, make it one's own. A good example is T.S. Eliot's famous observation that 'Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different' (quoted in Julius, 1995, p. 130). Thus even though transformative use is not a literary term, it is derived from, or at least consonant with, a vital and widely held belief in literary studies, and hence a successful instance of a reinvention of the literary wheel for legal purposes.

Stauffer also suggests that *pastiche* would serve as a better umbrella term than parody, because the distinction between parody and satire is imprecise and subjective. She is no doubt right that these terms are fuzzy at the borders, and that they sometimes converge, but I find it unlikely that pastiche is 'much easier to recognise', as Stauffer claims (2007–2008, p. 82). She defines it as a mixture of contradictory and unorthodox elements, styles, or modes, which does not necessarily seek to mock or criticise. However, because it is so loosely defined (it can be applied to any *mélange* of styles) and not tied to any specific purpose (it can be either honorific or iconoclastic, but most typically the former) pastiche is in fact a far more elusive concept than parody.

Moreover, I do not think it is entirely accurate to say, as Stauffer does, that 'Pastiche is understood to be imitative at its core, but towards transformative ends' (ibid., p. 83). In probably the most well-known account of pastiche, Fredric Jameson distinguishes it from parody precisely by reference to its lack of transformativeness and critical bite:

Pastiche is, like parody, the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in a dead language. But it is a neutral practice of such mimicry, without any of parody's ulterior

motives, amputated of the satiric impulse, devoid of laughter. Pastiche is thus blank parody, a statue with blind eyeballs (1991, p. 17).

Thus for Jameson pastiche is characterised precisely by its failure to alter that which it borrows. It is 'the random cannibalization of all the styles of the past, the play of random stylistic allusion' (ibid., p. 18).¹⁷ So even though pastiche tends to invoke past texts to celebrate them, the practice itself is not universally celebrated in aesthetics. Indeed, in her historical study of pastiche, Ingeborg Hoestery writes that it has been, and continues to be, used in a 'predominantly negative sense' (2001: ix). This somewhat blunts Stauffer's claim that one reason pastiche is a more appropriate term than parody in copyright law is that it provides secondary authors 'a way to argue that their uses were contributing to a recognised body of art' (2007–2008, pp. 85–86).

Of course, there are more positive accounts of postmodernism's playful recycling of past texts as well, and I agree with Linda Hutcheon that it can serve as a form of critique. The point is not, then, that Stauffer gets it wrong, and that parody is really the better umbrella term after all. Rather, it is that there is no need for an aesthetic umbrella term in the first place. Parody is useful because it typically identifies clearly critical and transformative uses of an underlying work or works; however, it is too narrow to accommodate all critical and transformative uses. Pastiche is useful because it draws attention to more subtle and non-comedic transformations; however, it is too broad in that the label encompasses non-transformative uses as well.

Stauffer too acknowledges this when she writes:

'Qualifying as pastiche would not give secondary works a free pass to copy, just as parodies do not automatically qualify for fair use's affirmative defence [...]'¹⁸ Unlike parody, pastiche may be merely imitative without ridiculing or criticizing, and it may be imitative without being transformative. Importantly, then, a pastiche would need to meet *Campbell's* transformative use test just as parody does now. Merely recycling clips or extended passages from underlying works would not qualify as fair use' (ibid., p. 85).

I agree with Stauffer's implication that the term pastiche in itself does not provide any resolution in copyright infringement cases. It is interesting, however, that the key criterion in her account too is the non-literary concept of transformative use. To my mind this shows that there is no need to pit parody against pastiche in order to find out which is 'better', for the only

umbrella term we have use for is the judge-made one. 'Transformative use' is better suited to draw a distinction between infringing and non-infringing borrowings than either parody or pastiche. It has the potential to do all the work we require of it to serve copyright's purpose of facilitating cultural flourishing. If US courts have come to equate transformative use exclusively with parody, then the problem is that it is being understood and used too narrowly. Courts should be open to the possibility that a range of cultural appropriations – including parody *and* pastiche – can be transformative and culturally and artistically valuable. This is where aesthetics can be of service. It can help fill the concept of transformative use with meaningful content; it can maintain a conversation about, and provide perspectives on, what constitutes cultural flourishing, and hence what is worthy of a fair use defence. In Europe, which has no real equivalent to fair use, aesthetics can serve to demonstrate the value of a broader and more flexible range of exceptions and limitations.

From theories to practical skills

The broader point to take from this is that aesthetics would seem to be better equipped to offer insights on copyright's ends than they are to supply the means by which to reach them. Of course, this conclusion merely restates the perennial problem of the humanities, namely that any prospective effects are likely to be long-term and indirect. Is there some way to make them more immediate and hands-on? I believe there is, if we accept the two premises this article has promoted: first, that copyright is supposed to foster creativity (also for secondary authors); and second, that in infringement cases courts already engage in evaluation and interpretation (or that they should, for this is one area of copyright law in which it is worth sacrificing quasi-objective criteria in the name of cultural policy).

However, we should not expect aesthetics to possess cut and dried tools for legal analysis. What scholars of art and popular culture could bring to the table is not so much existing terms and theories as a more broad-based and eclectic expertise in recognising, and providing arguments for, cultural and artistic value. It is by putting this competence to work on actual legal problems that truly useful concepts, definitions, and distinctions might eventually emerge. It would be a worthwhile undertaking to get literary scholars, film scholars, art historians and so on to grapple with a broad range of examples of cultural borrowings that raise tricky questions in copyright law. They would have to work closely with legal scholars, who would contribute in two main ways. First, they could identify relevant case law. It would be useful to examine closely and systematically what kinds of

works and issues have typically been brought before the court, what decision judges have come to, and how they have reasoned. Copyright experts also often express regret that some particularly interesting case has been settled out of court, and such specimens would also be indispensable objects of analysis. In addition, both sets of scholars are undoubtedly aware of new types of works and practices, like fan fiction or amateur remixes, that raise thorny legal issues, or call into question current terms and distinctions. Together, they could offer informed analyses that would shed light on difficult limit cases.

This brings us to the second contribution that legal scholars would make, namely to clarify the legal context within which the investigation of value takes place. Practical matters of law must actively shape the hermeneutic and evaluative input. It is by taking into account factors that literary scholars rarely need to reflect thoroughly upon – such as freedom of speech, the commercial intent of secondary works (another factor in US fair use analysis) and the moral rights of the first author (especially the rights of paternity and integrity) – that aesthetic know-how would be disciplined, and made to serve legal purposes specifically.

There is no guarantee of success, of course, but I believe we are much more likely to achieve genuine results if we stop looking for ways in which current terms and theories in aesthetics, no matter how suggestive, might have some relevance in copyright law, and rather seek to exploit the general competences of humanities scholars. Their sense of the history of different art forms and artistic practices, and their sensitivity towards, and ways of thinking about, social and artistic value must be confronted specifically with the kinds of works that *de facto* pose problems in copyright law, as well as with the full range of legal considerations relevant to the analysis. Only then might new definitions and distinctions emerge that are actually of any use to copyright.

It is not at all certain, however, that the most valuable contribution of such a project is terminological. Infringement analysis is simply too complex to tolerate much conceptual exactitude and fixed procedures. It is possible, of course, to impose a fair degree of precision and predictability. Hypothetically, courts could decide that all secondary works that are commercial in nature are infringing, or that secondary works must explicitly credit each and every author they borrow from, or that authors are only allowed to reproduce some specific amount from another work. This would still not make the analysis entirely objective – for example, it might not always be clear-cut whether or not a work is commercial – but more importantly, such provisions are clearly arbitrary and unreasonable. The US fair use

system seems to me to have a sensible amount of flexibility within certain guidelines. European copyright scholars also seem to think so, as their calls for a more flexible system of limitations and exemptions in EU copyright law often refer to fair use US style (Hugenholtz, 2013, Senftleben & Hugenholtz, 2011). Analysis should proceed on a case-by-case basis, and precision and predictability should come into view gradually as we amass ever more good decisions.

Aesthetics can throw light on what makes a decision good, and provide the most informed arguments available about why various forms of borrowings are worthy or unworthy of legal protection. Bright-line rules and tests are frequently inadequate; good policy sometimes entails evaluation and interpretation, or taking into account the reputation of the author, or the cultural standing of the underlying work. I have no illusions that involving experts in art and popular culture is going to make the task any easier. I do think, however, that copyright is a matter of cultural policy, and never more so than in the area of exceptions and limitations (whether they are called fair use, fair dealing, the right to quote, or something else). I do not think decisions in this extremely tricky region of copyright law should take the form of extrapolations from strict definitions and distinctions, but be guided by flexible umbrella concepts like 'transformative use' or 'critical purpose'.

No one is better suited to fill these terms with meaningful content than critics, historians, and theorists of art. Here the purposes of aesthetics and copyright law are perfectly congruent, yet the means by which they habitually explore the critical and transformative functions of works of authorship differ because they operate in different contexts, the main difference being that the legal one is far more pragmatic, more epistemologically restricted. It is typically only when they are called upon as expert witnesses in specific cases that humanities scholars are brought into contact with legal perspectives on the works they study. Such random one-off encounters tend to be of limited value because experts in aesthetics are unfamiliar with the intricacies of copyright law. To truly make a contribution they would have to be familiar with a range of difficult cases as well as the legal context within which infringement analysis takes place. That is when their relevant competence is geared towards legal purposes.

What I am suggesting, then, is that copyright law should not think of aesthetics as some reservoir of terms and theories that may, with a little tweaking, prove useful, but rather as a set of practical skills. In other words, I believe the input of humanities scholars should be less top-down and more bottom-up, less a matter of philosophy than of know-how.

The current uncertainty about what borrowings and appropriations courts actually allow is deplorable. The problem is not that copyright law has failed to shore up its definitions and distinctions properly, however, but rather a shortage of legal decisions. An interdisciplinary research project involving both aesthetic and legal scholars might improve this sad state of affairs somewhat by making public pronouncements on the legality or illegality of as many relevant works of authorship as possible. While their findings would not be legally binding, it would be beneficial to have a catalogue of expert opinions about how copyright law ought to give substance to concepts like 'transformative use' and 'critical purpose'. Of course, interpretation and evaluation in aesthetics is notoriously anarchic and inscrutable, but relating it explicitly and methodically to the needs and practices of copyright law should curb obvious excesses.

Maintaining a conversation about the transformative and critical functions of works of art is a fairly accurate description of what many academics in the humanities do every day. As Jaszi notes, this conversation probably already shapes legal attitudes. I remain sceptical of his analysis that the two famous infringement cases involving Jeff Koons – the court rejected his fair use defence in 1992, but found a similar work transformative in 2006 – tells us very much about the wellbeing of the Romantic author; it is possible, however, that the reversal owes a little something to the efforts of critics to validate postmodern art in the intervening years. The problem is that we do not really know. The aesthetic conversation could inform copyright law more directly. In my opinion, the common ground between law and the humanities is firmer at the level of hermeneutic craftsmanship than at the level of theory. Keeping their shared interest in cultural value apart on the grounds that one is objective and the other subjective deprives copyright law of a valuable resource and obscures the utility of aesthetics.

Notes

1. The struggle over Romantic authorship has been far more pronounced in the US. In Europe copyright expansion has generally not been explained by reference to the ideology of Romantic authorship, though there has been resistance to the Romantic rhetoric that stakeholders frequently resort to, especially the media, film, and publishing industries. The greater disinclination in Europe to see Romantic authorship as a root cause of copyright expansion is somewhat paradoxical in light of continental jurisprudence's insistence that works of authorship are expressions of their creators' personality. On the other hand, as we will see, this argument is often derived

- from deconstructive ideas, which had a far more profound and lasting impact in US universities.
2. Peter Jaszi writes that 'On the whole, the full-blown Romantic conception of "authorship" has a continuing grip on the legal imagination' (1991, p. 463); Margareth Cohn that 'the construct of the romantic author still very much influences copyright authorship' (2012, p. 830); Martha Woodmansee that 'In contemporary usage an author is an individual who is solely responsible – and therefore exclusively deserving of credit – for the production of a unique work' (1984, p. 426); and Elton Fukumoto that 'Copyright law seems to depend upon this Romantic conception [as] the statute makes originality a requirement for protection and imbues authorship with the ideology of Romanticism' (1997, pp. 907–908). See also Woodmansee and Jaszi (1994 and 1995); Boyle (1996).
 3. Bracha too mentions this: 'There is probably no more striking example of how far modern copyright law travelled from its supposed grounding in romantic authorship' (2008, p. 249).
 4. Mark Rose provides a similarly caricatured description of copyright when he writes that it is 'an institution built on intellectual quicksand: the essentially religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air' (1993, p. 142).
 5. I do not have any particular originality criterion in mind as they are fairly similar both across different national legal frameworks and international treaties. As Elisabeth F. Judge points out, 'originality standards are more properly understood as constellations, rather than silos, where the surface differences in wording mask similarities in both concepts and results' (2009, p. 403). Generally, the legal criteria are that a work must reflect an author's intellectual creation, display a modicum of creativity, and originate from the author (*ibid.*, p. 404).
 6. See Lavik and Van Gompel (2013).
 7. As we have seen, irreducible individuality is another criterion that is sometimes offered as a symptom of Romantic authorship ideology's enduring presence in legal doctrine. The difficulty legal scholars have identifying what Romantic authorship is, and their failure to agree on what parts live on in copyright law and where, adds to the impression that the reflectionist analytical framework is overly associative and accommodating.
 8. Bently notes that for scholars such as Mark Rose, Martha Woodmansee, and Jane Gaines, 'a gulf had been opened up between copyright law's notion of authorship and the new-orthodoxy of critical literary studies' (2008, p. 20).
 9. For example, commenting on Justice Story's decision in *Emerson v. Davies* – where he states that 'Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used be-

- fore' – Bracha notes that it only remains to 'add some gloss of literary theory [...] and a version of the poststructuralist critique of original authorship emerges' (2008, p. 202). Bently, meanwhile, calls the argument that musical performers borrow their style from others 'the poststructuralist strategy' (2008, p. 108). To my mind the awareness of the collaborative and cumulative nature of works of authorship is a long-known (though no doubt often soft-pedalled) commonplace rather than the discovery of modern literary theory.
10. Barthes' article came out in a double issue in 1967, and was only published in French one year later in the literary journal *Mateia*.
 11. The previous two issues were edited by Andy Warhol and Marshall McLuhan.
 12. Lamarque, for example, finds that to treat a text 'as an explosion of unconstrained meaning, without origin and purpose [is] like trying to hear a Mozart symphony as a mere string of unstructured sounds' (2002, p. 90).
 13. Theatre director Jonathan Miller reckons that this is to make works of authorship occasions for something else, to turn texts into pretexts: 'It becomes something which permits high jinks which happen to quote the text, but doesn't actually express it or mean it. And that seems to me hardly worthwhile doing' (1996, p. 164).
 14. See the contributions to this book by Van Gompel on originality and by Van Eechoud on adaptations and the EU exemption for parody.
 15. This is not to say that *The Wind Done Gone* is a satiric parody, just that such a work would clearly be possible.
 16. Transformative use is an important possible justification for so-called fair use under the US Copyright Code. As a rule, the author has the right to prevent the making of any work 'based upon' upon his or her preexisting work (the derivative right). Quoting or invoking a copyrighted work is less likely to be deemed infringing under the fair use defence when an author not merely replicates some part of an underlying work, but rather somehow adds something new to it, i.e. in the act of appropriation also alters or transforms it. That is, if the other factors of the fair use test, notably the effect on the (market for) the source work. See Pierre N. Leval, 'Toward a Fair Use Standard', 103 Harv. L. Rev. 1105 (1990).
 17. Perhaps Stauffer has Jameson in mind when she acknowledges in a footnote that pastiche has 'additional meanings in other art forms such as film and the visual arts' (2007–2008, p. 51). It should be noted, however, that Jameson's analysis also includes literature.
 18. In my view, though, a work is more likely to be overtly transformative if it can be plausibly labelled a parody than when it can be plausibly labelled a pastiche.

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Creativity, autonomy and personal touch

A critical appraisal of the CJEU's originality test for copyright

Stefvan Gompel

Copyright protects a wide range of productions in the literary, scientific and artistic domains. This not only includes cultural creations, such as works of literature, music, drama, film, photography and art, but also functional types of subject-matter, such as computer programs, databases, industrial design and works of applied art. As a rule, copyright protects works regardless of their 'merit' or purpose: the design of ordinary household items is eligible for copyright protection just as much as creations of 'high' art. The only threshold that must be satisfied for a work to attract copyright is that its expression is sufficiently 'original', in the legal sense of that word.

Copyright law's originality threshold is not a high-to-attain standard. Recent case law of the Court of Justice of the European Union (CJEU) confirms that copyright extends to subject-matter that is original in the sense that it is the 'author's own intellectual creation' (*Infopaq International*, 2009, § 37; *Bezpečnostní softwarová asociace*, 2010, § 46; *Football Association Premier League*, 2011, § 97; *Painer*, 2011, § 87; *Football Dataco*, 2012, § 37; and *SAS*, 2012, § 45) and that no other criteria may be applied to determine its eligibility for protection. In the *Eva-Maria Painer* case, the Court clarified that an intellectual creation is the author's own 'if it reflects the author's personality' and that this is the case 'if the author was able to express his creative abilities in the production of the work by making free and creative choices' (2011, §§ 88–89). This was reiterated in the *Football Dataco* case, where it was once more emphasised that, for an intellectual creation to be original, the author must have stamped it with his 'personal touch' by making 'free and creative choices' during its production (2012, § 38).

For readers untrained in copyright law, the language used by the CJEU may give the false impression that copyright law's originality test is not at all that easy to satisfy. The references to 'the author's personality', 'creative abilities' and 'free and creative choices' seem to suggest that only culturally significant creations carrying an obvious personal stamp of the author qualify for protection. This is not the case. Copyright applies to a wide range

of culturally trivial objects with no unique distinctiveness, as the *Eva-Maria Painer* case perfectly illustrates. This case involved a simple school portrait photograph – indeed, those school portraits that are impossible to tell apart, except for the images of the persons they portray. The CJEU found that the creation of such photographs could involve sufficient ‘free and creative choices’ to regard them as the own intellectual creations of the photographer (2011, § 93). This shows that, in reality, the words defining copyright law’s originality criterion differ considerably from what they mean to convey in everyday speech.

The CJEU’s endeavours to define copyright law’s standard of originality and to craft an EU-wide legal notion of copyrighted works came somewhat unexpected. Up until the *Infopaq International* decision of 2009, it was thought that the originality standard and the subject-matter definition of copyright were largely unharmonised terrains that are not governed by EU law but that instead fall to national regulation. Accordingly, the CJEU’s appropriation of the work concept has consequences for Member States that have traditionally applied other criteria to determine whether or not creations are eligible for copyright, such as the United Kingdom (Alexander, 2009; Derclaye, 2010; Griffiths, 2011). Due to the CJEU’s harmonisation of the originality standard, such national criteria will possibly need to be reassessed so as to put them on par with the ‘author’s own intellectual creation’-test. More specifically, it seems that the national criteria must be brought into line with the ‘free and creative choices’ language, which the CJEU has made a corner stone of its ‘author’s own intellectual creation’-test. By accentuating the author’s personality as a key constituent of the originality criterion, this test has been tied closely to the author as the individual creator of a work.

Interestingly, the meaning and substance of the CJEU’s originality criterion has not yet attracted much analytical scrutiny. In particular, the limits inherent in the CJEU’s originality standard have received little attention in legal doctrine – let alone in court decisions (although that is probably not where one would expect a critical review of the test be conducted in the first place). This is remarkable, seeing that copyright regulates such a wide variety of cultural production and may restrict the use of even the most low-key, routine creations that surround us in everyday life.

A more critical and out-of-the-box reading of the ‘free and creative choices’-language suggests that the CJEU’s originality standard may perhaps impose more limitations than is currently recognised in legal discourse. For one thing, authors are of course not autonomous creators who work in a vacuum. Creative processes are contingent on many external

factors. Cultural productions are usually made with audiences in mind and individual creators operate within social, technical and institutional environments with all of the attendant constraints. This implies that, in reality, the autonomy of authors to make free and creative choices is often naturally restricted.

Moreover, it is questionable whether the 'author's own intellectual creation'-test is an appropriate standard for determining the eligibility of protection of joint works. If free and creative choices imply that the autonomy of the individual creator is a key factor, how then are works to be rated that result from complex collaborative processes such as those that online communities create (whether art, software or encyclopaedias)? Whose free and creative choices count for this matter? Only those of the main author or all choices made by individual contributors? The weaker the connection between a work and the authors who created it, the more difficult it seems to apply the 'author's own intellectual creation'-test as it is currently defined by the CJEU.

Since 'free and creative choices' has become the mantra in decisions on copyrightable subject-matter, it is high time for a considerate study of the limits of the 'author's own intellectual creation'-test. Given that the originality standard is so easy to attain that even works of minimal creativity qualify for protection, there is need for a more nuanced understanding of how the 'author's own intellectual creation'-test operates in law. That is where this chapter aims to make a contribution.

This chapter consequently examines what the elements 'free and creative choices' and the author's 'personal touch' entail and how limits to creativity, autonomy and the expression of personality in creative processes may have bearing on the practical application of the CJEU's originality test. In so doing, it draws upon aesthetics and creativity studies to explain how creative processes can be affected by conventions and constraints. As has been remarked in the Introduction of this book, creativity studies is not a homogenous discipline, but rather a complex of diverse specialisations and approaches in the humanities and social sciences, each studying creativity from certain perspectives. Between these specialisations, creativity may be treated differently, depending on the specific strands that are examined and the approach that is taken. Because this chapter covers diverse areas, it necessarily takes a broad-brush approach to creativity and does not provide such a detailed account of concepts of creativity as many specialisations in the humanities and social sciences do.

For the most part, this chapter has the law as its object. Apart from the CJEU's case law, which is at the heart of the examination, I also discuss the

rich case law on copyrightable subject-matter from the Netherlands. Dutch courts not only tend to pass elaborately argued decisions, they often also have an open attitude towards court decisions and doctrine from other EU Member States. Furthermore, the Dutch originality test shows close similarity to the CJEU's 'author's own intellectual creation'-test. In the *Zonen Endstra v. Nieuw Amsterdam* case, the Dutch Supreme Court has ruled that a work must have an 'own, original character' and 'bear the personal stamp of the author' to attract copyright. This means that its form 'may not be derived from another work' and that it 'must be the result of creative human labour and thus of creative choices, so that it is a production of the human mind' (2008, § 4.5.1). The Supreme Court considers this to be on par with the CJEU's originality test (*Stokke v. H3 Products*, 2013, § 3.4(a); *Stokke v. Fikszó*, 2013, § 4.2(a); *Hauck v. Stokke*, 2013, § 4.2(a)) and so do Dutch legal commentators (see, e.g., Koelman, 2009, p. 205; Visser, 2010, p. 986; Hugenholtz, 2011). Accordingly, the Dutch case law can be considered sufficiently representative for illustrating the limitations of relying on the author's 'free and creative choices' and 'personal touch' in copyright cases.

The chapter consists of four parts. First, it clarifies what the CJEU alludes to when it uses the word 'creative'. It will be seen that, in copyright law, this notion has an entirely different connotation than it has in aesthetics and creativity studies. This explains why insights from these disciplines are difficult to apply for the purpose of reinterpreting or reconfiguring copyright law's originality test. Nevertheless, there are ways in which creativity studies can help to refine specific elements of the test. This will be elucidated in the next two sections on autonomy and personal touch. I explore how creative autonomy of authors can be constrained and whether such constraints are – or ought to be – accommodated for in copyright law's originality test. In addition, I show the difficulty of determining whether the author's personality is sufficiently reflected in works, in general, and jointly created works in particular. The chapter concludes with a synthesis of the main findings.

Creativity: a concept with diverse meanings

As explained in the introduction of this chapter, for readers unfamiliar with law, the terms 'originality' and 'creativity' in copyright law may have a somewhat surprising meaning. To illustrate this, this section contrasts copyright law's concept of creativity with that in aesthetics and creativity studies and explains the reasons for the difference of approach. It concludes

that it is not useful to reinterpret creativity in copyright law by drawing upon the same concept in aesthetics and creativity studies, but that further study of creative constraints and the imprint of the author's personality is necessary and desirable.

The creativity standard in copyright law

At first sight, the degree of creativity reflected in a work seems to be a critical factor for accepting copyright protection. In multiple instances, the CJEU has ruled that, for the author to achieve a result which is an intellectual creation of his or her own, the author must have 'express[ed] his creativity in an original manner' (*Infopaq International*, 2009, § 45; *Bezpečnostní softwarová asociace*, 2010, § 50). If understood in the ordinary day-to-day meaning of the word 'original', this language appears to suggest that copyright only extends to intellectual creations that, at least to some extent, are novel, innovative or unique in the sense that they depart from conventional expression.

On closer inspection, however, this is not how originality in copyright law is interpreted. The word 'original' merely signifies that the work must originate from the author or, in the words of the CJEU, that it is the 'author's own intellectual creation'. The CJEU does not specify when something is a 'creation' for the purposes of copyright. It seems to entertain the idea that it covers a very broad array of productions of the mind. The CJEU neither tests whether the subject-matter at issue belongs to the category of copyrightable works, nor categorically excludes specific types of creations in advance. Accordingly, it has denied copyright to sporting events for the reason that they 'cannot be regarded as intellectual creations classifiable as works' (*Football Association Premier League*, 2011, § 98), while accepting that copyright may extend to other – non-aesthetic – creations, including graphic user interfaces (*Bezpečnostní softwarová asociace*, 2010, § 46), football fixture lists (*Football Dataco*, 2012, §§ 29–45), programming languages and the format of data files in computer programs (*SAS*, 2012, § 45).

On the whole, a work only needs to reflect a minimum level of creative input to attract copyright. It suffices that the author has made 'free and creative choices' in its production (Van Eechoud, 2012, §§ 56–57). In particular, it is not required that a work is new or that it possesses certain quality or merit (Van Gompel & Lavik, 2013). The CJEU has explicated that, for literary works, the author's 'free and creative choices' can exist in the selection, sequence and combination of words (*Infopaq International*, 2009, § 45) and, for photos, in fixing the background, pose, lighting and framing,

choosing the angle and atmosphere and using developing techniques or computer software (*Eva-Maria Painer*, 2011, § 91). Here it must be stressed that copyright does not protect mere facts or ideas. Its protection does not extend beyond the individual expression that the author has given to his or her thoughts.

Interestingly, the CJEU has acknowledged that there are constraints to creativity that need to be taken into consideration when determining the eligibility for protection of works. It has explicitly ruled that copyright does not protect features of a work that are predetermined by technique or function and therefore are not based on free and creative choices (*Bezpečnostní softwarová asociace*, 2010, §§ 48–49; *Football Association Premier League*, 2011, § 98; *Football Dataco*, 2012, § 39; *SAS*, 2012, § 39). Yet, the CJEU is not really clear on what the requirement to disregard technically or functionally dictated choices means. Given that often it is feasible to make small, subjective deviations in the design of technical products (see Quaedvlieg, 1987, pp. 22–25), it is not at all so obvious where it has set the limit at which the author's creative freedom is too narrow for the work to attract copyright.

In general, the originality standard is very low. As observed in the introduction of this chapter, even regarding ordinary school portrait photos, the CJEU has held that 'the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent' (*Eva-Maria Painer*, 2011, § 93). This is also recognised at the national level, where there is an abundance of examples of low level creative works having received copyright protection. In the Netherlands, copyright has been conferred on 'passport photographs, striped wallpaper, the design of simple games like "four in a row" and designs of basic holiday homes' (Hugenholtz, 2012, p. 44).

It remains unclear from the CJEU's case law whether there are any further constraints to creativity that may render creations ineligible for copyright protection. Since the CJEU relies so heavily on the author's free and creative choices, it seems safe to assume that copyright does not extend to too obvious or trivial creations that insufficiently express the author's creative abilities. That is at least how originality's lower limit is traditionally understood in most Member States. Here too, however, it is not easy to draw a bright line between works that possess just enough creativity and those that are too obvious or trivial to attract copyright, at least if courts are expected to eliminate evaluation beyond the 'author's own intellectual creation'-test of the CJEU (see Van Gompel & Lavik, 2013, pp. 219–229).

The final judgment in the Dutch court case of *Zonen Endstra v. Nieuw Amsterdam* corroborates this. The case dealt with the question of whether copyright subsists in (transcripts of taped) conversations. These conversa-

tions took place during a series of secret meetings between police officers and Endstra, a real estate broker who was later murdered. The tapes were transcribed into official police reports, a copy of which found its way to crime reporters who published a book of the transcripts, with minor edits. The sons of the murdered businessman sought to stop publication by claiming copyright in the conversations. The case made it all the way to the Supreme Court (2008) and was ultimately remanded to the Court of Appeal of The Hague. In 2013, this court ruled that Endstra's conversations with the police were not original works, because Endstra had expressed himself in a high-endless sequence of incomplete, badly versed phrases that involved insufficient creative labour. Copyright protection was denied because Endstra had construed his speech in a form too 'ordinary or trivial' (§ 5.13). With this finding, some argue, the court makes, or at least comes close to making, an aesthetic quality judgment on the coherence of Endstra's speech (Tsoutsanis, 2013; Grosheide, 2013; Cohen Jehoram, 2013). It can also be argued, however, that the court actually sought to apply the originality test as phrased by the Dutch Supreme Court by critically examining whether Endstra had made 'free and creative choices' in expressing himself (Van Gompel, 2013, p. 203).

Creativity standards in aesthetics and creativity studies

The low standards of creativity and originality in copyright law stand in stark contrast with how these notions are understood in aesthetics and creativity studies. Although, within and between these disciplines, there are obviously many variations in the way these terms are used (Parkhurst, 1999), in general, the various definitions of creativity have in common that they involve an element of novelty and an element of quality or usefulness (Sternberg and Lubart, 1999, p. 3; Sternberg and Kaufman, 2010, p. 467). That is, to be creative, a work must exhibit some sort of novel, original or innovative outcome, either in its appearance or in its underlying ideas. In addition, it must also be appropriate (significant, valuable or useful) within the specific context (Mayer, 1999, pp. 449–450). As Amabile and Tighe describe it, creativity does not merely rest on a work being 'different for the sake of difference' but also requires it to be 'appropriate, correct, useful, valuable, or expressive of meaning' (1993, p. 9).

Regardless of the common elements, the definitions of creativity and originality vary greatly in detail. This can perhaps be explained by the variety of disciplines in which creativity has been studied, including psychology, sociology, biology and economics, with a vast 'panoply of perspectives on

creativity' within these disciplines (Kozbelt, Beghetto and Runco, 2010, p. 21). Richard E. Mayer notes for example that creativity can be perceived as a property of people, products or processes, as a personal or social phenomenon, as a common or exceptional incidence, as a domain-general or domain-specific concept or as a qualitative or quantitative matter (1999, pp. 450–451).

Despite the broad variety of disciplines and perspectives on creativity, however, both aesthetics and creativity studies seem to have in common that they treat creativity and originality as relative or comparative notions (cf. Moran, 2010, p. 75). That is, these notions are used as criteria to determine how one person, product or process stands out creatively against other people, products or processes within the same symbolic domain (Csikszentmihályi, 1999, p. 316). This is an important observation, because it allows us to understand the fundamental difference with the way in which originality and creativity are applied in copyright law. There, these notions are treated not as relative or comparative, but as independent, normative concepts.

Explaining the difference of interpretation and approach

The main reason for the difference of interpretation is that especially aesthetics and art studies on the one hand and copyright law on the other start from completely different points when examining notions of originality and creativity. At an abstract level, these points of departure can be described as being one of assessing distinctiveness versus one of legal demarcation.

Having artistic evaluation as one of its principal objectives, aesthetics clearly takes a relative approach to creativity by considering how original, novel or unique a work is in comparison with other works within a specific genre or cultural domain. That is not to say that aesthetic evaluation depends solely on how an artwork relates to similar works that precede it. It is also relevant what contribution the work makes to the further development of a genre (Levinson, 1990). As Sherri Irvin explains, if 'the characteristics for which a work is praised are ... developed further by other artists ... this, in turn, will reflect favorably on the initial work' (2007, p. 295). Whether the significance of an artwork is evaluated retrospectively or prospectively, however, it is evident that in making the assessment, other works within the same genre serve as key reference points.

Other disciplines do not concentrate on aesthetic creativity or value the superiority of one creative person, product or process over another. Creativity studies can also be oriented on organisational creativity (Puccio

and Cabra, 2010), educational creativity (Smith and Smith, 2010), functional creativity (Cromptley and Cromptley, 2010), et cetera. As a general rule, however, the degree to which creativity or innovation manifests itself in organisational, educational or functional settings is also measured in relation to other – sometimes hypothetical – settings to which they compare.

In copyright law, by contrast, the courts do not generally draw a comparison with other works to determine whether an intellectual creation meets the required level of creativity. Because copyright law's originality test 'is primarily concerned with the relationship between the creator and the work' (Bently and Sherman, 2009, p. 93) and not with how novel or meritorious a work is compared with earlier works, originality is examined solely on the basis of the work itself. Reference to pre-existing works is usually only made if there is doubt about whether a work is truly the author's own intellectual creation, for example, if there are indications that the author has copied parts of earlier works or draws upon unprotected ideas, elements of style or materials that are in the public domain (Van Gompel & Lavik, 2013, p. 217).

The reason why copyright law's originality test is primarily author-oriented and does not require a comparison of works with prior art is largely historically determined. In the 19th century, the justification for copyright was found to exist in protecting the labour and expense incurred by the author in creating the work (the labour theory of copyright) or in protecting the author's personality as manifested in the work (the personality rights theory of copyright) (Buydens, 2012, pp. 258–309, 315–340). This was reflected in the originality test being centred on the author as the creator of the work (Van Gompel & Lavik, 2013, p. 215). Since copyright extends only to the author's individual expression and not to facts and ideas, an originality criterion that focuses on the author's own intellectual endeavours in creating the work was considered a sufficient threshold. For the purpose of a legal demarcation of copyright, no further object-oriented criteria such as novelty, quality or merit were thought to be required.

Restyling copyright's creativity standard: an arduous task

Since the concept of creativity differs greatly between the humanities and copyright law in terms of interpretation and points of departure, reinterpreting copyright law's originality test by using insights from the humanities appears to be a difficult task. Although, in theory, the idea of drawing upon aesthetics or creativity studies to rephrase copyright law's creativity standard in more positive terms looks sympathetic, in practice,

raising the standard along these lines would seem to create far more problems than it solves. As Erlend Lavik also argues in this book, aesthetics and creativity studies simply do not provide sufficiently well-defined and coherent principles for the purpose of creating legal certainty in the copyright domain. This has been explained in greater detail elsewhere (Lavik & Van Gompel, 2013).

Without repeating the said discussion here, it is evident from the comparison above that if copyright law were to move away from the low, author-oriented originality criterion by adopting a higher creativity test akin to the one applied in aesthetics and creativity studies, then this would undoubtedly mark a departure from the core principles upon which copyright law rests. It would subject copyright to a novelty-like criterion and would require courts to determine whether a work creatively stands out against other, comparable works. Rather than centring protection on the author's own intellectual creation, it would require evaluating a work's merit vis-à-vis other works to ascertain whether it is worthy of protection. This is undesirable, as it would completely upset the current copyright system and the principles upon which it is based.

Still, this does not change the fact that creativity is part of copyright law's originality criterion and that it will remain a hollow term unless it is taken more seriously. For this reason, the following two sections will examine whether it would be practical and feasible to reinforce the current 'free and creative choices'-test by requiring courts to take full account, first, of constraints that may restrict the author's creative autonomy and, second, of the bond between a work and its creator so as to determine whether his or her personality is sufficiently reflected in it.

Autonomy: Exercising free choice within creative constraints

Creativity requires certain autonomy on the part of the creator. Without autonomy, creators may lose the intrinsic motivation for creating works, which can affect their sense of intellectual ownership (Amabile, 1998, p. 82). Moreover, as Mark A. Runco writes, '[o]riginality implies that the person is doing something that is different from what others are doing, and that is probably easiest if he or she is independent and autonomous' (2007, p. 288). Hence, there is a certain relationship between the degree of freedom that creators enjoy and the level of creativity evident in the works they produce.

This is also acknowledged in copyright law. As observed, the CJEU has judged that copyright protection is granted only to works that result

from the author's *free* and creative choices. Conversely, it has ruled that copyright's originality threshold is not met when the creation of a work is dictated by technical or functional considerations, rules or constraints that leave no room for creative freedom (*Bezpečnostní softwarová asociace*, 2010, § 48–49; *Football Association Premier League*, 2011, § 98; *Football Dataco*, 2012, § 39; *SAS*, 2012, § 39). The CJEU has held that copyright extends neither to the functionality of a computer program, nor to the programming language, the format of data files and the graphic user interface insofar as these components are differentiated by their technical function only (*Bezpečnostní softwarová asociace*, 2010, § 48; *SAS*, 2012, § 39).

From a legal perspective, since the originality criterion requires a work to express the author's free and creative choices, it makes sense that courts, in deciding on a work's eligibility for protection, ignore elements that do not result from autonomous creative choices by the author. However, the difficulty remains how the originality of a work as a whole is to be judged when it contains technical, functional or other non-original features. This will be considered in more detail below. In the *Bezpečnostní softwarová asociace* case, the CJEU has further explained the importance of discounting technical or functional considerations, rules or constraints when making judgment on the originality of a work. It stated that, if the different methods of implementing an idea are so limited that idea and expression become indissociable, then the space for authors to express their creativity in a personal manner is too narrow to create a work that constitutes an intellectual creation of their own (2010, §§ 49–50). Although the way in which the CJEU brings in the idea/expression dichotomy is odd, it clearly seeks to prevent that the originality test is interpreted in such a way that it would enable a monopolisation of ideas 'to the detriment of technological progress and industrial development' (*SAS*, 2012, § 40). Competition or innovation must not be excluded by authors who claim exclusive protection for elements of works that are merely technically or functionally defined and that leave no room for creative choices.

Creative constraints also play a role outside the mere technical or functional domains. At least, that can be inferred from the *Football Association Premier League* case, in which the CJEU denied protection to football matches on the grounds that they 'are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright' (2011, § 98). It would have been more straightforward had the Court denied protection by reasoning why a football game is not a literary or artistic 'work'. Copyright is indeed not intended to protect football matches or, more precisely, to cover sports techniques and tactics. If the Dutch athlete Epke Zonderland could claim copyright protection for the three consecutive flight elements which

he introduced and successfully completed in the men's horizontal bar final during the 2012 Olympics in London, then he could eliminate competition and innovation in this sport by precluding others from performing the same. The objective of sports being to attain maximum physical performance in fair competition with other participants, any athlete may seek a competitive advantage through physical training, mental preparation, refining skills, better applying knowledge, using better equipment or developing new techniques. It would be unthinkable, however, if the one athlete has a competitive advantage over the other due to an intellectual property right over the execution of sports elements (with the exception maybe of choreographed movements in disciplines such as figure skating or free style gymnastics). That is why it makes sense to exclude sports from the copyright domain altogether, as they are commonly understood to be in most countries (Spoor, Verkade and Visser, 2005, p. 127). It is somewhat surprising that, instead, the CJEU applied the 'creative freedom'-test to football matches, because by doing so it seems to imply that sports events are in principle eligible subject-matter. That in turn raises the thorny question of authorship. Who qualifies as 'author' of football matches? (The players, captain, technical staff, the coach, one team, both teams, all of the above?).

In practice, the challenge is to determine how much freedom authors actually have for making creative choices. Creative processes and outcomes are always contingent on conventions and constraints of some kind. These may exist in various forms and may vary from soft, self-imposed restrictions to hard limitations that are imposed from outside. This section first explains how creativity and constraints interact and then sketches types of constraints by which the author's creative freedom may be inhibited. Because the object is to illustrate that the author's autonomy in creative processes is invariably restricted, in these sections the copyright implications are not examined in much detail. That will be done in the subsequent section, which examines how courts deal with creative constraints when judging on copyright law's originality test. It will be seen that courts often only investigate the creative space that is available, without observing how that space is used and whether the author has been restricted in any way during the creative process.

The interplay between creativity and constraints

In creativity studies, there is extensive literature on how tradition, conventions and constraints affect creative processes. Most writings focus on the intricate relationship between creativity and constraints, explaining that, while the latter obviously restrict the creative freedom of authors, at the

same time, they are an intrinsic and perhaps necessary part of creative processes. If a sufficient degree of freedom is critical for artists to be able to make creative choices, then creativity will be stifled if there are too many restrictions. Yet, too much freedom can also paralyse creativity. If authors are offered too many choices, then the creative space may be too large to make adequate creative decisions. Linda Candy rightly observes that, since '[a] totally free or unoccupied space in which to begin a creative work is both unimaginable and probably undesirable', constraints can also be conducive to creativity by providing the author with 'a more manageable creative space' (2007, p. 366).

For Igor Stravinsky, for example, rules and restrictions were an integral and essential part of musical composition. He wrote:

The creator's function is to sift the elements he receives from [imagination], for human activity must impose limits upon itself. The more art is controlled, limited, worked over, the more it is free. As for myself, I experience a sort of terror when, at the moment of setting to work and finding myself before the infinitude of possibilities that present themselves, I have the feeling that everything is permissible to me. ... My freedom thus consists in my moving about within the narrow frame that I have assigned myself for each of my undertakings. I shall go even further: my freedom will be so much the greater and more meaningful the more narrowly I limit my field of action and the more I surround myself with obstacles. Whatever diminishes constraint, diminishes strength. The more constraints one imposes, the more one frees one's self of the chains that shackle the spirit (1970, pp. 63–65).

Hence, in constraint theories, creativity is typically defined as 'a process of exercising free choice in the context of a range of existing constraints' (Candy, 2007, p. 366). In a similar vein, Jon Elster interprets creativity as 'working within constraints' and originality as 'changing the constraints' (2000, p. 180), thus qualifying originality as a higher to attain standard than creativity. At the very end of this spectrum is Patricia D. Stokes' constraint model, according to which genuine artistic freedom is left only to artists like Motherwell, Mondrian, Klee and others 'who self-select and self-impose constraints on their current successful solutions' and, in so doing, pursue 'a novel goal and in the process of realising it [enlarge] a domain' (2008, pp. 234, 235).

Obviously the way in which constraints affect creativity fully depends on their nature. As in the example of Stravinsky, the restrictions are totally self-imposed and therefore part of the creative process. This does not directly upset creative freedom. In fact, it is creative autonomy that allows artists to

set the boundaries within which they wish to create. However, every creative choice, even if imposed by entirely idiosyncratic constraints, involves subsequent restrictions that may have an effect on the creative space available to authors. For this reason, Jon Elster suggests in his book *Ulysses Unbound* (2000, p. 176) that artistic creation must be envisaged as a two-step process, i.e., as a ‘*choice of constraints followed by choice within constraints*’. The first step involves voluntary choices of constraints that include, for example, the choice to work in a certain genre or the choice of materials. Such choices inevitably require authors to make subsequent – not necessarily voluntary – choices based on the external constraints that working in a particular genre or with the one or the other type of material implicate.

At the same time, there are also many external and internal constraints to creativity to which authors would usually not submit themselves voluntarily. Examples vary from psychological barriers, such as writers’ blocks and early creativity that limits future achievements (Goncalo, Vincent and Audia, 2010), to external restrictions, such as fixed deadlines and limited budgets. The former are personal and do not affect all authors, but the latter are very common. Nearly all authors are somehow restricted by time and money. In one way, these constraints are useful as they keep authors focused on creation. Jon Elster (2000, pp. 210–211) writes: ‘For a movie director, an unlimited budget may be disastrous. For a TV producer, having too much time may undermine creativity’. On the other hand, the same constraints may also restrict creative freedom, especially if the deadlines are too short or the available budget too tight.

Table 1. Some sources of creative constraints

	Voluntary/Autonomous	Involuntary
Internal	Choice of genre Choice of audience Choice of topic and content Choice of medium, format, methods and materials	Psychological barriers such as mood, writer’s block, early creativity, etc. Personality of the author, including personal traits, habits and preferences
External	Rules of the genre Trends and audience expectations Functional demands Work environment, including creative briefs and instructions, imposed deadlines and available budget	Barriers to understanding, such as limits of language Physiological barriers such as range of hearing and vision Limits to physical performance such as musical performance Properties of texture, strength and structure of materials Technical limitations

Table 1 provides examples of internal and external constraints to creativity and the voluntary or involuntary nature of them. Several of these examples are dealt with in more detail in the next section on creative conventions and constraints.

Conventions and constraints in creative processes

The previous section shows that, while different types of conventions and constraints affect creative processes, not all of them truly inhibit the author's creative freedom. In fact, authors often exercise their creative autonomy to actually impose restrictions on themselves. The voluntary internal constraints indicated in Table 1 clearly illustrate this. Other constraints, such as the psychological barriers to create as a result of mood, writer's block or early creativity hinder the creative process, but copyright discounts these factors because they are viewed as involuntary internal constraints. Hence, for the purpose of establishing whether a work passes or fails copyright law's originality test, all internal constraints mentioned in Table 1 are not directly relevant or useful, either because they do not impede but rather facilitate the author's ability to make 'free and creative choices' (the voluntary internal constraints) or because they are totally accidental and unintentional (the involuntary internal constraints).

Having said that, the voluntary internal constraints are not entirely irrelevant. They can serve as a useful starting point for laying bare the external constraints to creativity that will affect the ability of authors to make 'free and creative choices'. This follows from Jon Elster's depiction of artistic creation as a '*choice of constraints* followed by *choice within constraints*'. Because every creative process requires authors to make creative decisions (the voluntary internal constraints), these decisions eventually will also inflict various external constraints on them. Therefore, this section discerns three types of internal decisions that creative processes involve, namely, the choice of genre, the choice of medium, format, methods and materials and the choice of the audience that authors want to reach. It ascertains how these choices may impose external constraints on authors that limit their freedom of action. Next, it analyses how creative freedom may be inhibited by external constraints that may arise in employment or contractual relationships.

This approach differs from other ways of systematising constraints to creativity. Jon Elster, for example, distinguished purely between soft, self-imposed constraints and conventions, on the one hand, and hard, intrinsic and imposed constraints, on the other hand (2000, p. 190). Another division

was proposed by Brian Moeran who, in his paper on cultural production, creativity and constraints (2011, p. 16), differentiates between material, temporal, spatial, social, representational and economic restrictions. While these scholars engage in a treatment of how creativity is limited in a general way, our intention is to categorise constraints that restrict the author's ability to make free and creative choices in shaping their work. That is why the approach in this chapter differs.

At first sight, many constraints mentioned in the following sections may appear not very problematic from a copyright viewpoint, since the required originality threshold is so easily reached. However, the deeper we dig into the constraints to creativity, the more we shall realise that it cannot automatically be assumed – as courts sometimes do – that authors have made 'free and creative choices' in producing their works.

The choice of genre

The specific genre in which authors create their works clearly imposes a number of restrictions. While the term 'genre' has multiple meanings, varying from discipline to discipline and sometimes even within disciplines, in this section, it is used in a rather general fashion. It refers to any type, class or category of literature, music or art – in the broadest sense of the word – that is defined by shared characteristics of content, form, style, mood, et cetera. Genres are necessarily formed retroactively, as they require (informal) recognition of their shared characteristics by a specific artistic community or culture. Genres are thus defined by established conventions, the so-called 'rules of the genre'. These are – implicit or explicit – norms or understandings, to which nearly all authors in a particular genre submit themselves. Blues compositions, for example, traditionally have a twelve-bar chord scheme and a distinguishable A-A-B rhyme and lyric pattern.

Another example is Western movies, which comprise not only various visual conventions, such as their location in the countryside or in towns with saloons, people wearing wide-brimmed hats, high-heeled boots with spurs, using rifles, riding horses, and so on (Buscombe, 1970, pp. 36–38). Perhaps even stronger genre characteristics of Westerns are the recurring repertoire of situations and events that draw on the history of the American frontier, including 'gunfight, drifters from a defeated south, confrontations of cavalry and Indians, ambushes, gambling, cattle drives and railway building' (Collins, 1970, p. 70). It is these and possibly other conventions that allow audiences to recognise a film as belonging to the genre of Western movies.

In practice, it is very common that authors choose to work within certain artistic conventions of genre. While this obviously is a free choice, it may

restrict them in a way that is far more restraining than other constraints that they impose on themselves. This is, as Elster argues, because artistic conventions are not invented by authors who submit themselves to the rules of the genre (Elster 2000, pp. 175 and 196). For authors, artistic conventions can be 'normatively compelling' in the sense that, in the view of other artists, critics and the audience, they 'embody the right way of doing things' (ibid., p. 198). If authors would disobey the conventions, they risk being rejected or misunderstood by the public whom they wish to address. Additionally, authors may have no real incentive to deviate from artistic conventions, because their works can only be evaluated by competent judges if a reasonable comparison can be made with similar works. This ultimately compels all authors who work within a particular genre to conform to the same set of artistic conventions (ibid., p. 199).

This does not mean that, by working in a specific genre, authors cannot freely express themselves. With regard to blues music, Steven C. Tracy writes:

[...] the blues provide a basic structure free enough to accommodate individual temperament, abilities, and creativity. Far from being a limited genre, it provides a structured but expansive place for the individual to relate to and express the community, and for artists to touch home base but still express themselves individually (2004, p. 124).

The rules of some genres are more strictly defined than others. In contrast to Western movies, for which there are scores of – more or less – loosely organised conventions (of which usually only part need to be included in a movie to qualify it as a Western), some poetry follows clearly defined rules. To give an example, a sonnet always consists of a fourteen-line verse with a specific metrical structure and a fixed rhyme scheme (i.e. usually three quatrains and a couplet or an octave and a sestet). Limericks and other verse forms follow similar conventions. The rules of these genres 'may be so specific as to leave little room or necessity for elaborate rhetorical planning' (Flower and Hayes, 1981, p. 379). Still, the large variety of poems that are created over the years reveal that these genres leave ample room for individual expression.

The point is, however, that while genres may leave enough creative space for personal expression, authors cannot disregard the rules and conventions that intrinsically define it. Certainly, authors may challenge certain conventions or even abandon ones that have become too cliché. For 'avant-garde' works, pushing the boundaries of existing norms or genres is even

an essential aspect. This allows artistic conventions to evolve or change over time. Still, as it takes time to gain enough institutional momentum for recognition and appreciation of new conventions in existing genres, such progress can only occur slowly. To be understood and accepted, authors cannot recklessly deviate from the conventions of a genre. They must always remain somewhat traditional and conservative in their approach (Csíkszentmihályi, 1996, p. 71). This suggests that a work ‘may bend or break the rules, but it cannot simply ignore them’ (Lavik and Van Gompel, 2013, p. 396). Authors must somehow obey the rules of a genre.

Copyright law recognises creative constraints imposed by rules of genres in literature, film, visual arts, music, and so on, insofar as ‘style’ is excluded from protection. This means that authors are free to use the shared characteristics of form, content, style, or mood of existing genres, as long as they refrain from copying the original expression of specific works within those genres. However, as will be explained below, difficulties may arise in copyright infringement cases when it needs to be determined how elements of ‘style’ must be disregarded in comparing the overall impression of a work with the allegedly infringing copy. Another problem may occur when a new genre is born, that is, when an innovative style that emerged with one particular artist is followed by other artists and retroactively defined as a new ‘genre’. In such a case, separating the unprotected elements of ‘style’ from the protected ‘original expression’ of works created by a trendsetting artist at the time when he was still the only person using his or her own invented style may be very difficult (Verkade, 1996, § 9). This raises the question whether (parts of) the trendsetter’s works would not gradually degenerate into an unprotected style (Hugenholtz, 1999, § 3). This problem, which is manifested particularly in fashion, industrial design and other areas driven by trends, has stirred quite some debate in the Netherlands. Some legal scholars have argued that copyright protection can indeed ‘dilute’ and degenerate into an unprotected style (see e.g. Quaedvlieg, 2004), but the Supreme Court has denied that the scope of copyright protection can diminish over time (*Stokke v. Fikszó*, 2013, § 6.3.6).

The choice of medium, format, methods and materials

Other than by the choice of genre, authors may be constrained by the choice of the medium and format in which to cast their works and the methods and materials that they will apply. Nowadays, authors have the choice between digital and ‘analogue’ means of production and dissemination. This has opened new possibilities, but also introduced new constraints. In the digital arts, for example, while the space available for creative expression

is enormous, authors must duly understand digital technology to generate the desired outcome. Linda Candy (2007, p. 366) writes that producing digital art often requires a trade-off between artistic aspiration and digital constraints, explaining that '[t]he choice of whether to program or to use a software application can be critical to how much the artist has control over the character of the constraints to be specified'. The creative freedom of digital artists is consequently limited to the extent that they run into technological deficiencies of their own or of technologists with whom they collaborate. Not only does this challenge the boundaries of creative partnerships and the perception of authorship, as Elena Cooper's chapter in this book demonstrates, but digital artists must also accept the limitations of existing software applications and tools that they apply for creating their works. Even with state-of-the-art technologies, they simply cannot always create what they have envisaged.

Creative constraints may be stricter or looser depending on whether or not a work also has a utilitarian function. For example, while architectural works may be designed for aesthetic appeal, they ultimately must lead to the construction of real houses or buildings. In the drafting process, therefore, architects are constrained first of all by the utilitarian purpose of a building. If it is meant for living, then it must have certain basic facilities, such as a living space, a kitchen, one or more bedrooms, a toilet and bathroom, et cetera. Although there are various ways in which architects may spatially organise these facilities, in the end, there must be a – more or less – appropriate order between them if the architect wants the building to suit the purposes for which it is designed (Hall and Hall, 1975). A building must moreover have a firm construction. While any futuristic building can be designed on a creation table, it is not a given that constructing it is technically feasible. This will depend on the strength of materials, the distribution of stress, and environmental factors, including the level of hurricane or seismic activity in a region. Architects must use the right combination of materials, composition structures and assembly methods to ensure that their creations are durable and safe (Place, 2007). In practice, architects must also handle a large number of external constraints. They have to follow various statutory protocols and building regulations, such as technical regulations about minimum ceiling heights and room sizes and safety instructions about the place and number of fire exist doors in public spaces. Furthermore, they may be bound to comply with urban planning permissions, which not only have an impact on what can be built, but may also impose (aesthetic) guidelines on how buildings must be shaped (Imrie and Street, 2011).

For other, more artistic types of works such as music, literature, photos and films, the creative freedom in choosing the appropriate medium, format, methods and materials is usually much larger (unless the work is commissioned to be cast in a specific form, as will be discussed further below). Film directors, for example, can opt to shoot their movies with specific cameras (varying from 8mm to HD to 3D), silent or with sound, in colour, black-and-white or other toning effect, et cetera. Painters can choose between particular surfaces (e.g. canvas, wood or paper), painting sizes, types of paint (e.g. oil or acryl), specific painting techniques (e.g. aquarelle or airbrush), and so on. For other visual artists, photographers, music composers and novelists, the range of available media, formats, methods and materials is likewise very broad.

This does not mean, however, that these artists are not in any way constrained by the choice of medium, format, methods and materials. Just as works of architecture are meant to be built, so are musical compositions meant to be performed. Composers must therefore realise that there are limits to what musicians can physically perform (Elster, 2000, p. 191). Furthermore, artists must take account of the specific nature of the materials that they intend to use. Natural materials such as wood, clay and stone have specific properties of texture, structure and strength, which make them better or less suited for creating particular types of works. Other materials, including metal and glass, require special processing techniques like metalworking and glassblowing that involve specific constraints of their own. This has significance for the way in which authors can ultimately shape and cast their works (Moeran, 2011, pp. 19–21).

Here too, creative constraints may be tighter once a work receives a more utilitarian purpose. A good example is the creation of portraits, the object of which is to display the characteristic features of a person. This requires artists to compose the portrait in such a way that it enables viewers to instantly recognise the portrayed person. This obviously limits artistic freedom to some degree, but it certainly does not eliminate it. However, where it concerns passport photos made for official purposes, the creative freedom is almost certainly absent. To prevent crime, fraudulent uses and identify theft, states prescribe strict requirements for passport photographs in terms of size, photo quality, background, framing, exposure, position, visibility of facial features and expression of the portrayed person. Such regulations leave hardly any room for photographers to make ‘free and creative choices’.

The intended audience

Limitations further derive from the anticipated relation to the audience. In his book *Values of Art*, Malcolm Budd (1995, p. 11) writes 'that the role of the artist, properly understood, requires the artist, in the creation of her work, to adopt or bear in mind the role of the spectator'. While this does not prevent authors from making creative choices, it does limit the creative space in one way or the other. Since most works are created with an audience in mind, authors will somehow be constrained by their own expectations about the expectations of intended readers, viewers or listeners. As Jon Elster (2000, p. 188) argues: 'Once the artist has constructed his idea of the reader, he is constrained to write in a way that the reader will find instructive, entertaining, puzzling, moving, disturbing, and so on'. The same applies to painters, film directors, music composers and other artists. They usually also paint for intended viewers, make movies for intended spectators, compose for intended listeners, and so forth (although some authors may only be interested in the act of creation, but this is irrelevant for our present purposes because copyright presupposes communication: no proprietary legal regime is needed for authors who merely keep creation to themselves).

Authors must also understand that there are limits to what an expected audience can rationally endure. This is certainly important for works that attract a captive audience in theatres, cinemas and concert halls. As Thomas G. Pavel (1986, p. 98) remarks: 'a play cannot usually sustain the audience's attention for more than a couple of hours; a movie's duration depends on the eye's tolerance to strain'. Such restrictions will thus define the average length of a work within these genres. But even if the audience can freely choose the time and interval of consuming a work, as is typically the case for novels, then authors must still construct the plot and story line in such a way that they keep the reader's attention continuously alive (Elster, 2000, p. 191). This certainly also imposes limits on length, style and order of story telling.

Especially on the Internet, authors are bound to communicate their works as clearly and effectively as possible. Usability studies show that, on average, it takes only a few seconds to grab the attention of website visitors. If a page loads too slowly (Krishnan and Sitaraman, 2012) or visitors do not promptly find something of interest to them (Nielsen and Pernice, 2010), then the website is likely to be abandoned during the first couple of seconds of interaction. Authors that create and disseminate their works online can therefore easily lose (part of) their audience if a creation does not meet the immediate expectations of viewers. While this may be different for works that make greater demands on the audience's patience, such as modern

art, here too, there are specific challenges for engaging online users, as experience with virtual museums and art exhibitions corroborates (Soren and Lemelin, 2004; Soren, 2005). This means that websites not only need to operate well. To satisfy online users, web developers and creators must also take full account of online user expectations. For this purpose, they may adapt online content to make it more appealing to the target audience, for example, by including catchy headlines, writing short introductory notes, or using specific colours that are favoured by most users (Bonnardel, Piolat and Le Bigot, 2011).

Adaptations of such kind, although authors may freely apply them, are not necessarily based on autonomous choices. If they are primarily guided by user demands, it cannot truly be upheld that they result from the author's free and creative choices.

Constraints in employment or contractual relationships

The author's freedom of action may also be limited in cases of commissioned works or works created in the course of employment. A good example is journalists who work for a newspaper, either as freelancers or in employment. They must typically conform to an editorial statute or ethical code that guides them in writing their reports. Reuters (2008), for example, has published an online Handbook of Journalism, which contains detailed accounts on how to write a journalistic report, including rules on story length, basic story structure, consistency of style, key words, language that must be avoided, et cetera. While Reuters indicates on the homepage that 'the handbook is not intended as a collection of "rules" that seeks to constrain journalism, its guiding principles do restrict creative writing in the sense that journalists are expected to use the handbook 'as guidance to taking decisions and adopting behaviours' (ibid.). Hence, they are not allowed to make creative choices fully at their own discretion.

Likewise, 'no creative team in an advertising agency starts out with a blank piece of paper, but is given a "creative brief" by the client who directs the strategy to be taken by a particular campaign' (Moeran, 2011, p. 18). Such a brief unmistakably leads the authors of the campaign in a particular direction. Commercially this may be attractive, as it instructs the team to draft a campaign that will satisfy the client, but artistically, it comes with a number of restrictions. As Jeremy Bullmore (1999, p. 56) explains, a brief may encourage creative thinking and ensure the relevance of the message being conveyed, but it may also restrict creativity. Being informed by clients' demands that often follow consumer beliefs and expectations, advertising campaigns cannot be said to result from the free and creative choices of

authors alone. The advertising industry clearly also follows consumer trends and impacts (see e.g. Sinclair, 2012).

Other than creative instructions, authors may be constrained by the available budget and imposed deadlines. Although there seem to be few productions where time is not an issue, deadlines are obviously most critical for authors who create works on regular intervals, such as writers of daily newspaper columns or producers of daily or weekly TV shows (Elster, 2000, p. 193). But time constraints are also common in other areas, such as film production, where the schedules for shooting and production are to a considerable extent determined by factors like the availability of actors, access to set and locations and, ultimately, the allocated budget (Barnwell, 2004, p. 50).

That budget matters in creative endeavours is clearly illustrated by film and television production. Although there are many examples of low-budget films that are regarded as highly artistic, as for example Alfred Hitchcock's thriller *Psycho* illustrates, there often is a strong correlation between the available budget and what filmmakers can eventually put on the screen (Barnwell, 2004, p. 48). While it certainly does not prevent creative choices being made, the allocated money may have bearing on the creative freedom of filmmakers (and other types of creators) in the sense that it may prevent them from making the creative choices that they would have preferred to make (see e.g. Affron and Affron, 1995, p. 16; Jørholt, 2010, p. 107).

For copyright purposes, these types of diverse financial constraints will usually not be relevant for the question of whether there is a work, since copyright law's originality test is so low. However, they possibly are relevant in copyright infringement analyses, for example, where film directors reuse costumes, props or sets or even entire scenes or shots from earlier films to cut corners in their production budget. Such 'recycling' regularly occurs in the film industry, but will not easily lead to court cases, as films are often produced by the same company that owns the reused materials.

Implications for copyright law's originality test

As the preceding section has illustrated, authors may be invariably confronted with various restrictions during the creation of their works. For this reason, it cannot be unquestioningly presupposed that a work results from the author's 'free and creative choices', as the CJEU's originality test for copyright requires. Therefore, one would expect that in the assessment that courts make of the original character of a work, or the lack of it, ample consideration is given to the presence and impact of constraints. This section examines recent case law of the CJEU and Dutch courts on this point.

After some preliminary remarks and a short discussion of copyright and creative constraints generally, specific attention is given to how the case law handles technical and functional constraints and other constraints to creativity in applying copyright law's originality test.

Preliminary remarks

Before discussing the impact of creative constraints on copyright law's originality criterion, two observations must be made. First, it is important to understand that, in practice, there are very few stand-alone cases about the question of whether a creation is original enough to qualify as a copyright-protected work. For obvious reasons, copyright's originality test appears as part of infringement analyses, where the defendant disputes that the plaintiff's work attracts copyright or claims that no copyright relevant parts are copied in the allegedly infringing work. Accordingly, in such cases, courts necessarily make a comparison between the plaintiff's work and the allegedly infringing copy. Even if a court finds that certain borrowings (e.g. of technical or functional elements) are not infringing by themselves, they may still find infringement if they see much similarity in the 'overall impression' of the two works under consideration.

Second, it must be noted that manufacturers and designers of technical and functional products regularly claim copyright infringement as a subsidiary fall-back option to obtain protection against competitors, with infringement of registered design rights as the main claim. Before Dutch courts, actions for design right and copyright infringements are sometimes accompanied by an action in the tort of slavish imitation (*slaafse nabootsing*). Copyright can easily be relied upon, as the right comes into existence automatically upon the creation of an original work of authorship. It does not depend on registration or any other formality. Moreover, in most countries, the copyright term lasts for the author's life plus 70 years which is much longer than the usual 25-year term for design rights. If manufacturers and designers cannot rely on design protection because they failed to fulfil the formalities required for acquiring or maintaining design rights, or because the term has expired, or the use made is allowed under design law, they often can still fall back on copyright protection. Such copyright cases are primarily about thwarting competition, not about protecting artistic or creative achievements.

Copyright and creative constraints

Some constraints to creativity are difficult to accommodate in copyright law, because they do not restrict choice but merely limit creative freedom to

a certain degree. That is the case, for example, with deadlines and budgetary ceilings. While clearly limiting the freedom of action of authors, within the time and budget that is allocated to them, authors can exercise considerable autonomy to make creative choices of their own. Thus, time constraints and limited budgets are of no relevance in determining the eligibility for protection of works. As long as authors have made free and subjective choices within the creative space that is available to them, their works should benefit from the protection afforded by copyright law.

Other types of constraints, however, limit creative freedom to such a degree that it is more difficult to assume that they leave sufficient room for free and creative choices. Examples include cases where there are limited possibilities to accomplish the same or a similar artistic effect or utilitarian purpose, where the author's choices are clearly informed by audience demands or trends, and where creation is shaped by external instructions, such as those imposed by law or regulation. This suggests that courts should take such restrictions into account, since they might impinge on the question of whether a work is sufficiently the author's own to be eligible for protection.

Technical and functional constraints

As observed above, the CJEU has explicitly recognised that copyright does not extend to elements of works that leave no room for creative freedom. This principle is widely accepted, as case law at the national level of the EU Member States corroborates.

In the Netherlands, it is settled case law that functional or technical characteristics of a work – i.e. aspects of form that are determined by functional or technical demands – cannot attract copyright, as they fail to reflect the author's subjective creativity. This has recently been confirmed by the Dutch Supreme Court in *Kecofa v. Lancôme* (2006) and *Gavita v. Puutarhaliike Helle* (2010). Most published cases in which functional and technical constraints play a role concern productions in the applied arts and industrial design, e.g. furniture, upholstery, utensils, fashion accessories. These categories of works reside more on the edge of copyright, as evidenced by their optional protection under Art. 2(7) of the Berne Convention and their special treatment in the copyright laws of countries such as Italy, where they attract copyright only if they have 'inherent artistic value', and the UK, where they receive copyright only if they fit the statutory categories of 'artistic' or 'literary' works (Bently and Sherman, 2009, pp. 679–681). However, they obviously are eligible for copyright protection, as explicit in the Dutch Copyright Act (Art. 10(1) under 11).

The Dutch Supreme Court even assumes that works of applied art are subject to the same CJEU's 'author's own intellectual creation'-test as all other creations, as is evident from three cases involving Stokke's *Tripp Trapp* children's chair (*Stokke v. H3 Products*, 2013, § 3.4(b); *Stokke v. Fikszó*, 2013, § 4.2(b); *Hauck v. Stokke*, 2013, § 4.2(b)). In these cases, it was held that copyright may extend to technical or functional design if the author had sufficient room for making creative choices. Interestingly, the Supreme Court further ruled that also a selection of individually unprotected elements can attract copyright if it bears the author's personal imprint (*Stokke v. H3 Products*, 2013, § 3.4(e); *Stokke v. Fikszó*, 2013, § 4.2(e); *Hauck v. Stokke*, 2013, § 4.2(e)).

The latter is remarkable and, from a doctrinal viewpoint, not necessarily satisfactory. It testifies to the move of copyright's originality test towards a 'creative collection'-test. While before, creative collection was a concept at the macro level, designating an outlier category of works like anthologies and collections of texts, now it seemingly becomes a core concept at the micro level of the originality test. Of course, it can be argued that all protected works essentially consist of an 'original' combination of unprotected elements. Literary works are also made up of individual words that, taken in isolation, are unprotected (*Infopaq International*, 2009, § 46) – safe perhaps for a few exceptional cases where new words might attract copyright (cf. Spoor, Verkade and Visser, 2005, p. 118). However, this comparison does not really fit.

The difficulty is to establish the units, elements or resources from which to select. For example, saying that a written text is made up of 'units' of a language (a system of signs that encode information) or that a musical composition is made up of 'elements' of sounds (distinct manifestations of frequencies audible to the human ear) is not the same exercise as constructing the 'pool' of possible units, elements or resources from which industrial design may be composed. In the latter case, it is not only the object, but also the function of the design and the constraints that this poses on the eventual form and materials used (including functional restraints like e.g. stackability of say garden furniture, and market-oriented restraints like limiting production costs) that determine the relevant pool of resources. The question is whether making such a distinction is feasible, as it requires a comparison of works of industrial design to a theoretical pool of possible – creative and/or functional – choices to ascertain whether the combination of elements of which such work is composed would represent a sufficiently 'original' selection.

Legal reasoning on this point is not very well developed, probably because copyright covers such a vast array of cultural production. The 'unit' problem

is studied more in depth per category of work in other disciplines such as literary studies, visual arts, and film studies. In copyright law, by contrast, resort is made to more general statements and sweeping comparisons that do not easily withstand scrutiny from expert domains within the humanities. In practice, what happened in the three *Stokke* cases is that the defendants unpacked various elements of form of the *Tripp Trapp* chair to show that they could not qualify as 'original'. The Supreme Court, however, urged the Court of Appeal to look at the chair's overall impression and to repack all elements to determine whether the collection of elements constituted an intellectual creation by the author. This question is often resolved by assessing how much creative space a designer had at his or her disposal when creating a work. Still, while the existence of creative space is a *prerequisite* for an author to make an 'original' creation, this does not of itself lead to the conclusion that the creation must therefore also *be* original. Instead, as will be argued below, courts should distinguish the *presence* of creative space from how it is used. An individual assessment of the use of space in expressive form should thus be the ultimate test for establishing originality.

Obviously, if a combination of unprotected elements is deemed sufficiently original to attract copyright, then protection would only extend to the specific combination of unprotected elements. This means that competitors can create similar products using a different combination and/or a different set of protected or unprotected elements. The overall impression of the product must differ from that of the original. This needs to be determined by the facts of each case (*Stokke v. H3 Products*, 2013, § 3.4(e)(f); *Stokke v. Fikszo*, 2013, § 4.2(e)(f); *Hauck v. Stokke*, 2013, § 4.2(e)(f)).

While this assumes that the scope of protection granted is 'thin', in practice, it is not without significance. Once a court in an infringement case accepts that a work attracts copyright, this also has consequences reaching beyond the infringement case at hand. One important consequence is that, unless a copyright exception or limitation applies, third parties are prohibited from reproducing or communicating the work to the public (e.g., for advertising purposes or in a film documentary or TV special) without the copyright owner's consent. This may affect freedom of speech. It is unclear whether the Supreme Court realised this when drawing the originality criterion into copyright law's infringement analysis, as it did in the *Stokke* cases. From a doctrinal viewpoint, it would have been better if the Court had more critically approached the question of whether copyright extends to combinations of unprotected elements, especially where it concerns products created under technical and functional constraints.

Other creative constraints

Apart from functional and technical elements, the courts generally acknowledge that copyright does not extend to mere facts, ideas or elements of style, but only protects original expression. In the landmark case of *Van Gelder v. Van Rijn* (1946), the Dutch Supreme Court ruled that a style or method of treatment that confers a specific artistic effect on an object – in this case: applying burn and steel-brushing techniques to create wooden sculptures – cannot attract copyright. This was reiterated in the *Decaux v. Mediamax* case (1995), where it was held that style, trends and fashion are not copyrightable, but that protection may extend to the author's own individual way of expressing a design in a particular style, trend or fashion. In 2013, in the *Broeren v. Duijsens-Kroezen* case, the Supreme Court once more underlined that copyright does not protect style and further held that, save for exceptional circumstances, tort law does not grant protection against slavish imitation (*slaafse nabootsing*) of style. Doing so would harm the principle underlying the exclusion of style from copyright law, which is to foster cultural growth by ensuring that authors have enough freedom to build upon ideas and abstractions developed by others.

In practice, however, courts sometimes do recognise copyright in creations that balance on the edge of convergence of idea and expression. This includes productions like family board games and formats of TV programmes (Hugenholtz, 2012, pp. 44–45). Illustrative is that the courts in such cases often abstain from assessing whether authors, in expressing their works, exerted creative autonomy or whether the creative choices they made were rather informed by external considerations.

In the *Impag v. Hasbro* case (2001), for example, the Supreme Court upheld the ruling of the Court of Appeal of Amsterdam that, notwithstanding the uncopyrightability of game concepts, the design of family games like 'Jenga' (a wooden tumbling stacking tower game), 'Connect Four' (a first to get four-in-a-row game) and 'Guess Who?' (a flip-and-find face game) was sufficiently original to attract copyright protection. As it concerned a case in summary proceeding, the Supreme Court accepted that the Court of Appeal had only briefly motivated its decision. Nevertheless, it is fairly remarkable that both courts overlooked that the concepts of most family games are based on early playing games that, if protectable, would be in the public domain. 'Connect Four', for example, is a variant of tic-tac-toe and tower building games have also been known for many centuries. Furthermore, the courts too easily glossed over the fact that the simplicity of many game concepts puts restraints on the execution of form. The creative choices involving the design of a stacking block tower game like 'Jenga', for instance,

leave little choice for variation. The blocks must be stackable, their height must exceed the average diameter of a finger (but not too far), their surface must be smooth enough to allow their removal from the tower, and so on. In reality, therefore, the creative space for designing such a game is limited. This raises questions about how much creativity the designer truly exercised in creating the game, other than in developing and elaborating the game concept along technical or functional constraints.

As regards TV programme formats, in the *Castaway v. Endemol* case, the Court of Appeal of Amsterdam (2002) ruled that such formats might attract copyright if they are sufficiently elaborated in detail and their specific elements, which alone do not need to attract copyright, together form a 'unity' with an own, original character. This decision, which was upheld by the Supreme Court in 2004, resembles the protection conferred on original combinations of unprotected elements in the three *Stokke* cases discussed above. In this case, which concerned the format of a reality TV show, the court identified twelve elements of the format and concluded that, together, these elements were sufficiently original to attract copyright. How the court arrived at this conclusion is unclear, but nothing in the judgment reveals that it examined how much of the format essentially resulted from the author's own, subjective choices and how much of it was based on established conventions within the genre and thus resided outside the author's autonomy. That is disappointing, because it could have shed more light on whether the format was really the author's own intellectual creation. While in the end, the court did not find copyright infringement in this case, the fact that it gave the format the status of a copyrighted work may have consequences for third parties who wish to create similar formats for other reality TV shows. In this regard, it should be noted that it is debateable whether TV programme formats actually need copyright protection. As Stefan Bechtold (2013) argues, despite the difficulty of claiming protection for TV show formats under intellectual property laws, the international trade in them is thriving. In practice, their protection is often jealously guarded through contracts and industry norms (Kretschmer, Singh and Wardle, 2009). This places question marks on the importance of copyright for protecting TV show formats in the first place.

In cases concerning the copyrightability of websites, the courts also look at the overall impression of webpages to consider whether they are sufficiently original. Sometimes protection is denied because a webpage mainly consists of elements that are also used on other websites (*Social Deal v. Wowdeal*, 2012) or because the design and layout of a webpage are too trivial and obvious to involve any type of creative labour (*Union v.*

Calleur, 2012). Other times protection is granted if the court finds the text, design and layout of a webpage to sufficiently reflect the author's creative choices, as the *E2Ma v. Malicor* case (2012) illustrates. Oddly, in this case, the District Court of Utrecht based its analysis on the choice and arrangement of elements that, on closer inspection and save for individual texts and pictures, are common and basic features of webpages, such as the division and placement of texts and fields, the use of banners, arrows and other indicators, the letter type, the colour pattern, et cetera. While such elements can be combined in various ways, the question remains whether the webpage design was the result of the author's 'free and creative choices' or primarily informed by trends and audience expectations about how websites are logically organised.

Courts' overly one-sided analysis of creative autonomy

The above examples reveal that examining creative constraints is usually not part of the court's analysis when ascertaining the eligibility for protection of works. Dutch courts look at the creative space that is available, without actually observing how the space is used and whether, in the course of the creative process, the author has been restricted in any way. As a result, they evaluate whether creative space exists and then apparently assume that if it does, the way in which it is used automatically produces an original result of the author.

The CJEU seems to sanction that. In the *Eva-Maria Painer* case (2011, §§ 90–93), it generally observed that photographers of a school portrait photograph, 'can make free and creative choices in several ways and at various points in its production', thereby pointing at the possibility to fix the background, pose, lighting and framing, choose the angle and atmosphere and use developing techniques or computer software. The CJEU then concluded rather one-dimensionally that school portrait photographers enjoy a considerable freedom to exercise their creative abilities, without considering that making portrait photographs also involves various creative constraints, as has been clearly demonstrated above. In the end, it was left for the national court to determine whether the photograph was an intellectual creation of the author reflecting his personality, but the positive way in which the CJEU constructed the creative space available to the author gives the impression that the national court could not simply deny protection to it.

In the Netherlands, a similar one-sided analysis of creative freedom led the district court of Haarlem to accept copyright in basic passport

photographs (*X v. Ringfoto Nederland*, 2010). The case concerned ‘old style’ passport photographs which did not have to meet the strict requirements for official passport photographs, e.g. no smiling, head kept straight, earlobes visible, plain background, no head attire. The Court ruled that, in comparison to official passport photographs, the photographer had made ‘various autonomous, subjective choices’ in producing the photo, including the cropping of the image, the posing of the portrayed person, the lighting of the face, and the fixing of hair. It can be disputed, however, whether these choices were really part of the photographer’s creative freedom: they could have also been prompted by demands of the portrayed person, who probably was also responsible for fixing his or her hair and perhaps even for choosing the pose. Moreover, the making of passport photos is often a highly standardised and automated process in a fixed studio setting, making it questionable to what extent the photographer actually exercises creative freedom. Nevertheless, the Court held that there was enough space for making personal and creative choices and that the passport photo therefore qualified as an own intellectual creation.

This line of argument is remarkable and unsatisfactory, because it gives an incomplete picture of the creative autonomy exerted by authors. There are several possible explanations for the approach taken. One reason seems to lie in the low originality criterion itself. Since the design of creative products nearly always leaves some room for small variations, it is arguably harder for courts to establish that authors did in effect not exercise any creative autonomy than that they did. Creative space thus seems easier to demonstrate, or at least to assume, than creative constraints, especially in the absence of a clear appraisal by the courts of the creative process. In many cases, however, it is not feasible for a court to dig into every detail of each case, particularly when it concerns summary proceedings or when the list of judicial proceedings set down for trial is long. Judges may further be confronted with poorly defended cases, where creative freedom is insufficiently put into question. This may also have to do with the cost of expert witness testimonies and the fact that parties are not necessarily eager to accept instructions of proof. Lastly, courts may sometimes also be guided by notions of fairness or unjust enrichment, especially in cases where copyright is used as an instrument against competitors. This shows how policy considerations may affect the interpretation and application of legal concepts such as originality.

This is not to say that courts always ignore limits to creative autonomy. In the case of *Doréma v. Isabella* (1996), the Arnhem Court of Appeal declined copyright protection to caravan awnings because of the lack of originality.

The Court held that the different elements of the awnings, including the austere lines and simplicity of the design, the combination of colours, the dimensions, the circular canopy, and the layout of panes that creates a special light effect, were either technically or functionally determined, or elements of style, or existing features of known awnings produced by third parties, or clearly designed to fit in with current trends in the awning industry. Further, it found that the selection and combination of unprotected elements of which the caravan awnings were made up was insufficiently original for vesting copyright. The awnings too much followed patterns and trends that are common in the caravan awning branch to constitute own intellectual creations eligible for copyright protection.

Similarly, in the case of *Timans v. Haarsma et al.*, the Leeuwarden Court of Appeal refused to grant copyright to the design of basic, low-cost holiday homes, holding that the margins for designing them in an original way were too limited. The Court argued that Timans' design was very similar to existing design traditions in holiday housing in the Netherlands and that, generally speaking, holiday homes must satisfy the same functional requirements. The Supreme Court, however, overruled this decision as it found that the Court of Appeal had erred in putting these considerations at the heart of its originality analysis (2006, § 3.7). It is unclear from the Supreme Court's ruling whether it reversed the decision because the Court of Appeal had put relatively much weight to the 'common fact' of similar holiday homes having been built under similar circumstances (thus giving lesser importance to the specific facts of the case at hand), or because the Court of Appeal had recognised that the creative freedom in this case was marginal due to the constraints that designing basic holiday homes involves. The latter reasoning would be odd, at least in light of the current 'author's own intellectual creation'-test. If copyright is granted only to works that result from the author's free and creative choices, then it would appear that protection must be denied whenever a court finds that the author's creative autonomy is restricted too tightly.

Personal touch: the author as key constituent of the originality test

A last key element of copyright law's originality criterion is unmistakably the author. Pursuant to the CJEU's case law, an intellectual creation is original if it reflects the author's personality. To that end, the author must have left a personal imprint on the work (*Eva-Maria Painer*, 2011, §§ 88–89). This requirement applies not merely to cultural types of works, such as

books, music and works of art, but also to functional and technical types of works like computer programmes and databases, for which it seems difficult to determine in which elements the ‘personal touch’ of authors can be found. The CJEU has ruled, however, that such works must also bear the imprint of the author’s personality to attract copyright (*Football Dataco*, 2012, § 38).

This directly shows that the requirement of a ‘personal touch’ or ‘personal stamp’ is somewhat problematic. Only in certain aesthetic genres, such as high-end visual arts and music, would an (trained) audience recognise works as emanating from a specific person, or at least attribute it to him or her. Apart from the creator’s own, individual way of expressing him/herself in a specific work, therefore, the notions of ‘personal touch’ and ‘personal stamp’ cannot mean to signify an easily detectible ‘signature’ or personal ‘style’ of a creator, such as the style of painting of Vincent van Gogh. Similarly, these notions cannot be linked to individuality of personhood as in personal traits, habits or preferences of a creator that can be actually recognised in the work. Probably, the reflection of the author’s personality is merely required to show that the work must be the author’s own individual expression, i.e., that it must originate from the author in the sense of not being copied (see Laura Biron’s chapter in this book on the meaning of ‘originating from’). Yet, this raises a broader difficulty. If copyright law’s originality criterion is so tied to the individual author, how then must the original character of large-scale collaborative works, such as Wikipedia entries, be assessed?

This section examines how the courts deal with the requirement that a work must bear the personal imprint of the author to attract copyright. Do they first establish who the author is and what types of subjective choices he or she has made in producing the work? The CJEU’s originality test would arguably require such an analysis, but in reality, courts do not seem to systematically examine the question of authorship in assessing the originality of a work. This section then examines the question of how the originality of large-scale collaborative works must be determined if the co-contributors’ expressive marks are not readily ascertainable. This question is highly relevant to the digital environment, where works are increasingly produced in online creative communities or with the help of audience participation.

Who is the creator? And does that actually matter?

As observed above, the justification of copyright is largely premised on protecting the author as creator of the work. This personality-based justifi-

cation materialises clearly in connection with moral rights, which concern the immaterial interest of authors to receive protection against acts that can damage or alter their work or harm their name or reputation. However, it is also reflected in the originality standard, which subjects copyright to the requirement that the work is the ‘author’s own intellectual creation’ that exhibits his or her personality. This suggests that, to determine whether a work is sufficiently original, it is of utmost importance to know who is the creator and which subjective choices he or she has made during the creative process.

In the Netherlands, the Supreme Court has also emphasised that the bond between the author and the work matters in ascertaining originality. In the *Van Dale v. Romme* case (1991), which concerned the copyrightability of a list of headwords in a dictionary, it held that a collection of words by itself does not satisfy the originality test, because it consists of no more than factual data that as such do not attract copyright. It ruled that a collection of headwords would be eligible for protection only if it ‘were the result of a selection process expressing the author’s personal views’. By so ruling, it tied the originality test closely to the author’s individual creative endeavours.

In practice, however, the courts – especially those adjudicating cases at first instance and in summary proceedings – tend to disregard who actually created the work. Instead of looking at the work and the process that led to its creation to ascertain which creative choices have been made by the author, they ask themselves the theoretical question whether it is conceivable that two or more authors, independently from each other, create exactly the same work. If they consider this to be (nearly) impossible, then they typically assume that the work satisfies the originality test (*Eek BV v. Esfera*, 2007). Otherwise, they will accept that the work lacks originality and deny protection to it (*Social Deal v. Wowdeal*, 2012). In such rulings, the courts clearly overlook the actual author in assessing whether a work is the author’s own intellectual creation.

The courts’ reliance on a hypothetical situation, whereby a comparison is made with other, fictitious creators, seems to be based on doctrine developed in scholarly literature. One of the leading treatises on copyright law in the Netherlands suggests that, in practice, the courts can apply such a pragmatic comparison as a rule of thumb to determine whether a work meets the originality standard (Spoor, Verkade and Visser, 2005, p. 66). While it may ease the originality analysis, such an approach is not entirely satisfactory, since it virtually eliminates the author from the originality test. Applying a hypothetical comparison of this kind means that courts only consider whether subjective choices *can* be made, without actually

examining whether creative choices *have* been made by the author during the production of the work.

Therefore, it is undesirable if the rule of thumb is used as a stand-alone criterion for establishing originality, as Spoor, Verkade and Visser (2005) themselves admit. They warn against the risk that the courts may lose sight of 'the relationship between author and work, which is the foundation of copyright' (p. 73). Moreover, they argue that, if applied too strictly, the rule of thumb may convert the originality test into an analysis of whether a creation is considered 'statistically unique' (p. 66), which is an argument about the distinctiveness of works, not about the author's use of the available creative space. In the *Technip v. Goossens* case (2006), the Supreme Court also considered that the answer to 'the question whether it is inconceivable that two (teams of) scientists, working independently from each other, would have arrived at the same selection ... is but one of the viewpoints to be considered in assessing [originality]' (§ 3.5).

Nonetheless, since the rule of thumb is mentioned in a leading treatise on copyright and the Supreme Court, by presenting it as 'one of the viewpoints to be considered', has recognised that courts may base their originality analysis on it, it is not unlikely that the rule enters the mind-set of judges who must decide on the copyrightability of works, as the above cases illustrate. Thus, it cannot be excluded that courts assess the originality of a work by ascertaining whether it is virtually unrepeatable, rather than by examining whether it results from the author's free and creative choices.

Still, there are examples of courts adjourning a ruling if they want more information about the 'chain of authorship to copyright owner'. In its interim decision in the case of *Inspirion v. Pokonobe et al.* (2011), for instance, the District Court of The Hague required the defendant, the producer of the tower game 'Jenga', to deliver proof of the chain of title. Although this was not to examine the author's role in creating the work but to demonstrate copyright ownership, the final verdict (2012) reveals that, in the end, the court took notice of the right owner's statements on the chain of title about how the author had made own, subjective choices in the process of creating the game. However, this did not help the plaintiff who claimed that the 'Jenga' game could not attract copyright. The court found both the design of the game and the elaboration of the game concept to be sufficiently original to attract copyright, thereby arguing that 'other choices are possible'. Competitors could, for example, make the tower round or rectangular. As observed above, while other creative choices are probably feasible, in general, the creative space for designing a game like 'Jenga' is restricted. A round or rectangular stacking tower most probably has entirely different

stacking properties, so the shape of the game clearly affects the play. Hence, the court could have entertained a much more critical approach to the question of originality in this case.

Moreover, there are cases where the courts deny copyright protection to a work while the authorship status is obscure. In the *Melano v. Quiges Fashion Jewels* case (2013), for example, the Court of Appeal of 's-Hertogenbosch dismissed a claim for copyright in pieces of jewellery with interchangeable coloured elements on the ground that the plaintiff insufficiently substantiated the authorship of the jewellery and the required personal stamp of the author. This stands in contrast to the *SEVV v. AY Illuminate* case (2010), where the District Court of Amsterdam held that the plaintiffs, of which it was sufficiently convinced that they were the actual creators, had made creative choices in designing decorative lamps with comparable, interchangeable elements.

In the end, the outcomes of court proceedings will obviously depend on a variety of factors, including the value of the case, the resources available to argue it, the way the facts are presented to the courts, the strengths or weaknesses of arguments entertained by lawyers defending the case, et cetera. However, the manner in which the originality test is applied and interpreted is clearly also of relevance. As can be derived from the case law above, courts do not consistently and systematically review the rudimentary questions of who is the author of a work and whether free and creative choices have been made in the course of its creation. This is remarkable. If courts need to resolve whether an intellectual creation is truly the author's own, as the CJEU's originality test seems to imply, then it would appear that these questions must be an integral part of the analysis of whether or not a work qualifies for copyright protection.

Personal touch in collaborative works

The reflection of the personality of authors seems more difficult, if not impossible, to identify in large-scale collaborative productions. Traditional examples are film, TV and theatre productions. Often, but not always, these are created within more or less tightly organised structures with a more or less specified division of roles among the actors involved. In the online environment, examples abound of productions that are co-created within online communities. This includes open source software and collaborative projects like Wikipedia and other wikis. Outwardly, these projects have a less strict division of roles, but that does not mean that they lack organisational structure. On the contrary, within Wikipedia, there

is a complex hierarchical division of developers, stewards, bureaucrats, administrators, registered users, and anonymous contributors, which is not immediately visible (Pink, 2005; Reagle, 2010, pp. 126–127; O’Neil, 2011, p. 314). Furthermore, online communities often share a set of norms and ethics, guided by principles of etiquette on how to work with others in the community and by requirements on attribution, modification and exploitation of the output (Kelty, 2008; Reagle, 2010). This illustrates that in online collaborative projects, there is also control over the manner of participation of individual contributors.

Other examples are user-generated productions that involve the public in creating a movie, book, song or other type of work. Sometimes, these projects are led by known artists, such as Paul Verhoeven’s film project *Entertainment Experience*, which won an International Digital Emmy Award in 2013. This project involves the audience in creating the script and scenarios, composing the music, acting, directing and filming and editing the final product. In the end, two movies will be created: one completely user-generated movie and one user-inspired movie directed by Paul Verhoeven and his team. Other examples are the twitter book *Wie een kuil graaft*, which was drawn up by Simon de Waal on the basis of hundreds of tweets of different people, and the *Koningslied*, a song composed by John Ewbank for the instalment of King Willem-Alexander of the Netherlands, to which many citizens contributed by proposing lyrics. But there are also myriads of examples of user-created productions that do not involve one or more main artists directing, editing or finalising the end-results, but that purely rely on self-governance and editorial control within creative communities.

When it comes to ascertaining the personal touch of authors in collaborative creations, it seems that a distinction should be drawn between works created under the direction or guidance of one or more leading authors and works of which it is nearly impossible to identify who of the authors were in creative control. For the purpose of establishing *whose* personal touch is reflected in the work, so as to resolve whether the threshold for copyright is met, it is convenient if one of more creative leaders can be identified, as it seems reasonable to assume that, one way or the other, they will have left their personal imprint on the work. On the other hand, the fact that no creative leader can be identified does not mean that works produced by large-scale creative communities lack originality in a copyright sense. For the latter types of works, it is more suitable to assess the group level creativity than to unpack the creative choices made by the various individual creative co-contributors when it comes to ascertaining the existence of creative space and how is it used.

The personal touch of distinct creative leaders

Who counts as a leading contributor to a joint work depends on various circumstances and must be determined on a case-by-case basis. Legal rules on co-authorship are not necessarily useful in drawing distinctions between co-creators, as the focus must lie on identifying the natural creative persons who are the source of the work's original character. Furthermore, as Lionel Bently's chapter in this book clearly shows, there may be a disparity between who legally counts as a co-author and who is recognised as a co-creator in specific businesses or particular fields of practice.

In general, however, it seems that artists whose names are attached to a work, such as Paul Verhoeven, Simon de Waal and John Ewbank in the above-mentioned examples, can be reckoned among the leading creators, unless they have merely lent their name and reputation to it for marketing or identification purposes. Yet, if they are seriously involved in the creative process, they probably have had an important, if not ultimate, saying in the creative decision-making. This is relevant, because the personal touch of authors who had a final say on the finished product is likely to reflect better in a work than the personal touch of those who made relatively small creative contributions.

This is also recognised in contemporary cinema, where the director is often assumed to be the creator who has the 'final cut' and thus deserves to be credited as the main author of a film, even though many other creators collaborated on it. According to this *auteur* theory, 'there is a guiding, dominant, creative identity that is responsible for the essence and personality of the work', such as the film producer or actor but, more frequently, the director (Cahir, 2006, pp. 86-90). It is debatable whether such an *auteur* cinema concept fits new forms of filmmaking, including user-aided film projects like the *Entertainment Experience*. Probably it would still fit the user-inspired movie that Paul Verhoeven directs, but not the entirely user-generated version that comes out of the project. It may not be easy to establish who counts as authors of the latter types of productions, or whose personal imprints they reflect. As Paul Sellors has argued with respect to collective authorship in film, the question of who counts as an author ultimately depends on the contribution that is made to the filmic utterance, whether that be 'the film's authorial body, [or] the number of authored components that contribute to the overall film' (2007, pp. 269-270).

The fact that a main artist or director leads a project does not mean that he or she is solely responsible for making creative choices. Except perhaps for the twitter book, many individuals were creatively involved at

different stages of the user-aided projects mentioned above. For example, John Ewbank worked together with Dutch artists like Alain Clark, Guus Meeuwis, Jack Poels and Daphne Deckers in arranging, editing and writing the lyrics for the *Koningslied*. Paul Verhoeven's *Entertainment Experience* likewise involves a team of creative specialists including an art director, a casting director, a scriptwriter, a script doctor, and a composer.

The question remains, however, whether the creators assisting the principal artist will necessarily also make creative choices that are expressed in the final product's form. Whether creative collaborators can thus leave a personal imprint on a finished work depends on the nature and closeness of the collaboration. Vera John-Steiner writes in her book *Creative Collaboration* that, through intellectual and artistic collaboration, individuals can develop 'thought communities' in which the participants 'construct mutuality and productive interdependence' with the aim 'to develop a shared vision as well as achieve jointly negotiated outcomes' (2000, p. 196). 'Thought communities' of this kind vary from loosely organised distributed collaborations with a common interest, such as online discussion forums; to symbiotic partnerships dividing labour 'based on complementary expertise, disciplinary knowledge, roles, and temperament'; to steady family collaborations with flexible and interchangeable roles; to integrated collaborations where partners interact during 'a prolonged period of committed activity' with a 'desire to transform existing knowledge, thought styles, or artistic approaches into new visions' (*ibid.*, pp. 197–204).

It seems that the stronger the creative collaboration is, the more the final work will reflect the joint personal imprint of the collaborators. Eva Novrup Redvall describes this clearly in her work on screenwriting in Danish filmmaking (2009). She followed the scriptwriting process of the feature film *Lille soldat*, on which director Annette K. Oleson and scriptwriter Kim Fupz Aakeson worked together 'all the way from an original idea to not only the final draft of the script, but also to the finished film with the writer also often being brought in during the "rewriting" of the film in the final editing' (*ibid.*, p. 36). The film being based on a shared vision of director and scriptwriter, she concludes that such intense collaboration challenges 'the traditional notion of a film being the personal statement of one auteur' (*ibid.*, p. 52). While the director still had the final say in the decision-making, 'the finished film is very much the unique result of two people with complementary skills ... creating something that they could never have created by themselves' (Redvall, 2010, p. 76).

This raises the question whether joint subjective traces of co-creators also count as a reflection of the 'personal stamp' necessary for establishing

copyright protection. It seems that copyright law indeed recognises a personal stamp, not only of individual creators, but also of groups of creators. Otherwise it would be impossible to explain how it could protect works of co-creators who constructed a hybrid subjective work on the basis of a joint vision. At the same time, however, it seems that the larger the group creation is, the more awkward it is to require a reflection of a 'personal stamp' of the creators as a condition for copyright protection, as the next section on large-scale (online) creative collaborations will illustrate.

The personal touch of contributors in creative communities

The requirement that copyright only vests in works that bear the personal imprint of their creators does not correspond well with creations that are produced by a myriad of different co-creators. How can the user-generated movie created in the context of the *Entertainment Experience* project reflect the personal touches of the numerous contributors who sent in their suggestion for a plot, the script, the music or perhaps even actual film footage? How about the persons who submitted tweets for the twitter book or lines of lyrics for the *Koningslied*? In these examples, it can still be asserted that the principal artists have left their personal imprint in the work, but in many other examples it is difficult to identify the leading contributors. That is frequently the case with programmers developing open source software and contributors writing entries on Wikipedia. Socially, culturally or economically speaking, such group creations are certainly as significant as other types of creations, but from a copyright perspective, they sit quite uneasily with the requirement that they must reflect the personal touch of their creators to attract protection. Although copyright has never been denied on these grounds, because usually courts merely take account of the existence of creative space without observing the contributions of actual creators (as was set out above), it is fairly remarkable that such large-scale creative collaborations are not well accommodated in the wording of the 'author's own intellectual creation'-test for copyright.

Even a small individual contribution can be copyrighted on its own accord, if it is the author's own intellectual creation that somehow reflects his or her personality. In the *Infopaq International* case (2009, §§ 46–47), the CJEU held that the expression of the author's intellectual creation can be reflected in isolated sentences, or even parts of sentences, of a work such as a newspaper article. This means that, to the extent that copyright applies, permission may be required for including individual contributions in a joint work. For works created in online communities, such permission is usually explicitly or implicitly given when the contributions are submitted. That

is not to say, however, that authors whose contributions are used would then immediately also be entitled to copyright protection in the joint work. Whether that is the case depends on legal rules on co-authorship, which vary between different jurisdictions (cf. Ginsburg, 2003; Van Eechoud, et al., 2009, pp. 236–243; Margoni and Perry, 2012).

Irrespective of the rules on co-authorship, for the purpose of establishing whether the originality threshold is met, it is immensely difficult to identify the personal touch of each individual contributor in insignificantly small parts of a final production, such as parts of a sentence in a twitter book or in lyrics of a song, even if, in isolation, these parts would reflect (some of) the author's personality. In the broader creative context, such small individual contributions merely constitute the building blocks from which the final work is created. This may be different, however, if a personal contribution is independently recognisable and occupies a prominent place in a work, for instance, as the opening line or refrain of a song. In such case, the work probably will reflect the personal touch of the individual creator who contributed the specific lyrics.

The difficulty remains how to deal with large-scale collaborative productions, such as entries on Wikipedia and open source software, which are often created by numerous, sometimes anonymous, contributors and which are constantly being updated by other, subsequent contributors. Here, the problem is not only to ascertain the identity of the different creative co-contributors, but also to determine the 'work' or 'unit' of which the original character is established. As is argued in Van Eechoud's chapter on adaptation in this book, for these types of works (as well as for drafts, versions and spin offs of other types of creative works), there is an important temporal aspect to the determination of originality. Because the group of co-creators changes over time, the question is at which point in time is the original character tested?

The example of Wikipedia can illustrate this. When a new Wikipedia entry is started, it will almost certainly reflect the personal touch of the first contributor (unless he or she has copied it from another person's work). The personal imprint of subsequent contributors that substantially change the entry or add sections later on may perhaps also still be recognisable in it. However, the more the entry is elaborated on, the more pertinent the question becomes how much space is left for subsequent contributors to leave a personal stamp on it. Being part of a group effort not only creates restrictions for individual choice, but succeeding contributors also seem to be constrained by the creative choices that others have made before them. Over time, the entry may undergo changes by so many different people

that recognisable personal imprints of earlier co-creators can completely be erased by alterations of later contributors.

This shows that it can be very challenging to ascertain whether a Wikipedia entry is sufficiently original to attract copyright protection. Perhaps this can be meaningfully done only at the stage of a copyright infringement analysis, when it is exactly known from which version the allegedly infringing work is copied. However, even then, the requirement that Wikipedia entries must bear the personal imprint of their creators to attract copyright may raise difficulties. If this requirement is interpreted too literally, this may imply that, through the course of time, an entry that once attracted copyright protection may lose protection, should the personal touch that links the entry to the various co-creators have evaporated due to successive changes. Moreover, if too much weight were put on the constraints faced by subsequent contributors who elaborate on existing entries, then copyright's originality test would arguably set a higher threshold for large-scale collaborative works than for single-authored works. It seems that these are unjustifiable consequences, which copyright law does not wish to draw.

Accordingly, the 'author's own intellectual creation'-test seems inapt for determining the eligibility for copyright protection of large-scale collaborative productions, at least as far as it requires an unpacking of creative choices of individual co-contributors. If copyright would depend on how the personality of individual co-creators is reflected in a collaborative work, then this could have the unintended result that no protection may be granted, if due to the large number of contributors or the successive changes that have been made over time, the work unduly expresses the personal touches of the various co-contributors. For large-scale collaborative productions, it would be better to focus on group level creativity when it comes to ascertaining both the existence of creative space and how it is used. The increasing body of literature on group creativity (e.g. John-Steiner, 2000; Paulus and Nijstad, 2003; Sawyer, 2007; Mannix, Nealeand and Goncalo, 2009) can perhaps provide helpful guidance in this respect.

Conclusion

Originality in copyright law is a loose, but certainly not a meaningless, criterion. To attract copyright, a work does not have to be new, innovative or unique in comparison with other works in the same symbolic domain. The only requirement is that the work is the 'author's own intellectual creation'. Drawing upon studies in the humanities and social sciences,

this chapter has reviewed copyright law's originality test and the 'free and creative choices' and 'personal touch' requirements that are part of it. It follows from this analysis that copyright law's understanding of originality can only partly be informed by aesthetics and creativity studies. In these disciplines and sub-disciplines within them, the meanings of 'creativity' and 'originality' are much more vague and plural than in copyright law. Moreover, they generally apply a more novelty-oriented originality test that requires works to creatively stand out against comparable works in the same domain. Thus, other than in copyright law, where originality is tested solely on the basis of a work itself, most disciplines in aesthetics and creativity studies treat originality and creativity as relative or comparative concepts. If a novelty-oriented originality test were introduced in copyright law, this would completely overturn the core principle on which the system rests, namely that a work attracts copyright as long as it can be regarded as the own intellectual creation of the author.

Even so, the humanities can provide some valuable insights to reach more fine-tuned decisions about protecting original works of authorship. If attention is focused on the autonomy that authors enjoy in creative processes, then it becomes apparent that, in practice, it is not always a given that a work results from the author's free and creative choices. Creators are often constrained by audience expectations (e.g. about a logical organisation and order of things), trends, rules of the genre, utilitarian considerations, et cetera. Apart from excluding from protection elements of works that are technically or functionally defined or that resemble ideas rather than expression, however, Dutch courts do not systematically examine whether creative choices were made freely or whether they were informed by outside constraints. They merely look at the available creative space, without observing whether the creative autonomy was inhibited in any way. That is remarkable. If free and creative choices made within the available space are part and parcel of the originality test, then courts need to acknowledge this in their analysis of copyrightability and dismiss those elements of a work that leave no room for creative choices or that are inspired by other motives than creativity.

This does not mean that in cases where creation is guided by technical or functional considerations or audience expectations, authors cannot produce works with an own, original character, as the Dutch Supreme Court confirmed in the *MB v. Mattel* case about the copyrightability of Barbie dolls (1992). However, to determine whether a functional work attracts copyright, it cannot merely be observed whether there was space for making free and creative choices. Such space almost always exists, at least to some degree.

To demonstrate originality, the question should be answered whether the author has made use of the creative space to produce an intellectual creation that can be considered the author's own. For this purpose, courts should take more account of the creative decision-making process. In addition, the law could perhaps impose a higher burden of proof on authors who seek copyright protection to better substantiate their claim by demonstrating their use of creative space in expressive form.

Moreover, the 'author's own intellectual creation'-test for copyright is so tied to the author as the individual creator of a work that it raises difficulties for determining the eligibility for protection of large-scale collaborative productions. The requirement that copyright only vests in works that bear the 'personal imprint' of their creators is especially problematic for group creations. Perhaps such a personal imprint can still be assumed if a joint work involves one or more creative leaders who have a final say on the finished product. However, if no main authors can be identified or if the work is in a constant process of evolution, as is typically the case for Wikipedia entries and open source software, the current originality test creates problems. A first difficulty arises in relation to the question at which point in time is the original character tested. Since the group of co-contributors changes over time, this is a relevant question if the individual contributions matter for ascertaining originality. Taking apart the creative contribution of each individual co-author would moreover create a supplemental set of functional limitations at the level of the individual, because being part of a group effort undeniably creates restrictions for individual choice. This would imply a higher threshold for joint works than for single-authored works. Since copyright must not punish group creation, when it comes to ascertaining the existence of creative space and how it is used in large-scale collaborative productions, the originality test should rather focus on group level creativity than on individual creative choices.

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Adapting the work

Mireille van Eechoud

When the Dutch government commissioned official portraits in the run-up to the investiture of Willem-Alexander as king of The Netherlands in 2013, artist Iris van Dongen was among the twelve artists asked to make a study. She based her work on a photograph she had found on the internet, without informing artist-photographer Koos Breukel, let alone asking him permission. To the average observer the similarities are striking. Van Dongen and two other artists went on to win the competition to make a state portrait of the new king. Breukel was not amused to see Van Dongen's study exhibited in the Rijksmuseum in Amsterdam. A public row ensued (Ribbens, 2014), which ended not in court but with apologies and a settlement: Van Dongen gave Breukel the study on loan (Mondriaanfonds, 2014).

More famous examples that did make it to the court room are controversies over art in the US. The high visibility legal actions against Jeff Koons and appropriation artist Richard Prince come to mind. Both were sued for taking pre-existing photographs and then turning them into different artworks – Koons created the *String of puppies* sculpture, Prince produced the collages and paintings in the Canal Zone exhibition using Cariou's Rasta images. Koons was held to have infringed Art Rogers' copyright in the photo (*Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)). In the Prince case the district court found copyright infringement, but on appeal Prince's fair use defense was honoured. The appeals court found that under applicable US copyright law standards most of the collages are sufficiently transformative and therefore not infringing.¹ The works give 'Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's' (*Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), p. 15). Of the five works which only show minimal alterations compared to the source photographs, the appeals court remanded for the district court to make the call on fair use (see Allen 2013 for a compilation of all court documents). The court never had to because Prince and Cariou agreed a settlement, the details of which remain undisclosed (Boucher, 2014).

These are US cases, and the European legal traditions that I will focus on here recognise certain free uses that under US law would constitute 'fair use', such as parody and quoting for purposes of criticism or review. But generally speaking, the copyright laws of European countries know only a limited number of exempt uses, setting out exactly which acts do

not require authorisation from the copyright owner. What this implies for the legality of various kinds of borrowings, adaptations and appropriations will be taken up later.

Most copyright lawyers in Europe would probably have little trouble arguing that takings of the kinds described above constitute an infringement of the copyrights in the source works. Artists themselves obviously hold a range of different beliefs about the freedom they have (or ought to have) to borrow. Richard Prince challenges the notion of intellectual property outright. That was never more obvious than from his recent piece, a faithful copy of the first edition of J.D. Salinger's *Catcher in the Rye* in all respects but authorship credit: Prince substituted his name as author (Gordon, 2012).

Marlene Dumas based her painting *Nuclear Family* on a photograph by (friend) Van Noord, who incidentally was rather pleased to find his work had inspired hers. When asked whether this was not plagiarism Dumas responded: 'In my view plagiarism is a literary term. You can copy a text literally, it stays the same medium, but my painting is built out of strokes of paint, it is such a different "thing". You can see this best when you show a detail of the painting next to a detail of the photograph. Then the differences appear instead of the resemblances. They are two worlds.'² (quoted in Cohen, 2014). From the perspective of art this might be true. The medium and genre in which a work is expressed matter to artists when it comes to the acceptability of borrowing.

Copyright laws have much less nuance. The author has the exclusive right of copying and adaptation, to which there are limited exceptions. In popular culture too, the rigidity of copyright notions is at odds with social practices of borrowing. The rise of 'user generated content' such as fan fiction, video parodies, artifacts in virtual games, blogs and music remixes has led to intense debate on the need for more flexible copyright law, a cause for which Stanford law professor Lessig is a celebrity champion, authoring influential books such as *The Culture of Ideas* (2002) and *Remix* (2008). The rise of social media platforms shows it is now common for individuals to construct and communicate online identities. We do this not just by producing our own texts. The copy/pasting and forwarding of image, text and audio is an integral part of it too. The distinction between writing and rewriting blurs. Continual processes of writing and rewriting are key features too of what in recent years has become mainstream social production: large-scale networked collaboration to create information resources (Wikipedia is a prime example of course) and software. Copyright laws have not kept pace with these developments.

My focus in this piece is on the interplay between the legal concepts of work, copy and adaptation in light of the now ubiquitous 'new' forms or genres of works that online networks enabled. Can European copyright law accommodate the increased fluidity of some of these work genres? What avenues might be taken to attenuate the gap between legal and social practices? Is a more flexible system of limitations enough? Or do we need a wholesale rethink of the work concept? Might a more relaxed notion of copying and especially of adapting suffice? What would that mean for the kind of copyright infringement analysis courts engage in? My ambition is to explore potential avenues for reform, and in doing so take on board some insights from non-legal disciplines, notably genre and adaptations studies.

In the first part of this chapter I highlight the relationships that exist in most laws between the status of copies and adaptations, and discuss some challenges with the notion of adaptation when it comes to fluid works. In the second part, the focus is on how precisely the relationship work, copy, adaptation is encoded in copyright law. As all EU Member States share the norms of the Berne Convention for the Protection of Literary and Artistic Property of 1886, I start there. But the Berne Convention and its satellite WIPO Copyright Treaty of 1996 show the signs of being the product of more than a century of multiple rounds of drafting and political compromise: its treatment of adaptations is patchy.

The making of copyright policy is a thoroughly European affair because of the effect diverging national intellectual property laws have on the common market. Still, twenty-five years of piecemeal harmonisation has resulted in a corpus of directives that leave plenty of uncertainty about the scope of the right to control adaptations. I will therefore consider how a number of laws of EU Member States shape the relationship between work, adaptation and copies and how this affects infringement analysis. In the final third part, I will examine some roads that might be taken to effectuate changes to the law.

Fluid works, discrete adaptations

Transformative, derivative, secondary, reworked, reproduced, translated, recast, altered, arranged works: these are but a few (translations) of the terms used in law and beyond to describe what I shall denote as 'adaptations'. For students of literature and film, the latter term might have a strong connotation with the practice of creating a film on the basis of a novel or play (or vice versa). But I use adaptation as the more general term

that covers the realm beyond mere direct copying, that of the reworking of works whether in text, image or sound. When I speak of 'copying' it refers to taking verbatim or literal parts.

Traditionally, a distinction is made in law between copying a work and adapting it. The exclusive right to copy (reproduction) essentially pertains to the fixation of a work in a tangible form (Spoor, 2012, p. 206). Copying then is the more straightforward act that requires the author's permission. It is the production of 'mechanical' copies of the work in the analogue world, as well as digital ones. It might be a complete copy or a partial one. It might involve a 'technical' kind of format shifting, like encoding a music file in a different file-type, or resizing an image to make it fit a certain layout.

If the work is modified in other ways, as was done in by artists Koons, Dumas, Prince and Van Dongen, the relationship between the earlier and later work is more complex. The right of adaptation is about changing the work as an immaterial object, that is the original intellectual creation that is taken to exist separately from the (physical) form. Whether modification without permission infringes depends on the treatment of elements or features that give the source work its original character. In a nutshell, if on comparison enough characteristic elements of the source are recognisable in the later work, the latter is infringing. A change of medium, or reworking in the same medium offers no escape. Unless of course the source work is no longer in copyright, or a defense is available under the limitations recognised by the applicable law, for example on copying for private study, on free use for parody purposes or incidental uses.

The distinction between copies and modification matters for two reasons. The first is that copying does not give rise to new rights, whereas the making of an adaptation often will. Standards of originality required for copyright protection are low, so the adaptation will qualify as a protected work itself. The second reason is that copying without permission – in whole or in part – will normally infringe whereas creating something on the basis of another work without literal copying might not.

A modification might qualify as a protected work in its own right, the second author being the copyright owner. A layering effect then arises, because with each exploitation of the second work the rights in the source work are at play as well. In principle this layering can build up over subsequent adaptations, of adaptations, of adaptations, until such time when the resemblance between earlier and later works are so remote as to not be legally relevant anymore. The notion of adaptation makes sense in situations where there is one source work, and a follow-on creation that comes distinctly later in time. The concept becomes difficult to operationalise

if there are multiple source works involved, or if a 'work' is continually updated or consists of versions that are created simultaneously or in quick succession. Think of the edits to Wikipedia entries, or daily updates of many software programmes. Does it make sense to view each version as a subsequent adaptation of the first version, or is there a web of adaptations?

In the sphere of the arts, collages are a good example. If a collage contains bits of different pre-existing works, does that make the collage an adaptation of each source work? And what to make of interactive works, like 'database documentaries' that consist of a series of tracks or guided paths through one or a number of (virtual) databases containing various types of items (e.g. static text, image, sound, live feeds) that allow the reader/viewer to 'create' his own documentary (Burdick et al., 2012)? Is each 'path' a copy or adaptation, and of what exactly? What constitutes the work in such cases, all of the potential instantiations combined? Copyright laws provide no clear answers because of its traditional orientation on materially distinct forms. Although what copyright ultimately protects is the (immaterial) intellectual creation, for assessing the work's boundaries it is still easiest to consider a distinct material form.

In the history of copyright, technological developments have always caused debate about how (and if) copyright laws should accommodate new kinds of cultural production. But the problem was never really so much with the form, the boundaries of new works. Notable instances are the debates on photography in the 19th century, film in the early 20th century and computer programmes from the 1970s onwards. In all these cases, there was initial hesitation about bringing them into the copyright domain because of their perceived 'functional' or 'technical' character – as opposed to aesthetic qualities. Ultimately all were accepted into the fold. Reasoning by analogy proved a powerful tool: Photography is similar to graphic art, painting, and other types of imagery that copyright already protected. Once photographs were accorded work status, then surely films – sequences of images – must benefit too.³ Computer programmes are forms of text, and copyright protected all kinds of writings, so authors of this new form should not be discriminated against, the argument runs.

What of the transition from analogue to digital then? Confronted with new work forms spawned by digital technologies, copyright scholars in the 1980-1990s considered how 'multimedia' works consisting of image, text, sound and software fitted in the copyright system, and whether computer-generated productions posed particular problems of authorship and originality. In the main, again through reasoning by analogy, the conclusion was that there was no fundamental problem with work status. There might be

difficulties with the application of national rules written for specific genres of works, e.g. how to apply specific national rules for co-ownership in film to multimedia productions, but no fundamental problems were foreseen.

What the transition from analogue to digital meant for the concept of a work as a stable, clearly identifiable entity seems to have remained below the radar of mainstream legal scholarship for quite some time. Although in most instances, it will remain easy to identify a 'discrete work in reality' (*Hyperion Records v Warner Music*, cited in Griffiths, 2013), there seems to be a growing number of situations in which it becomes difficult to do so. Works become dynamic rather than static. The modular production of works, constant updating and revising, and open-ended nature of creations pose challenges to the concepts of work, copy and adaptation. David Sewell (2009) recounts how since the 1990s the openendedness and incompleteness of digital work(s) is often celebrated in literary studies and new media studies. Academic publishers of course struggle to deal with these digital born objects. The prevailing expectation among authors and readers alike still is that a publication has to be 'done' before being published.

Especially in networked collaborative environments, the notion of a stable, finished work is problematic. Legal notions of work and adaptation might not have changed yet, but practice has adapted to the new realities of networked digital production already, as is evident from succesful peer production projects. The open-ended collaborative creation that characterises the famous encyclopedia Wikipedia and open source software projects like Linux, but also modular e-learning resources like Openstax⁴ is only possible because of 'copyleft' collective management schemes: the inventive use of copyright to impose standardised terms of use across communities or contributors and users that foster follow-on creation and prevent contributors from making legal claims to control adaptation of their contributions. These strategies make the identification of discrete intellectual properties of less importance – although attribution of (author) credit is an important element in open source and open content communities. Another view is that the recourse co-creating communities have had to take to 'anti-copyright' models shows just how inapt core concepts of copyright have become for these new forms of creation. Kelty (2008), Berdou (2010) and Reagle (2010) all analyzed the role of 'copyleft' models in collaborative communities. Many members have an extraordinary level of copyright knowledge, and need to have this to sustain collaborative production.

The examples above illustrate that in today's digitally connected world we see large-scale open-ended intellectual creations that are perhaps more accurately understood as processes, or information services, or libraries,

than as discrete works of authorship. But at the same time, we also witness increasing atomisation: short communications such as tweets, RSS feeds of news headlines, alerts of all kinds. Short as they may be, these snippets represent economic value and their use is increasingly the subject of dispute, hence the tendency to accord them work status. Newsmedia in particular claim protection against copying (or at least compensation), the *Infopaq* case before the Court of Justice EU being a well known example. Copyright laws generally protect short works, if they are long enough to show original character, but a pertinent question is what constitutes an independent work, and what is merely part of a larger work. As we shall see later, for the assessment of whether copying constitutes infringement this is a highly relevant question. I turn now first to the question how the right to control adaptations is expressed in international norms and national copyright laws.

The adaptation right in (inter)national law

On a conceptual level, a distinction between ‘mere’ copies, ‘adaptations’ and free uses shows up in many national copyright laws. But the way in which these are given shape in concrete legal provisions, the terminology used, and the level of judicial interpretation required to make sense of them – especially in times of rapid changes in information markets and technologies we might add – is quite diverse, as we shall see throughout this chapter.

The Berne Convention

The 1886 Berne Convention obliges its signatories to protect foreign authors by granting them a number of communication rights (public recitation, broadcasting and the like, articles 10bis through 11ter) as well as the right to authorise reproductions (article 9). The current general right of reproduction was not introduced until the Stockholm revision of 1967 (Ricketson & Ginsburg 2005, at 8.104). From the beginning, the Berne Convention contained provisions that dealt with certain kinds of adaptations, over time the rights were expanded. Unlike the national laws of countries such as France, Belgium and The Netherlands, the BC does not classify adaptation rights as a subcategory of the reproduction right.

In its current wording, article 2 (1) of the Berne Convention for the protection of literary and artistic property, lists as protected

'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science'.

What the boundaries are of the domains of art, literature and science was not an issue debated in the context of the negotiations on the Berne Convention and subsequent revisions. The domains were copied from earlier bilateral treaties. Ricketson & Ginsburg (2005, p. 406-7) suggest they might be taken to refer to creations expressed as text ('literary') or image ('artistic'), while 'scientific' has no special significance but covers written expression about scientific matters in a broad sense, since copyright does not aim to protect scientific findings as such.

The list maps the kinds of works that many national copyright laws already protected (Ricketson & Ginsburg, 2005, at 8.08). The initial list was expanded in 1908 at the Berlin revision conference to include lectures and other oral works as well as choreographic works. Cinematographic works and photographic works, which were protected in some form already from the beginning, were included in the work list following the 1948 Brussels revision, as were works of architecture and applied art.

The text of the Convention shows the marks of the drawn-out battle over adaptation rights. Five provisions in the current text deal with adaptations (as works in their own right) and the right to control adaptations: articles 2(3), 2(5), 8, 12 and 14bis. They have been rephrased, renumbered and reclassified various times, as often the debate over what rights the author should have to control the creation of derivative works went hand in hand with discussion on the status of adaptations as protected works themselves. The birth of new genres and their subsequent development into independent art forms is reflected in the convention. The treatment of film is a good example. Initially, film was regarded as an adaptation of a dramatic work (i.e. play), and the making of a film an act that required permission from the owner of the copyright in the play. But such films were also seen as

a particular genre of dramatic work and were protected. Only later was film considered a 'stand-alone' genre of work, to be protected regardless of whether pre-existing works used in its creation (see Ricketson & Ginsburg who discuss the development in the history of the Berne Convention, at 8.31–8.41).

The earliest and most pronounced disagreements over adaptations concerned the proposed inclusion of a right of authors or their publishers to control any translation of books and plays into another language. In *Cosmopolitan Copyright* (2011), Eva Hemmungs Wirtén 'excavates' the debate over freedom of translation and shows how it is also linked to shifting linguistic power relations in the 19th and early 20th century. Countries such as France and the UK were net 'exporters' of literary works and supported broad translation rights. Importing countries on the other hand were interested in freedom of translation and wanted very limited translation rights if any. In Europe opponents of broad rights included Scandinavian countries and the lowlands (Belgium, The Netherlands). The idea that it was important for authors to control the quality of translations, and that this justified the extension of copyright played a substantial role in the debate. The French delegations to the various diplomatic conferences in particular fervently pushed this idea.

The Convention recognises that a 'derivative' production enjoys copyright on condition that it meets the requirements for protection: it must be an original intellectual creation in the domain of literature, science or art (Ricketson & Ginsburg, 2005). The present Article 2(3), which dates back to 1908, confirms the status of adaptations: 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.'

From this wording no test can be readily derived for establishing when authorisation is required for borrowings. As for translations, all that is clear from the legislative historical record is that the term denotes the recreation of a work in another human language (whether this also includes spoken to sign translation is uncertain, Ricketson & Ginsburg, 2005 at 8.78). Article 8 stipulates that authors have the exclusive right to authorise translations. In addition, article 12 covers the right to authorise 'adaptations, arrangements and other alterations.' The original provision in the 1886 Convention was much narrower than the current text. Subsequent changes to it made for confusing reading, and included enumerations of e.g. the dramatisation of novels into plays as indirect unauthorised reproductions. Nonetheless, it is common opinion that 'adaptations' should be constructed as a broad category (*ibid.*, at 8.79).

Not specifically named as adaptations are collections of works. Article 2(5) accords work status to 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations'. Article 14bis recognises films as works, regardless of whether they are based on pre-existing literary or dramatic works (and thus are adaptations).

The treaty further provides on the term of protection that 'Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works' (Art. 8 Berne Convention, introduced in 1908). Authors of plays, operas and other dramatic works enjoy '...during the full term of their rights in the original works, the same rights with respect to translations thereof.' (art. 11(2)).

As to the limits of adaptation and translation rights, the Berne Convention itself contains few permitted uses. The only mandatory limitation is the right to quote of article 10(1) BC. It does not contain more general defences that allow for free use or transformative use of the kind known in e.g. Germany and the US. But article 9(2) BC provides that contracting states are free to have exceptions to the reproduction right on condition that they conform to the three-step-test (special cases only, not to conflict with a normal exploitation of the work, not to unreasonably prejudice the legitimate interests of the author).

European laws

Despite a quarter century of harmonisation efforts by the EU, there still are differences among national copyright laws in the European Union on a number of aspects. One of the most striking is that the right to authorise adaptations remains unharmonised for most types of works, computer programmes and databases being the notable exceptions (Van Eechoud et al 2009, p. 84). The author's exclusive right to authorise or prohibit copying ('reproduction') is subject to the common standard of article 2 of the 2001 Information Society Directive. But many do not regard that provision as covering the right to authorise adaptations (Bently, 2011; Hugenholtz & Sentleben, 2011, p. 26; Walter & Von Lewinski, 2010, p. 964; different: Griffiths 2013). While it is indeed difficult to find support in the legislative record for the position that the EU lawmaker sought to harmonise adaptations rights in the Information Society Directive, the recent line of judgments by the Europe Court of Justice on the reproduction right (Van Eechoud, 2012) suggests that it might in the coming years construct a pan-European notion anyway.

As noted above, the legal terms used in national laws to capture instances of borrowing that require the consent of the owners of rights in the source remain quite diverse and tied up with the particular act's structure. Historically, in France the adaptation right is seen as part and parcel of the right to reproduce a work. The copyright acts of Belgium and The Netherlands follow a similar approach, although in all countries a conceptual difference is recognised between copying and adapting a work. The German copyright act has a more elaborate system of rules, including a provision on adaptations that can be freely made. The Copyright act of the United Kingdom has yet another structure. A separate provision governs common types of adaptations, but since the right to prevent copying is interpreted broadly alterations can also be prohibited on that basis.

The Netherlands

Article 1 of the Dutch copyright act (*Auteurswet*) defines copyright as the right of the author to make the work public and to reproduce it. The right to authorise adaptations or 'bewerkingen' is a sub-category of the broader right to authorise reproductions laid down in article 13 ('verveelvoudiging', literally: multiplication, see Spoor, 2012). The article stipulates that 'The reproduction of a literary, scientific or artistic work includes the translation, musical arrangement, film adaptation or dramatisation and generally any partial or full adaptation or imitation in a modified form, which cannot be regarded as a new, original work.' When is something a *new*, original work, so that no permission of the copyright owner in the source work is required?

The standard is not easily met, but has in the past been successfully invoked for parodies. The extent of copying allowed is determined by the need to identify the work that is parodied and signal that the adaptation is a parody. In contrast to the German Supreme Court (see discussion below), the Dutch Supreme Court has held that in case of famous works, less is needed to make clear which source is parodied; so for famous works the level of copying allowed is lower. It can also be argued that works with canonical status should if anything be protected less, precisely because of their status. In response to the inclusion of a parody exception in the Information Society Directive, the Dutch legislator enacted an explicit exception that is somewhat broader than the one developed by the Courts on the basis of the adaptation right (Senftleben, 2012). Another exception of particular relevance to adaptations is the right to quote for the purposes of 'announcement, review, polemic or scientific treatise or a piece with a comparable purpose' (article 15a). Article 14 clarifies that any (additional) fixation of a work or part of it constitutes reproduction as well.

Germany

In Germany, the use of material copies of works is subject to the twin rights of reproduction and of distribution ('Vervielfältigungsrecht' of art. 16 *Urheberrechtsgesetz* and 'Verbreitungsrecht' of art. 17 *UrhG*). Any material fixation that allows the work to be perceived by human senses triggers application of these rights. The rights also extend to material fixations of works in altered form, but adaptations are subject to specific rules (Loewenheim, 2010, p. 375-376). For making direct copies permission is required, but this is not so for most work categories when it comes to adaptations ('Bearbeitungen') or other transformations ('Umgestaltungen'). It is not the production as such, but the communication or exploitation of an adaptation that requires prior permission.⁵ Article 23 names a number of exceptions to this rule: dramatisation (to film), the execution of designs of sculptural works, the imitation (by construction) of a building as well as the adaptation of a database all require permission at the reproduction stage. The database provision implements the adaptation right of the EU Database Directive, presumably the other exceptions are the result of successful lobbying.

The distinction between adaptation and other transformations is not clearly established. Adaptations seem to cover instances where the source work is altered only to enable a new form of exploitation while retaining the work's identity, for example by translating a text from one language to another (Schricke, 2010, p. 512). Other alterations are 'umgestaltungen'. Like adaptations, they retain elements of the source that give it its original character, albeit fewer. In both cases, the alteration itself can be a protected work if it is original.

German copyright law recognises free transformative use: either a transformative work is 'dependent' on its source and covered by the adaptation right of article 23, or it has 'independent' status under article 24 ('Freie Benutzung'). In that case the owner of copyright in the source has no claim in controlling its use. Which side of the divide a particular creation is on must be decided on a case by case basis and has never been easy to determine. Some 90 years ago Smoschewer (1926) already observed that the division depends less on logic than on aesthetic feeling.

Landmark cases in which the German Supreme Court interpreted article 24 are *Alcolix-Astérix* (1993) and *Perlentaucher* (2010). The *Alcolix* case concerned a parody on the famous *Astérix* comics. The plaintiffs claimed that the use of the comic characters as such constituted infringement. The use of a number of characteristic features of the *Astérix* stories – such as the situation of the parody in a Gallic village and the use of fish as a weapon in fights – were claimed to infringe as well. It was not contested that the

characters of *Astérix* and *Obelix* are protected as works, separate from the actual graphic representations (drawings).

Perlentaucher was an altogether different case: it is an online journal that produced summaries of book reviews. Two newspapers sued for infringement. The Supreme Court held that that courts must assess for each summary individually if it is distinct enough from the review it summarises. Since only the expression of a bookreview is protected and not thoughts expressed, it comes down to the question whether the original wording of the book review is copied.

The free use is allowed when the second work foregrounds its individual and distinct personal character to such a degree that the original characteristics of the source fade – even though some of its original traits might remain identifiable. Of course, the more well-known the source work is, the fewer the hints that are necessary to reference it. That the reference to a (famous) work is clear does not mean that (too many) original elements have been taken, or too little own character is developed in the new work. If the ‘outer’ distance to the source is great (i.e. as regards form), the source is in effect only an inspiration. If the outer distance is not great, e.g. as will be the case in parodies for which the copying of some form aspects is typically required, but the ‘inner’ distance is great because of the independent original nature of the second work, the transformative use is also free. According to the German Supreme Court, the ‘inner distance’ test is a strict one (*Astérix*). Whether there is a case of free use must be judged from the perspective of (a hypothetical) observer who knows the source work but who also has the intellectual capacity to understand the new work.

United Kingdom

Countries like Canada and the UK initially treated rights to control adaptations quite separate from the right to copy. The black letter text of the laws still give the impression that a reproduction right and adaptation rights exist side by side. However, the continuously expanded interpretation of the reproduction right caused it to overlap with the specific adaptation provisions (Fischman, 2007). These retain value mainly as examples of the kind of derivative works that cannot be created without permission, and that themselves will typically qualify as protected works.

Section 16 of the UK Copyright, Designs and Patents Act 1988 (‘CDPA’) reserves to the copyright owner a catalogue of rights, among which are the right to copy (para. a) and the right to make adaptations (para e), both ‘in relation to the work as a whole or any substantial part of it’. The substantiality test has over the past decade or so become a qualitative test.

Griffiths (2013) describes and critically assesses this development in depth, in particular in light of the previous importance attached in UK copyright to material form (see also Ginsburg, 2006: about similar struggles in early French and US copyright to view the object of protection as immaterial). Copying or adapting a 'substantial' part is not so much about the proportion of the source work that is copied or taken (i.e. quantity, like the number of pages in relation to the whole source work), but the quality of what was taken: those elements that define the work's original character, or 'skill and labour' in English copyright language. The distinction between copying and making adaptations fades in the light of this test.

Section 17 of the CDPA considers as an infringement unauthorised copying, that is the act 'of reproducing the work in any material form'. Section 21(1) stipulates that the 'making of an adaptation of the work is an act restricted by the copyright in a literary, dramatic or musical work'. The Act is quite specific in describing what qualifies as an adaptation. For musical works it is an arrangement or transcription. For literary and dramatic works it includes e.g. translations, conversions into non-dramatic works and conveying action or story of a literary work into pictures (section 21 CDPA). Artistic works are not covered. But since section 21 further provides that 'No inference shall be drawn from this section as to what does or does not amount to copying a work', there seems ample room to regard transformative uses of artistic works as acts of the *copying* rather than *adapting* of substantial parts. It is indeed a criticism of UK courts that they only consider what is taken rather than what is added, which leaves little room for genres such as parody. There is only limited room to protect parody, namely under the fair dealing provision for criticism and review (Mendis & Kretschmer, 2013). The planned introduction of a parody exception in the CDPA will remedy this.

France and Belgium

In the French copyright system, a division is made between two broad categories of exploitation rights: the right to make the work public (le droit de représentation) and to reproduce it (art. L 122-1 *Code de la propriété intellectuelle*, CPI). The right of representation includes any form of communication to the public. The Act lists a few, including communication by recitation, stage performance and (as a later addition) broadcasting. Further instances have been elaborated by the courts, e.g. it also covers the exhibition of (art) works (Lucas, 2012, p. 286–287). A reproduction is any 'fixation' of a work in material form. What the minimally required permanence should be was controversial (Lucas, 2012, p. 256–259), but the

2001 Information Society Directive leaves no doubt it includes transient copies (e.g. in cache, RAM).

French doctrine and courts developed the notion of a right of ‘destination’ to capture the copyright owner’s claim to control subsequent uses of copies of a work, such as playing records in a club or broadcasting them (Lucas 2012, pp. 259–277). This *droit de destination* then is wider than the German notion of distribution right, and seems more akin to the Dutch right to communicate to the public. Lucas criticises the French approach and suggests the *droit de destination* be abandoned for a distribution right German style, including an exhaustian rule (ibid.). Belgian copyright law also retains the (implicit) notion of a destination right that was developed as part of the old law’s broad reproduction right. To make matters more confusing, since 2005 the Belgian copyright contains an explicit provision on the distribution right as harmonised by the Information Society Directive (see F. Gotzen, 2012, p. 12–15). The exclusive right to authorise reproductions also covers translations and other adaptations, says article 1 (1) Belgian *Auteurswet*.

Partial reproduction requires the author’s consent in both jurisdictions. Examples from French caselaw include the copying of a few lines of a book and the incorporation of an image in a film (Lucas, 2012, p. 300–302). An exception to the reproduction right exists for parodies (art. L.122–5) and quotations for among other things critical, educational or research purposes. A parody must be humorous and not have the intention to harm the economic or moral interests of the author of the targeted work (Mendis & Kretschmer, 2013).

The copyright owner’s right to control the creation of translations and adaptations are corollary to the rights of reproduction and representation, and thus not distinct. Only for computer programmes is this different due to the harmonised EU rules (Lucas, 2012, p. 251, 303 ff).

The short overview of the rights of reproduction/copying, of adaptation and the exemptions for parody and quotation given above make clear that even within the harmonised landscape of the EU, adaptations are dealt with differently. In Germany and the Netherlands, the assessment of free adaptations not only considers what is taken from the source, but also what is added. UK courts on the other hand tend to focus on what is taken and thus seem more likely to find infringement. This takes us to the topic of infringement analysis. How do courts go about establishing infringement, and what are the particular challenges they face when they have to consider source works that are not fixed and stable?

Infringement analysis

Sanders (2006, p. 12) argues that the relationship between adaptation and source text is 'often viewed as linear and reductive; the appropriation is always in the secondary, belated position, and the discussion will therefore always be, to a certain extent, about difference, lack or loss.' For students of adaptation in film, literature and other arts it is better 'to think in complex processes of filtration, and in terms of intertextual fields of signifying fields, rather than simplistic one-way lines of influence from source to adaptation (ibid., p. 24). These observations are interesting because they stand in sharp contrast to how lawyers approach this relationship.

To lawyers, adaptations are not about what is lost, but about what is *not* lost. Having to work with existing legal constructions, lawyers need to be precise about identifying the 'one-way lines of influence'. The predominant view in law is that what matters is how much has been taken, not how much has been added. As Stef van Gompel in this book elaborates: when courts are called upon to decide whether a work is original, they tend to consider the creative space that was available to the author in the case at hand. If such space existed, the work is judged to be original. No particular comparison is made with other creations to ascertain originality, the existence of creative space suffices. If on the other hand courts are asked to judge whether a work infringes, they will compare the later with one very specific earlier work (Spoor, 2012, p. 207).

Any amount of direct copying will normally constitute infringement, for example copying part of a text, or a few bars of a song. The lower threshold is – according to the Court of Justice EU in *Infopaq* – where the material presumably taken does not show the original expression by the author of the source. With a low originality threshold, virtually any amount of literal copying would infringe. The case is somewhat different in case of adaptations, i.e. if not the wording but themes, plot or characters are borrowed, or when the alleged adaptation is in another medium or genre.

Some have taken the Court of Justice's reasoning in *Infopaq* as saying that copyright exists in snippets of text, that is: a snippet can be a work (I have discussed the reception of *Infopaq* and later judgments extensively elsewhere, see Van Eechoud 2012). Such a reading would allow copyright owners to carve up their work in ever smaller units, with the result that if such units were copied there would always be infringement. Laddie J., when confronted with such an attempt (before *Infopaq*) by a publisher who argued various elements of a magazine cover were independent works

judged that the cover could not be treated as a ‘millefeuilles’ with layers of different copyrights (*IPC Media Ltd v Highbury-Leisure Publishing Ltd*). In many ‘analogue’ cases there can be little doubt about what is the ‘unit’ of work, namely a focussed whole that the relevant public recognises as a discrete entity.

Dutch courts increasingly apply an ‘overall similar impression’ test. This test is in a sense a reverse test. The focus is not on first establishing what makes a work original and then looking for those elements in the derivative work. Rather, the court compares the source and alleged infringing work to determine how similar they are. If the impression is one of overall similarity and difference on minor points only, the later work is judged infringing. A major critique of this approach is that features of the work that do not contribute to its original character – because they are dictated by function, or style – should be ‘discounted’. They are not protected thus copying them is free. If the courts are not diligent in doing this, the test favours plaintiffs. Initially the overall-impression test was applied in cases involving industrial design, but increasingly it is also used to decide cases on copying of e.g. TV formats and musical works (Spoor, 2012, pp. 210–12).

The French courts approach to assessing infringement is to only consider the taking of characteristic elements by which the (initial) author has personalised the theme/idea (Lucas, 2012, p. 309). Under Dutch copyright law, the fact that only little is copied and much added is regarded as not relevant for a finding of infringement (Spoor, 2012, pp. 208–209), although one might speculate that in such cases the courts are more likely to moderate remedies sought. Likewise, UK courts also stress that to find infringement what matters is to what extent protected elements have been copied and not how (dis)similar the works are (Griffiths, 2013).

Roads that might be taken

In this section I consider in a bit more detail what we might want copyright law to do in light of the problems outlined above, and possible ways in which change could be achieved, notably by looking to transplant certain national solutions to the European level. For some questions solutions are relatively easy to design within the current copyright system, even though achieving reform might be a substantial political challenge. Others would require more profound changes and as a first step will need to be researched more in depth in a multi-disciplinary setting.

Limits of the work concept

The recent line of cases by the Court of Justice of the EU has made clear that the notion of 'work' is an autonomous concept of European law that must be interpreted and applied in a uniform manner in all Member States of the EU. As Stef van Gompel details in his contribution, the originality test that the Court elaborated is that copyright protects the author's own intellectual creation, that is: the author must give the work a personal stamp through the exercise of free and creative choices (*Infopaq* 2009, *BSA* 2011, *Football Association Premier League* 2011, *Painer* 2011, *Football Dataco* 2012, and *SAS* 2012). This focus on originality does not give us a comprehensive definition of what a work is.

What are the boundaries of a 'creation'? What defines the domain of intellectual creations that copyright covers in the first place? In *Football Dataco* for example, the Court observed that football matches as such cannot be copyrighted because players must follow the rules of the game so the requisite creative freedom is not present. By grasping at the straws of creativity the court in my view dodged the more difficult questions of what productions count as being in the 'literary, artistic or scientific' domain and whether speech of any genre could be a 'work' (Van Eechoud, 2012).

As we have seen, the Berne Convention gives us examples of the kinds of creations copyright protects, but not much guidance beyond. The domains of art, literature and science are commonly understood in copyright to be extremely broad and not (or no longer) tied to more limited meanings they might have in everyday language. Some have argued the domain is all things 'cultural' (Grosheide, 1986), or simply 'information' (Hugenholtz, 1989) but courts seem to stay away from pronouncing on the domain. In the UK, the challenge for the courts was to fit new genres into one of the work categories of the closed list of the Copyright act, which is why broader domain questions probably did not arise. Anyway, for our purposes the domain question is not the most problematic.

What is relevant is whether new forms of cultural production lead to genres that can always be fitted into the work concept. Or must we recognise more readily the limits of the work concept and not always seek to make new genres fit through reasoning by analogy? For open-ended creations I suggest just that. We might ask: Are open-ended ventures like Wikipedia just enormous draft databases? Conceptually, the problem is not that the first version created is not the 'definitive' one. After all, copyright laws have long recognised that works need not be finished to be protected. No-one

would deny the studies that the artists made for the Dutch King's portrait of state are works. The Computer Programme Directive states explicitly that preparatory works are protected under copyright. If 'drafts' are denied work status it is because the level of elaboration from idea(s) to expression is too low, not because they are not the 'finished' work. The problem with open-ended works is that they really are not like drafts – the notion itself already implies that at some later stage there will be a finished work – but a continuing work-in-progress.

We might more accurately conceive of open-ended 'works' as processes or practices. What is interesting is that in (popular) music studies and musicology the work concept – or to paraphrase Goehr, the objectified result of a special creative activity that did not exist prior to compositional activity – has come under fundamental and prolonged attack. In her influential book *The Imaginary Museum of Musical Works*, Goehr (1992) unpacked the specific historical, social and aesthetic conditions that gave rise to the work concept in what we now categorise as classical musical works.⁶ She argues it is neither necessary nor obvious to speak of classical music – let alone all types of music – in terms of 'works', despite 'the lack of ability we presently seem to have to speak about music in any other way' (*ibid.*, p. 243).

Discussing the validity of the musical work concept in popular music, Middleton (2000) argues that the focus in music copyright on the (written) composition does not do justice to the process by which music is created. Making music involves multiple creative contributors, who rely on common stock models, tune families and riffs. A score is seldom used to transmit pieces; rather this happens through oral/aural channels. The work concept, it is argued, causes law to favour scored music over improvisation, melody over harmony and rhythm, to give author-composers more power than performers. It also throws up barriers to genres that rely on sampling. To make a distinction between performance and composition is often artificial. Similar criticisms are made by Horn (2000), Lacasse (2000) and Théberge (1997).

Admittedly the idea of a work does not map onto all types of creative practices equally well. Testing legal norms against creative practices should be done more commonly, and the knowledge from disciplines outside law can be immensely helpful. A problem with much of the criticism voiced in humanities disciplines – be it music studies, literary studies, film studies or another field – is that it only helps to *deconstruct* legal concepts. Replacing them with a better alternative is another matter. What would it mean for the law for instance, to treat music production (and consumption) or open-ended peer production as a practice, or process? What is the implication of

resisting the urge to fit them into the work of authorship concept? Possibly it means that rather than having the author-work relationship at its core, the focus of law would be on regulating the information relationships involved more directly: between contributors, editors, users, and competitors. For some of these relationships we might look to special areas of law, notably consumer law and unfair competition law. But I must admit I have trouble conceiving of alternatives that still fulfil the primary function of copyright today: safeguarding exploitation rights to foster creation. I have fewer problems imagining how moral rights might be protected separate from the notion of work (but that is material for another article).

Versioning

Distinct from the open-ended nature of internet-based peer production projects is the frequent updating or versioning aspect, which characterises many other internet-based content as well. Is a continuously refreshed Facebook profile just a sequence of adaptations? Is the rapid versioning of software merely a hugely accelerated type of publishing editions?

Versioning is by no means a recent phenomenon. Musicologists' research on the manuscripts Chopin prepared for publishers shows that he often produced three different versions of the same composition for his German, French and English publishers; he did not regard one as the authentic one (Rink, 2012). In literature, Dickens and Arthur Conan Doyle are famous examples of authors whose work was routinely published in serial form. In broadcasting, the continuous, drawn-out narratives of radio soaps and other long-form narratives were deployed to create a regular and faithful audience (Hilmes, 2012, p. 279).

An important difference between old and new kinds of serialism is the sheer volume (caused by open-endedness), the short interval between versions and the fact that older versions are changed. In the case of the radio-soap and publication in instalments, the later part adds to what came before but is not meant to replace the earlier. There is no adaptation of earlier instalments.

Kelty (2008) argues that different genres are affected differently by the changing ways in which information is created, stored and distributed. In his view music production has not changed much because even with new composition and recording technologies, musicians largely mimic previous practices. Much online publishing also recreates something that looks like traditional print (e.g. e-book, magazines). But for open source and other collaborative projects the change from editions to versioning

and forking – ‘breaking away’ to continue a separate project based on the same source materials – ‘raises troubling questions about the boundaries and status of a copyright work’ (Kelty, 2008, p. 278).

A particular problem is caused by the dominant method lawyers apply to establish infringement, which is as we have seen a one-to-one comparison of works. Furthermore, whether updates or revisions qualify as a copyright work themselves – because relative to the source an original contribution has been made – will depend on how frequent updates or edits are. If updates are very frequent, changes are more likely to be minor and the latest version as not original. Obviously, ‘saving up’ modifications over a longer period (as is done in traditional book publishing) leads to a more substantial change from one version to the next. Therefore each new version is more likely to be protected as a separate work. Current copyright law favours slow change over rapid change. It is obvious why this is so, but not so obviously justifiable. Particularly when it comes to establishing authorship, a contributor that makes frequent but small contributions is less likely to be recognised as author than someone who ‘saves up’, for example. Also, it becomes more difficult to establish the point in time at which the new version is not just a copy but an adaptation protected in its own right. What, in other words, is the cut-off point for determining originality?

How might copyright better recognise the incremental nature of new forms of production? One possibility is that the one-to-one comparison of the penultimate version (source work) and the latest version (derivative work) to establish work status is replaced by comparison across a range of editions. This might sound harder to do than it is. Version control is a key feature of collaborative production platforms. All modifications can be tracked and archived. In principle then, it should be possible to compare versions and establishing which changes were made by whom over time.

Another possibility is to consider a more nuanced system of rights of attribution, a system that reflects the social norms in communities rather than the rather myopic view of authorship that traditionally characterises copyright laws. Bently and Biron suggest just that in their contribution to this book. But also beyond authorship status norms there might be more that could be done to ensure copyright law supports modern forms of collaboration. Society has an interest in fostering collaborative continuous creation of knowledge and tools, so has an interest in a legal system that enables collaboration. The development of copyleft systems for the management of collaborations in a way shows that copyright seems to do this quite well. The fact that rights can be licensed allowed copyleft models to be developed. As the use of such collective licensing schemes continues to

expand – from open source software to education, research and the arts – it is time for lawyers and field experts to consider whether there are legal norms need fine-tuning (or a radical overhaul for that matter) to safeguard the continuity of copyleft systems of copyright management.

A reigned in reproduction right

Although as was noted above, the general opinion among scholars still seems to be that the adaptation right is not harmonised, there are clear signs that the reproduction right of article 2 Information Society Directive lends itself to such broad interpretation that it usurps all types of copying, borrowing and reworking. Recall that the provision says that it is ‘the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ of a work of authorship. The provision has no internal normative brake so to speak, that prevents it from applying to uses of minor economic significance. Especially if the reproduction right will be constructed as including the adaptation right by the Court of Justice, its lack of normative meaning is troubling. We have seen that in a number of countries (Netherlands, Belgium, France) the right of adaptation is regarded as part of the exclusive right of reproduction, whereas in other countries it is viewed as slightly more separate (Germany, UK).

The reason why in the end adaptation and copying might be judged as being essentially similar acts by the ECJ is best illustrated by the Advocate General’s approach in the *Painer* case. The Advocate General’s opinion in *Painer* implies that the reproduction right of article 2 Information Society Directive does include the exclusive right to authorise adaptations. In *Painer*, one of the questions (in the end not directly addressed by the Court) was whether a photo-fit made on the basis of a simple portrait photo infringed the copyright in the portrait photo. The Advocate General observes (para 129): ‘The publication of a photo-fit thus constitutes a reproduction of the portrait photo used as a template only if the personal intellectual creation which justifies the copyright protection of the photographic template is still embodied in the photo-fit. In a case where the photo-fit was based on a scan of the photographic template, this as a rule can be assumed.’ Clearly the thinking here is that reproduction covers both direct copying and transformative ‘copying’. In *Infopaq*, the first case on article 2 Information Society Directive, the court had ruled that the reproduction right protects against the copying of parts of a text (potentially even parts of sentences in the text in question) if such parts ‘convey[ing] to the reader the originality of

a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article.' In *Infopaq* the dispute was about the taking of 11-word long snippets of newspaper articles. The copying was literal.

If the test for infringement of both the reproduction right and the adaptation right is: were characteristic elements of the source taken, then it seems to make sense to view the reproduction right as overarching. However, this leaves no room in the infringement analysis to have regard for what has been added in the adaptation. In my view, if the adaptation in its overall impression is so different from the source(s) that the source works only play a minor part in the whole, the adaptation should be a free use.

We have seen above that the German concept of 'Freie Benutzung' allows transformative uses but the test is also quite strict. If original elements of the source work are recognisable, the derived work must have a great distance in terms of genre and purpose in order to be free (e.g. a parody). The test I suggest is less strict. It is more akin to the free adaptation Lionel Bently (2011) proposes, namely 'where as a result of the adaptation or arrangement, a new work with a substantially different meaning, or of a significantly different genre, is thereby created.' Perhaps combined with the added test that the exploitation of the new work does not significantly harm the commercial interests of the original creator or copyright owner, this seems a good alternative. One thorny question is how such a free adaptive use limitation plays out in entertainment industries where trans-media storytelling is an increasingly important business model. The strategy is to take intellectual properties (such as comic characters, or a story, a toy) to multiple markets, rather than bringing a work developed for one market (say fiction books) to another market once it is successful. Examples are toymaker Mattel (Bulik, 2010) and comic publisher Marvel's ventures in filmed entertainment (Johnson, 2006). Obviously, the more trans media a company is, the less room there would be for free transformative use.

Limitations

The continued expansion of the exploitation rights of authors in European law has not been accompanied by equally robust claims to fair uses. The call for a stronger and more flexible system of limitations has become louder over recent years (Van Eechoud et al., 2009, Geiger et al, 2010, Guibault, 2010, Senftleben, 2012). In terms of feasibility, it is much more likely that more room for 'borrowing' will be effectuated through broader limitations, rather than through a narrower right of reproduction. Law professors united in the European Copyright Society have called for making limitations manda-

tory and more flexible, by giving courts the ability to develop tailor-made solutions (European Copyright Society, 2014).

In the field of limitations and exceptions, the introduction of a defence for user generated content might go some way to accommodate the by now common practice of individuals to create their own text, video and music through remixing and adapting existing works. It stands to reason that the limitation would only apply for non-commercial uses and only if there has been a substantial adaptation of the source works. Otherwise user generated content could compete with the source work. Legal scholarship could benefit from media studies to get a fuller understanding of the role user generated content plays in entertainment industry commercial strategies because the dynamics are largely unknown to students of the law. Scolari (2013) for example analysed UGC surrounding the successful TV-series 'Lost'. He found boundaries between commercial industry and non-commercial user generated content to be porous; some UGC can be acquired and elaborated by industry.

The limitations for parody and pastiche and on quotation are other obvious candidates that can be propped up so as to enable more liberal transformative uses. The European Court of Justice could take a broad reading of the exception for parody of article 5(3)(k) Information Society Directive, which leaves Member States the freedom to allow free 'use for the purpose of caricature, parody or pastiche'. National courts so far have tended to demand that the parody or pastiche target the source work. But as Dyer argues in his in-depth examination of pastiche, it is an artistic imitation of other art, not necessarily of one particular work of art, and not necessarily critical (Dyer, 2007, p. 2, 157). Erlend Lavik observes in his contribution to this book: 'Courts should be open to the possibility that a range of cultural appropriations – including parody *and* pastiche – can be transformative and culturally and artistically valuable. This is where aesthetics can be of service. It can help fill the concept of transformative use with meaningful content.' Likewise, Julie Sanders invites us to bring (literary) adaptation and appropriation 'out of the shadows', not to view them as merely 'belated practices and processes; they are creative and influential in their own right. And they acknowledge something fundamental about literature: that its impulse is to spark related thoughts, responses and readings' (Sanders, 2006, p. 160).

Lastly, there is the exception 'for incidental inclusion of a work or other subject-matter in other material' (art. 5(3) sub i Information Society Directive) that might be expanded. How likely the Court of Justice is to take the lead is uncertain however, since it has repeatedly stated that the exceptions

laid down in article 5 Information Society Directive are to be given a narrow interpretation.

There are we have seen, several potential routes. Some can be taken by courts; others would need to be taken by the EU legislator. Whatever the route to be taken, a less all-encompassing right to control copying and adaptation is called for, if the law is to keep at least remotely in step with today's practices of cultural production.

Notes

1. For my purposes, I shall not go into the details of the US fair use defense. The *Cariou v. Prince* case has drawn much attention among copyright scholars and in art circles because the district court gave a narrow reading of fair use. It held that no defense is available if the secondary work does not somehow comment on the source work, its author or popular culture. The appeals court ruled that the law does not require such comment. The four factors that must be considered when assessing whether a use infringes or is fair are (1) the purpose and character of the use (including commercial nature); (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work (Section 107, 17 U.S.C.).
2. Dumas gave the interview in Dutch. She said: 'Plagiaat is mijns inziens een literaire term. Een tekst kun je letterlijk overnemen, het blijft in hetzelfde medium, maar mijn schilderij is opgebouwd uit verfstrepen, het is zo'n ander "ding". Dat zie je het beste als je een detail van het schilderij laat zien naast een detail van de foto. Dan verschijnen de verschillen in plaats van de overeenkomsten. Het zijn twee werelden.' *Vrij Nederland*, 13 February 2014.
3. At the international level, the protection of computer programmes and databases was secured through the TRIPs Agreement (1992) and the WIPO Copyright Treaty (1996), which essentially oblige contracting states to them as literary works and collections within the meaning of the Berne Convention.
4. Openstax (formerly: Connexions) is an example of an online collaborative system designed to promote the sharing and reuse of educational content: teachers/authors can contribute 'pages' (learning modules) that can be adapted and combined into collections (text books, readers). Content is licensed under a Creative Commons Attribution license, making it freely reusable on condition that the author(s) are credited. See <http://cnx.org/>.
5. The German Copyright lists exceptions to this rule that the creation of an adaptation does not require permission, but only its subsequent communication or trade (art. 23 UrhG), e.g. turning a work into a film does require

- prior authorisation, as does executing a work or art (after a plan), or copying a work of architecture through building, or adapting a database (as the EU Database directive imposes such a rule).
6. Looking to the historic development of UK music copyright and the influence some scholars attribute to Romanticism on notions of work, Barron (2006) concludes that changes in thinking about property, notably the inclusion of intangibles is what caused the musical work concept (as score-based) to develop. The rise of a 'middle class' with an appetite for buying sheet music is the more likely cause. About the difficulty of establishing causal links between Romantic ideas in the arts and the development of legal concepts, see Erlend Lavik's contribution to this volume.

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Reassessing the challenge of the digital

An empirical perspective on authorship and copyright

Elena Cooper

Policymakers have long noted the challenges posed by new internet and digital technologies to copyright's category of authorship. As the European Commission expressed at the advent of the internet, in its Green Paper Copyright and Related Rights in the Information Society of 1995:

The traditional picture of the author as a craftsman working more or less in isolation and using wholly original materials is contradicted by new forms of creation. The new products and services are increasingly the outcome of a process in which a great many people have taken part – their individual contributions often difficult to identify – and in which several different techniques have been used [...] (European Commission, 1995, p. 25).

The perception that creative practices of the digital age often involve the contributions of many people is thought to complicate the task of identifying the author.¹ In addition, scholars noted how digital technology, in facilitating collaboration, was 'hastening ... the demise of the illusion that writing is solitary and originary' (Woodmansee, 1994, p. 25). As Martha Woodmansee expressed, this was a development that sat uneasily with a proprietary notion of authorship:

Electronic communication seems to be assaulting the distinction between mine and thine that the modern authorship construct was designed to enforce (1994, p. 26).²

This chapter³ explores these perceived challenges of the digital for copyright, through ideas about authorship that underpin so-called creative practices today. It does so through a qualitative empirical study that involved semi-structured interviews with 'artists' and 'poets' who use digital technology.⁴ The interviews sought to uncover the extent to which the participation of many people was characteristic of the interviewees' work and their views about 'authorship'. For example, is authorship of any significance to interviewee 'artists' and 'poets'? If so, who do they consider to be the author?

In situations where many have contributed, how and why do they attribute authorship to some contributors while denying it to others? Finally, why is authorship important to the interviewees, if at all, and does this bear any relation to copyright's proprietary author?

The interviewees were those listed as 'notable individuals' on Wikipedia entries for 'Digital Art' and 'Digital Poetry' accessed in May 2011.⁵ No claim is made that the interviewees are representative of all 'creative' practices involving digital technology. Notwithstanding this, I will argue that the interviews provide a basis for questioning the common assumptions noted above, thereby facilitating a more nuanced understanding of the implications of the digital.

By way of introduction, over the past decades practices involving digital technology have been characterised by what interviewee Joseph Nechvatal termed to be an interdisciplinary 'conversation' between 'computer science' and 'art', the result of which is that the parameters of 'artistic practice' changed and gave way to a 'third culture': '... these two fields are rubbing up against each other and they used to be thought of as ... discrete and separate activities and now there is a kind of third culture that is emerging out of the combination of these two areas of interest'.

In this context, Nechvatal observed that 'it's been a growing thing for creative artists to have computer science at [their] disposal and collaboration'. In the early years of computer technology, such work was inherently collaborative, involving multiple contributors each with different areas of expertise. The pioneers of such work in the 1960s and 1970s, such as Lillian Schwartz at Bell Labs,⁶ David Em at Jet Propulsion Labs⁷ and Herbert Franke,⁸ all entered a highly technical environment in order both to obtain access to technology that was not readily available, as well as to come into contact with 'scientists' who knew how it worked. By contrast, today, technology has become ubiquitous, with the result that in many instances, work that was formerly collaborative has now become solitary. Today, David Em is able to work alone from his studio or garden at home. As he explained, technology is so easily accessible that 'I don't need all those programmers and I don't need a big facility'.

Further, in certain spheres, the favoured approach is for solitary work, rather than collaboration. Loss Pequeño Glazier is director of the Electronic Poetry Center, the world's largest collection of electronic poetry which was founded in 1994,⁹ as well as being the first 'digital poet' to hold an academic chair (recently awarded by the University of Buffalo, USA). Glazier questions whether the involvement of many in producing a work of 'digital poetry' (or to use his term, 'digital poesis') can work, as it can, for example, in the

case of film, as the process of creation or 'poesis' requires involvement in all levels of the digital poem, from the computer coding, to the words and images. In Glazier's view, these are therefore best composed by one person working alone.

Notwithstanding these movements towards solitary working practices, the interviews revealed a number of instances where current practices using digital technology give rise to the involvement of many people. These are explored in this chapter in five detailed case studies.

First, there continue to be instances where 'artists' enter a highly technical environment, in order to gain access to powerful technology that is not generally accessible. An example of such a practice is explored in Case Study 1, which concerns the collaborative work of 'artist' Donna Cox and the interdisciplinary team at the National Center for Supercomputing Applications, Illinois, USA, who produce what she terms 'visualisations' of scientific data. Inspired by the philosophy of the Renaissance, which saw a convergence in the goals of science and art, Cox articulates a concept of co-authorship which encompasses the contributions of all members of the team: as she described, both those with authority over 'artistic decisions' (for example, 'colour or timing or viewpoint') and those responsible for the 'computer science' and 'formatting' of the data.

Even beyond the environment of the so-called 'supercomputers' there are other frameworks in which the interdisciplinary nature of the venture results in the collaboration between specialists in different disciplines. Case Study 2 concerns the work of 'artist' Joseph Nechvatal at Louis Pasteur Atelier, France who has worked with computer programmers so as to develop applications of computer virus algorithms, as a metaphor for biological virus attacks on cells. Nechvatal characterised such work as 'an equalised exchange' between 'art' and 'computer science': a 'collaborative union'. Yet, when it comes to determining authorship of the resulting work, this rests with Nechvatal alone because, as he explained, he is the 'project director' who has 'control' over the 'aesthetic demands' (which he sees as the emotional effects of colour and form). In contrast to the views articulated by Cox, therefore, in this context, the computer scientist is termed a 'technician', not an author.

In Case Study 3, we turn to an example of a so-called 'digital art collective': the OpenEndedGroup based in New York, USA. The collective brings together the three Group members, along with external participants, described as 'collaborators', 'consultants' and 'contributors', with expertise in a variety of different areas such as computer programming, art, film and dance choreography. The Group organise these participants in what

they consider to be a 'strict' 'taxonomy of collaboration', so as to restrict involvement in 'artistic decisions', the latter determining who are credited as the 'artists' of the piece. While attribution as 'artists' is important, the interview revealed that the Group feel uncomfortable with any notion of authorship tied to 'creation'. As Group member Marc Downie expressed, in part due to the role of technology as 'collaborator', the Group see themselves as engaging in a process of 'discovery', over which they never have complete 'control', a position that contrasts, in particular, to aspects of that taken by Joseph Nechvatal (in Case Study 2).

Another practice giving rise to the participation of many arises in the work of those who engage in what is sometimes called 'the art of not making': the 'artist' takes on the mantle of 'art director' and delegates some or all of the skilled tasks, including computer programming and other digital technological tasks, to others.¹⁰ This is a process of delegation, rather than an 'equalised exchange' (as Joseph Nechvatal's described his approach in Case Study 2). Case Study 4 looks at two examples of such works by 'artists' who delegate tasks to different degrees. First, we consider the talking animatronic sculpture installations produced by New York based 'artist' Ken Feingold, which employ artificial intelligence technology and digital synthetic voices. Feingold delegates specific tasks, for example, the making of the animatronic heads or the computer programming. This is in contrast to the broader delegation of tasks by Greek website 'artist' Miltos Manetas, in the second example that we consider which Manetas presents as 'collaborative' work: www.jesuswimming.com. In both cases, the interviewees drew analogies with the position of the director of a film, to support their claim to sole authorship. This is a standpoint which contrasts with that taken by Cox, in Case Study 1.

Finally, Case Study 5 looks at the active role of the audience or user, in interactive digital works. Tracing the early history of interactive works in the pioneering laser-disc work called *Lorna* by California based 'artist' Lynn Hershman Leeson, the case study turns to consider an example of an interactive poem by Loss Pequeño Glazier, as well as the huge interactive installations produced by Don Ritter, a Canadian 'artist' based in South Korea. There was a general consensus amongst interviewees that the audience's participation did not amount to authorship and we look at the justifications for this position.

As is apparent from this overview, the interviews revealed a diverse set of practices, and consequently a diverse set of ideas about authorship. Accordingly, this contribution resists simplistic conclusions about what these ideas should mean for law. Instead the final concluding section makes more

general observations. In addition to addressing how the interviews might refine our perceptions of the challenge of the digital, this chapter draws out some unexpected results: while there was no evidence of any influence of copyright law in informing the techniques which interviewees used to identify the author(s), law did appear to underpin a number of interviewees' understandings of authorship as proprietary. Therefore, one conclusion is that far from always a challenge, law sometimes in fact supports or even informs certain aspects of the interviewees' ideas about authorship.

Case Study One: Donna Cox of The National Center for Supercomputing Applications, Illinois

The National Center for Supercomputing Applications (or NCSA) at the University of Illinois was established in 1986 as part of a national program aimed at providing powerful and high performance computing facilities to researchers of science and engineering. Supported by the state of Illinois, in addition to federal grants, the NCSA has developed a worldwide reputation in 'scientific visualisation'. Using the computer facilities and expertise at the NCSA, simulations are made of complex natural phenomena, such as how galaxies collide and merge, how molecules move through a cell wall, and how tornadoes and hurricanes form.

Donna Cox¹¹ is the Director of the NCSA's 'Advanced Visualisation Laboratory'. She works as part of a team comprising 'artists', 'technologists' (such as computer scientists) and 'scientists', who work together to transform scientific data into graphic visualisations such as computer animations called 'visaphors'. Cox refers to the team as a 'Renaissance team', so drawing a parallel with the convergence of the goals of science and art in the time of Leonardo Da Vinci. Asked about this analogy, Cox explained that drawings by Da Vinci, while 'amazingly beautiful' were also visual representations of scientific information about anatomy or botany: a 'mirror of nature'. In a similar vein, the 'visaphors' produced by Cox's Renaissance team today are seen as 'digital visual metaphors' of scientific data. Yet, as Cox explains, as with Da Vinci, there is also 'an art ... in how we turn these numbers into pictures'. More than 'just a translation or representation of data', the creation of a 'visaphor' involves 'interpretation and design' and 'art choices'.

For example, the team produced a 'scientific visualisation' of hurricane Katrina, which caused devastation in Louisiana in 2005. The team comprised 'artist' Cox, 'cinematographer' Bob Pattison, as well as 'computer scientist' Stuart Levy. The project began by the team visiting external

scientists at the National Center for Atmospheric Research, Colorado, to obtain scientific data concerning the hurricane, recorded in numerical form. The initial meeting with the external scientists was an important one: 'We as visualisation artists needed to understand more completely about what was important about the numbers ... the question that we asked, was what is the most important feature in this current hurricane of the data that we can help to show with the data, that tells the public why this hurricane became so deadly.' The team's goal, therefore, was to produce a visualisation of the data, to capture the scientific processes that cause the 'enormous power engine of the oceans to build up': 'as the planet warms, the oceans heat and it feeds this enormous hurricane...'

In producing the 'visualisation', the members of the team were 'all playing kind of distinctive roles', reflecting their particular expertise in computer science, cinematography and art. For example, Stuart Levy's role was to 'handle' the data; it was obtained from the Colorado scientists in numerical form and it needed to be formatted so it could be used by the team. Bob Patterson, as 'cinematographer', oversaw 'the settings on a lot of the shots'. Cox's specialism was the use of colour, for example, in suggesting that the piece shows 'the sun rising and setting and the moon rising and setting and the stars to give the timeline of the life span of this hurricane'.

The result of these different areas of specialism is that 'artistic decisions' were generally seen as in the domain of Cox and Patterson, rather than Levy:

So, you have the person who deals primarily with the data, he does some graphics but leaves all the artistic decisions up to us – Bob and I. And Bob and I will get into struggles sometimes over colour or timing or viewpoint but we work it out and usually results in a compromise on something that satisfies both of us.

Despite the greater authority of Cox and Patterson in 'artistic' matters, decisions are seen as made by the team collectively. Cox described this process as a 'negotiation' between all team members. For example, there was much discussion over how to present the 'hot towers which feed the hurricane', the source of its deadly consequences: 'There are different ways of representing hot towers. We had choices ... We had different types of software that can represent the data. We had lots of dials. We can turn these dials to make some of these clouds brighter or they can just be outlines instead of dense fog ... all of those are negotiations ...'

The result of the negotiations was a 'compromise' that satisfied all team members, in the light of the overall goal: to produce something which is

‘jaw droppingly beautiful’ while also ‘informative’ in ‘[communicating] something essential about the science’. As the aim was clear, Cox considered that reaching a compromise was not difficult: ‘we definitely are willing to compromise’. Facilitating this are team dynamics of ‘mutual respect’ and ‘really listening’ to each other. As Cox explained:

You know ... whatever we are producing together, we want it to be the best and sometimes that means that your first ideas might not be that great anyway, and you see how it might play out in another way, and you just sit back and say “well that other way does look better” ... or “I’ll give you this if I can have this”. That kind of negotiation ... but the ultimate goal for the team is that it looks good and it represents the data well, and accurately [...]

The model of the ‘Renaissance team’, which operates today at the NCSA, stems from collaborative work dating back to the late 1980s. For example, in 1988, Cox collaborated with Professor of Mathematics George Francis, and a computer scientist, in producing computer graphics software that would create images visualising Francis’ mathematical theories. As Cox explained, the basic principles for successful ‘Renaissance teams’ were formulated at this time. Cox published widely on this subject in the 1980s and 1990s, and she considers that those principles have continued to underpin ‘Renaissance teams’ from that time to today.

One of the most important prerequisites for a ‘successful team’ is that it ‘has to be egalitarian’, that is all members of the team must be ‘equal players’. The consequences of this ‘egalitarian’ framework for ‘authorship’ are that all of the team members are considered ‘co-authors’ of the resulting ‘visualisation’. This conclusion flows from the characterisation of the team ‘as a unit’, comprising ‘in and of itself ... the collection of very unique guilds’ such as ‘artists, film makers, software writers’. As Cox accepted during the interview, this is a concept of authorship which appears closer to Arts and Crafts ideas which circulated in the 1890s, involving recognition for every contribution, as opposed to the single author model of authorship implicit in, for example, some interpretations of the Auteur approach to film. As she explained:

[...] what I don’t like and I have a real prejudice against, is when I see artists, so single artists, who can pull together teams and take the sole credit, and sometimes the team is not even listed on the work. I have always been against that director “Auteur” approach. ... The authorship

has to be shared in these larger collaborations. It is a kind of plagiarism when an artist will say: "I have 'hired' that programmer to do this work, I conceptualised it, I could have hired another programmer to do the work". I just take issue with that. The best work comes when you recognise that team [...]

Later in the same interview, Cox returned to this point:

[...] Artists ... finally say "right, I'm going to work with technology" and they want to keep the technologists like technicians, and they want to retain that ownership, but for me and my early career, what I recognised early on ... that through the collaborative process the outcome would be so much better than what I could do by myself [...]

In this way, as Cox explains: '... the group shares authorship because the final artefact could not have come into being without the collective partnership and the collective authorship of working together and making the final set of sequences or digital images.' And, later in the same interview: 'I consider now the very sophisticated work that we do as a group of professionals that we are all co-authors because it simply could not have come about otherwise ... the final artefact was so totally dependent on that collaboration that I don't think you could separate them out ...'

This notion of 'collective' authorship, including 'computer scientist' members of the team, in addition to those with authority over 'artistic decisions' (Cox and Patterson), stems from the 'Renaissance' inspired view of the work as a 'mirror of nature', encompassing both scientific and artistic aspects. As Cox agreed in interview, this is a concept of authorship conducive to capturing collaboration between practitioners of 'art' and 'science', in contrast, for example, to the Romantic concept of the author as a 'lamp',¹² which in privileging contributions of 'personal expression' or 'creation', might confer authorship status only on Cox and Patterson, and deny it to the 'computer scientist' members of the team, for example, Levy.

While Cox considers all members of the team to be co-authors of the 'visualisation', the 'creators of the data' that the team uses are not co-authors of the visualisation, because their 'intent' in creating the data was 'to do research on that data'. This is in contrast to the 'final intent of the final creator', who is using that data as 'part of an art work ... [who] does so for a very different audience and very different purpose'.

The concepts which the 'Renaissance team' employ to determine authorship of the 'scientific visualisation' seem to be uninfluenced by copyright

doctrine. First, Cox's 'Renaissance' or 'mirror of nature' approach, which accords parity between contributions of artists and scientists, provides a different emphasis to tests of co-authorship in US copyright law.¹³ Secondly, where convergence exists with the test of co-authorship in US law, this appears to be coincidental. For example, Cox's test of authorship based on 'intent' might, at a first glance, appear to converge with the US legal test of co-authorship, which following the Second Federal Circuit decision in *Childress v. Taylor* (1991) requires that the contributors intended to regard themselves as joint authors (which also involves the court considering a number of 'objective indicia' of intention, such as whether the contributors were billed as co-authors). However, this was a commonality with the law of which Cox was unaware.¹⁴ Instead, she explained that her notion of authorship based on 'intention' came from her studies of art history, particularly conceptual art. Here Cox drew on the practices of the American artist Robert Rauschenberg (1925–2008), who came to prominence in the 1950s for his collages of 'found objects'. Just as Rauschenberg would 'walk around the streets of New York and find objects and include them in a final original work' so scientific data is an object which the artist uses; 'the authorship is about the invention of this new sum of the parts that becomes a new kind of thing'.

Notwithstanding the independence of the team's concept of authorship from that contained in law, the consequences of the status of authorship are firmly tied to copyright law. This stems from changes in the channels of distribution of 'scientific visualisations' since the mid-1990s. By way of background, in the 1980s, 'Renaissance teams' operated outside the commercial environment. As Cox explained:

These early Renaissance teams ... were not budget driven. They were driven by curiosity. They were driven by people trying to get something back out of that new kind of research: out of creating graphics, out of exploring something that would give them their own rewards in their own systemic systems. ... They didn't get rewards other than academic feedback and academic rewards ...

This changed in 1994, when Cox was approached by the Smithsonian Aerospace Museum, who sought a 'scientific visualisation' that would form part of an IMAX movie *Cosmic Voyage*. The film had a budget of USD5 million and was funded by a 'commercial partner': Motorola. It was 'the first time ever' that the 'visualisation of computational science' was provided for the cinema. Cox has continued to work on projects such as these ever since.

For example, the 'scientific visualisation' of Katrina formed part of the film *Dynamic Earth*, produced for the Denver Museum of Nature and Science, as an illustration of the film's narrative about the 'story of the complex systems of the earth'.

In this way, the 'egalitarian' concept of authorship which underpins the 'Renaissance team' entered into a commercial environment regulated by intellectual property agreements. For Cox, it was of great importance that co-authorship status as understood by the team was translated into both attribution and an ownership interest in the copyright in the visualisations, and she was instrumental in ensuring that the legal contracts secured this: 'I was drafting the first contracts here at the University, I could write into the contracts ... the credit and the ownership. I hand wrote it first and then they drafted it on paper. ... I made sure that we as a team got the appropriate credit ... [and] ownership, so the collaboration as a true collaboration had to be preserved, and that was preserved through the funding model'.

Accordingly, Cox's analysis of authorship (outlined above) underpins the 'intellectual property agreements' that are 'vetted very carefully with lawyers', and concluded for each project involving Cox and the team. These provide that copyright in the final visualisation images is to be co-owned by Cox and the other team members, the University of Illinois and the company seeking to exploit the visualisation (e.g. IMAX Corporation). The same agreement specifies that any intellectual property arising as part of the production process, for example, copyright in software, is to be co-owned by Cox and her team. Further, the owners of any intellectual property in the underlying scientific data sign a 'data release form', making it available for use by Cox and her team for any purpose, whether academic or commercial.

In this way, for the 'Renaissance team', co-authorship is bound up with the consequences that flow under legal contracts and copyright law: co-authorship status within the team results in ownership of copyright and entitlement to royalties. As Cox noted in relation to the hurricane Katrina project: 'each of the co-authors – each of our team – ... we all get royalties from the production ... we are co-creators on the hurricane Katrina and we own it ...'¹⁵ Further, the provision of 'ownership' and 'royalties' to all team members, are matters which Cox considers instrumental in promoting collaboration. As she explained: 'My philosophy is that you build that organism and it really becomes an active creative organism, by people having personal buy-ins and ownership and rewards out of the product ...' In this context, therefore, copyright's proprietary framework is employed such as both to support and reinforce a spirit of 'egalitarian' collaboration amongst multiple authors.

Case Study Two: Joseph Nechvatal and the Computer Virus Projects

'Artist' Joseph Nechvatal has worked on a number of Computer Virus Projects which involved him collaborating with two 'computer scientists' skilled in computer programming. For Nechvatal, this is an 'equalised exchange between disciplines' of 'science and art', as 'each side has gained something and feels a positive growth coming from the exchange'. The result of 'art and science ... sharing and collaborating together' in this way, brings about 'beneficial things on both sides of the equation': the 'arts' are 'greatly enriched' in 'engaging with science and new technology', while 'the scientist gains ... challenges to do things that they may not have conceptualised before'.

The first Computer Virus Project was completed in the early 1990s while Nechvatal was artist-in-residence at the Louis Pasteur Atelier and Saline Royal/Ledouz Foundation lab in Arbois, France. The project involved the development of computer software, written in Basic, by a computer programmer, Jean Philippe Massonie. The program enabled the launch of a computer virus onto Nechvatal's database of visual works stored on a computer. From this process, Nechvatal selected a series of still images capturing various stages of the virus 'attack'. These images were then transferred onto canvas using a robotic painting technique (conducted by a third party company), which involves the mechanical application of paint to canvas via the spray of an air-gun/nozzle pigment delivery system driven by a computer program. In addition, Nechvatal selected a series of moving images comprising part of the virus 'attack', which was exhibited as an animation.

The second such project, Computer Virus project 2.0, involved Nechvatal working with another computer programmer, Stéphane Sikora who specialises in 'Artificial Life' technology. The software, written by Sikora, launches unpredictable virus operations on Nechvatal's images that occur in real time, thereby creating a form of 'artificial life' (or 'A-life'). The resulting work was exhibited by Nechvatal in a solo show called *cOntaminatiOns* at the Château de Linardié in Senouillac, France. The exhibition featured digital prints and paintings (created by the robotic technique outlined above) of images which Nechvatal selected from the virus 'attack'. It also included two live electronic virus 'attack' art installations entitled *Viral Counter-Attack* which enable the audience to watch an attack in real time thereby simulating life and death-like phenomena on screen.

The 'collaboration' between Nechvatal and Sikora started out as a conversation at a conference called Virtual Worlds held in Paris in 2000 about virtual reality. Following this they met in Sikora's studio. Nechvatal

explained how he outlined the 'basic premises' or 'bigger ideas' of 'the vision of the project' to Sikora: 'I want to have an art work that can be penetrated by a computer virus-like algorithm that will treat my image as an ecosystem.' Nechvatal then left Sikora for a few days, to allow him to 'execute my vision'. Sikora would then be 'back and forth' from meetings with Nechvatal to programming, showing Nechvatal what he had achieved so far, and giving Nechvatal an opportunity for critique: 'I would say "yes" or "no" basically. "Yes, that's what I'm looking for" or "no, that's not what I'm looking for", to help him shape the result. And of course this is a cumulative process over several months. And in the end we reached the first plateau, where I was rather happy with the results ...'

Nechvatal described his 'aim' as to provide 'aesthetically pleasing results'. While the computer programmers might 'understand' that aim, and be 'great partners', it is Nechvatal alone who determines what meets that aim. This understanding is consistent with Sikora's account of his work with Nechvatal, described in a paper published online (Sikora, n.d.). Sikora concludes the paper as follows: 'Above I have outlined the software architecture governing the simulation bases of J. Nechvatal's Computer Virus Project. This software permits the exploration of complex dynamics while adhering to Nechvatal's specific aesthetic demands.'

Asked what these 'specific aesthetic demands' were, Nechvatal explained as follows:

[...] like I want to have an emotional effect of aesthetic quality that revolves around a certain set of colour or has an aesthetic relationship between colours, between the forms and the form of the virus and the form of the host ... because it is the imagery that you are really seeing, in terms of the still images, and of course I have complete control over that, so it is about how the virus interacts with that host, what is the form of the virus, what is the colour of the form of the virus, how the images interact with the preceding and following image ... These are the kind of aesthetic demands that I put ... Now I want it to be more transparent, now I want it to be more colourful, this one is going to be black. These kinds of specifics.

Nechvatal described this 'collaborative' process as based on 'goodwill and mutual respect' and he could not think of a single instance where they had disagreed: 'I cannot think of one instance in which we have clashed over anything ... It has been an amazing collaborative union.' If Sikora had disagreed, Nechvatal considered that it would have been 'tough' for their

project to continue: 'he is ... helping me execute my vision, and if we weren't going towards what I wanted to do, there would be no point in us working together any more.'

Asked about how he would characterise the computer programmer's contribution, Nechvatal said it was a 'creative' task. As he explained: 'I am demanding things that they have not done before, in fact perhaps that no one has ever done before. So they need to bring all their creative powers to the enterprise.' As he said of Sikora, 'his talent to be a programmer at that level is a form of creativity ...' However, his view is that this did not amount to authorship or co-authorship. Instead, the works are solely authored by Nechvatal. As he expressed:

[...] I am the sole author and my name is always on the work that we produce. I always credit my collaborators, but because the concept came from me, the desire came from me the context of the work came from me and continues through me, it is about my approach to art so generally it is my name on top and their name second. So they get credited, but it is my work and I own everything that comes out of the work, and again, it is a kind of respect and acknowledgement but this is my art work, and they are kind of helping me, collaborating with me to help me develop my work.

In the same interview, Nechvatal justified his position as 'sole author', on the basis that he is the 'director' of the project (a position which contrasts to that put forward by Cox in the previous Case Study):

What I do is to throw out big challenges and ideas and I also say "no" a lot. They show me what they did, and I say "no that's not what I was interested in or where I'm going." Or "that's not acceptable for aesthetic reasons or other reasons." So, I am the project director and I am controlling what comes out of it, it came from my original intentions and my name is going to be on it, so I have to be the one that is completely pleased with the end result.

This understanding of 'authorship' is also present in other works on which Sikora has collaborated with 'artists' other than Nechvatal:

Stéphane has worked with other artists, and they are always the author, almost always the sole author of the work ... So he is accustomed to this procedure ... He doesn't have a creative vision himself but he loves to work with artists and do creative work, and he has a big appreciation for art

and music and culture, it is just that he needs someone to direct him as to what the project is, what the goal of the project is. So he is the technician.¹⁶

As regards to those involved in making the arrangements for the robotic painting technique, Nechvatal considers them to be neither 'creative', as they are 'merely fabricating to my specification', nor 'authors', on the basis that they are providing a paid commercial service.

One issue explored in the interview was how the role of technology in Nechvatal's work (e.g. the role of the computer viruses in acting on his 'body' of visual work) might limit human authorship. Nechvatal has previously described the relationship between 'human agency' and 'non-human processes' in his work, as 'a dialogue ... conversation or dance' (Roniger, 2012). Asked what he meant by this, Nechvatal placed his work in the context of avant-garde thought of the 20th century, in particular John Cage's approach to music and art which 'embraces chance operations'. As he explained: 'What you want to do is, you author the work and control it tightly but then you leave it open for chance, for things to happen, or actually you design it rigorously so chance can happen. That is what I did with the program with Stéphane. What we do is we ... allow and dictate that chance will happen. So it is just a way of making the work more unexpected and a little more unusual than might be possible'.

While Nechvatal accepted that 'chance' might 'fuzzy the edges a little bit of authorship', he remained of the view that 'authorship' was an important concept: 'I don't see how that precludes the authorship of the work. It just is a technique for making work really.' Therefore, while technology played an important role in his work, it still made sense to speak of 'human authorship':

[...] because ... it is me that is making selections and choices and presentations and within a certain context of my choosing, so again the chance element is just another angle of opening up the work but it is no way destroying its connection to me. ... I think it is very important that the human is dominant and I don't for one second want to be dominated by non-human processes, of machines ... particularly in aesthetics, I do not for one instance want to be subjected to dominance by machine processes, and I think part of our work, part of my work, is an attempt to resist that tendency.

Indeed, Nechvatal considered his 'authorship' of the work, to make it his 'property', on the basis that it would not exist without him: 'Do you consider your work to be your property?' 'Yes, absolutely.' 'And why do you feel that

way?' 'I never really question it, because I make it from nothing and because it wouldn't be there without me. And I sign it, and now I even sign it with my DNA so there can be no forgery. I never even question that it isn't mine, because without me it wouldn't exist!'

Consequently, if his work was copied without his consent, he said he would be 'shocked and dismayed', regardless of whether he was attributed or not. Notwithstanding this, he would not mind his work being copied if there was an 'educational context' for the use or if the use amounted to a 'new work'. As regards the latter aspect, Nechvatal related this to his understanding of the US legal test of transformative use:

[...] if they are artists and they are putting their art on the market and they are using appropriation as part of their work, I can accept that. I know other artists that have done that successfully, Richard Prince most famously, and many others, say Jeff Koons, Warhol. Sometimes it is a question of degree and I believe that the legal view, especially in the United States is "was a transformation created', did the other artist transform the work or not.

Asked whether he felt that this approach was appropriate, Nechvatal responded: 'I do. Then there is a creative process that is happening, and I think that we have to be open to appropriation as part of the artistic dialogue because we live in such an image conscious culture.' In fact, the legal concept of transformative use, which stems from judicial interpretation of the first factor of the 'fair use' test set out in section 107 of the US Copyright Code, is not cast in such broad terms. Notwithstanding this, these comments indicate that while Nechvatal's art practice might not bring him into proximity to lawyers (as in the case of Cox's copyright exploitation contracts) copyright terminology resonated in his understanding of the limits of the control denoted by authorship, albeit in a form more accommodating of appropriation art than is currently contained in US law.

Case Study Three: The Open Ended Group, a 'Digital Art Collective'

The OpenEndedGroup (or 'OEG') comprises three members: Marc Downie, Shelley Eshkar and Paul Kaiser. Established in 2001 and based in New York, the OEG exhibits in galleries, public spaces and the stage, in both the USA

and Europe. This often involves installations involving projections produced using motion-capture technology.

A recent project was the production of huge floating 3D imagery that was projected onto the stage of a performance of Mark-Anthony Turnage's opera *Twice Through the Heart* at Sadler's Wells Theatre, London. The opera concerned a housewife abused by her husband, and the 'ethereal' imagery, visible to the audience wearing 3D glasses, sought to capture her sense of 'fear'. The imagery was produced from photographs which the members of the Group took of the interior of a 1980s-style Council flat in Dartington. The photographs were then processed by software, written by the Group, which could locate where the photographs were taken within the geometry of the room. The resulting images were then displayed on a computer screen, with all three members of the Group working together to produce the final imagery. Downie described this process of working on the imagery as follows:

You capture a glimpse of an interesting shape or juxtaposition or mistake in the computer's recognition of an object, and you go back and try to craft that particular angle, that particular moment, that particular shape by either changing the photographs that you put in, or changing the way the material is revealed. ... You really are trying to work in dialogue with an algorithm, something which produces something unexpected. You are trying to take control over it, but it is not a situation where we are completely in control.

Asked about the different 'roles' of the various Group members, Downie explained that each brings different expertise. Downie's grounding is in natural science and physics, and he specialises in computer programming. Eshkar's emphasis is on drawing, computer graphics and the 'exploration of human motion', in particular through the use of motion capture technology. Finally, Kaiser's background is in filmmaking and art history. The OEG members' different backgrounds means that, as Downie acknowledged, 'there are some core things that we are each much better at than the others'. However, 'other than that it's a flat organisation', with the core activities performed by the three of them, working together as 'equals'. As Downie explained: 'If you were to be in the room while we're working you would see three people staring at 3D projectors, shouting out opinions about the way that things are drawn until we agree that what we are looking at is good ... When we are actually being creative it's usually us staring at something, changing it, and shouting out our opinions'.

At another point in the interview, Downie expanded on this further:

Really the bit that is us making art is about the three of us sitting in front of the screen shouting out things at it. That is the core of what we do. The drive that we have had to make pieces and distribute them has all been about maximising the time we spend together, as three artists staring at something and changing it. The common thread through all of our work, is that the reason that we write code is to be able to work in real time, even if what we are making is just a film, so you don't have to have code, but it has to be in real time so the three of us can sit in front of it as equals and change it.

As regards dynamics between Group members, Downie said that there is always a 'broad level of agreement' as to 'what a piece is going to be about'. Where disagreements arise as to particular issues, such as 'is this image good?', this 'simply leads to us working harder at it': 'If one of us thinks that an image is good, but another thinks it isn't there yet, we continue to manipulate it until we reach a consensus'. However, he considered disagreements that could not be resolved through consensus to be 'very rare', a matter which he attributed to the fact that they all have 'very similar aesthetics': 'We broadly agree about what images are good and what images aren't. If you put us in for blind testing and flashed images at us, and asked us to say which images we liked, we would actually end up with fairly similar conclusions. I think we would end up with different reasons for what we liked. So that then is the balance that we can reach similar end-points by different means with different justifications'.

Asked what would happen if an instance arose where no consensus was reached, Downie considered that the Group would probably 'abandon the work'; 'that would be the end of the piece'. As Downie concluded 'working by consensus is the only way that we can really work'.

Where expertise or assistance is required from outside, the OEG have developed a 'taxonomy of collaboration', which designates the parameters of the external person's participation. Downie described this as follows:

Well we internally have a taxonomy of people we work with. "Collaborator" is top of the pile. Collaborator is where there is an equality. We are equal with collaborators, though we might have different responsibilities. Collaborators are the ones who at least have the freedom to give ideas quite directly for what we are working on. But beneath that, or different to that, are "contributors", and beneath that still are "consultants". So

a “consultant” is where you have a very particular technical issue that we need a fairly constrained answer on. And there is almost nothing a consultant can do to surprise you. The answer to a technical question will be either “yes” this is how you do it or “no” that’s actually impossible. A “contributor” is somewhere between those things, in that they could surprise you with the quality of what they do, but they are working within a fairly confined space, a space that you have pre-determined. What they are working on is not up for change. A sound designer for example might be a contributor. You have chosen the material that they will use and provided them with the actual piece of music or track, and simply you need someone with sound engineering competence to realise it and make it sound good in a gallery. So that would be an example of someone contributing to the art work. So they’re important because if they screw up it sounds awful and if they are not there it is left to 3 people that aren’t particularly good at sound devices, but it is not an open-ended equal class structure, in that sound designers aren’t allowed to say “why don’t you do that, it would be better”, because that’s not what they are being brought in to do. So that is the taxonomy of collaboration from our point of view.

‘Collaborators’ are credited alongside the OEG as ‘artists’, for example when the work is displayed, unlike ‘consultants’ and ‘contributors’. Downie explained the purpose of the ‘taxonomy’ as follows: ‘It is about accurately curating the voices in the room when you are all looking at something shouting out “that’s right”, “that needs to be over there” or “that’s awful” or “that’s really good, that bit there” or “we need more of that”. So whoever is barking out those opinions at the crunch moments when we are really trying to discover what we’ve got, what we could make, so it’s an invitation as to that, as that moment has to be very carefully constructed’.

The taxonomy of collaboration is very strictly enforced by the OEG, and ‘collaborators’ are [selected] ... very carefully’ to ensure consensus with OEG members will be reached. Asked whether ‘contributors’ or ‘consultants’ ever sought to exceed their roles, Downie remarked that they stick to their taxonomy so rigidly ‘that no one tries to exceed their role’. This contrasts to an earlier project, *How long Does the Subject Linger on the Edge of the Volume* (2005), when the Group was ‘less experienced’, where ‘engineers’ who were merely meant to ‘provide engineering support’, assumed they were ‘equal participants in all artistic decisions’. As Downie explained: ‘... in that case we weren’t nearly clear enough which caused a certain amount of heart-

ache amongst everyone. So since that point we've been much clearer about the status of people involved ... So we've been more careful in choosing our collaborators and more careful in making sure that people who aren't collaborators know it ...'

An example of the OEG's work with a 'collaborator' is *Stairwell*, displayed at the Hayward Gallery in 2010. The 'collaborator' in that instance was the dancer and choreographer Wayne McGregor. McGregor's movements in the space of the stairwell at the Hayward were recorded using specially designed motion-capture technology. The final work involved the 3D projection of that footage into the space of the stairwell. Downie described this process of working as follows: 'And that involved the three of us challenging Wayne, to do something in the particular curve of the stairwell, round the corner or vertically this way. Sort of giving him regions of space to work in and to improvise within them, a region marked out by cameras.' The footage was then edited by the three members of the OEG: 'After all of that ... it was just me, Paul and Shelley sitting around the screen editing footage in real time, and then all of it is saved and sent off-site so it could be put on three screens – one at the bottom, one in the middle and one at the top of the stairwell. On site we continued to revise our editing. Finally the whole thing was played back in stereo.'

McGregor was, according to Downie, 'the motor of the piece' and the status of 'collaborator' denotes the influence and freedom which he was allowed to exert. As Downie explained in relation to his work with another dancer/choreographer 'collaborator': 'we were all influencing very strongly what each of us were doing, so all four of us had responsibility for the way the piece worked and we were all allowed to blurt out ideas, and we were all allowed to say "that's crap" or "this bit here, that's the good bit". We were all allowed to make those statements.'

This contrasts to 'contributors' who, while creative in the tasks they perform, are ultimately working under the control and direction of the OEG:

For example every time we need to film something, where we might care how it looks, so it's not just data capture, especially if it's in the US, there are a couple of camera men that we like so we'll bring them on, and they will be in a contributor role. They know how to hold a camera and have vastly more knowledge about where to stick the lights than us, about what to do. And they will be there on-site, with us directing. We have a very good rapport with them. So that would add two to the project but only for a few hours. Only for the shoot.

In this way, the OEG's taxonomy of 'collaborators', 'contributors' and 'consultants' can be seen as a way of restricting the number of participants that deserve equality of status with the OEG members, in the making of 'artistic decisions'. As Downie noted, 'the status of collaborator marks that relationship as different.' For Downie, 'artistic decisions' are:

[...] when we are responding to material, and manipulating it, and navigating through possibilities, we are working very quickly, shouting out our initial responses to what we are seeing. There is a tremendous amount of instinct in that. The three of us and every other artist that we've worked with are capable of producing opinions about material very very quickly ... we are very quick in evaluating things. ... I think you have to marry that with the vision of being able to see the long-term consequences or potential of those things. So you see an image and you don't really like it but there is something in it that offers a glimmer of hope. ... So, if this is good it goes into the piece, or we grow that out into a section of a piece [...]

While the Group (and any collaborators) make the 'artistic decisions', and are credited as 'artists', Downie felt uncomfortable with any notion of authorship that denoted 'creation':

[...] the sense of discovery, the sense that you are mining something out of material, weakens my claim to have authored it in a direct way, in the sense that I have had this idea, this idea has come from me, and I have given this life in the world. It is hard to be completely convinced about that when you feel like you have discovered something'.

In part, the resistance to the view of 'author' as 'creator' rests with the role of the technology itself as a 'collaborating agent'. As Downie explained (in a manner which differs in emphasis, from Joseph Nechvatal's views at Case Study 2 above): '... when you are working like this, it really does feel like there is an additional agency, be it of the algorithm or of the material as seen through a lens you have constructed, and even if you write your own code, or even if know intimately how things work, when this way of working is good is where there is an additional agency – you are working in collaboration with material or in collaboration with an algorithm.'¹⁷ Further, Downie felt uncomfortable with the suggestion that the work might be the OEG's 'property'. In his view, the work felt like 'property of the world', again stemming from their work being 'more like discovery than creation':

Quite often when things are going really well, the way that we work in particular, it feels less like creation. So you build some complicated system or analytical way of looking at some object in the world, and you craft it and change it, and suddenly you see something on the screen that you find surprising. Those are the moments which keep you going. It feels more like discovery than creation. You have found something that you have always suspected that was there, but you've found it. It's not like we've made it up. It's not like the process of drawing where a person uses his talents to create something from the blank page.

While unauthorised copying might 'upset' Downie 'slightly', this was not something which concerned him. In part this was due to the fact that the technical complexity of their work made close copying implausible:

[...] an exact copy of our work, short of someone breaking into your computer and stealing it, is just so highly implausible. The indirection that goes into making a piece is so great, that defends off against many of these sorts of duplications. If someone stole all of my computers and then asked me to duplicate *Stairwell*, I'd have a pretty hard time doing it. We'd have a hard time copying ourselves.

Notwithstanding this, the attribution of the Group (and any collaborator) as the 'artists' of a particular work, was a matter of significance, as attribution ensured accurate 'critical discourse' about 'who did what' in the field:

One of the things that makes me upset ... right now, is the quality of the critical discourse in our particular area of art. One thing is that if I'd feel that the world, or art historical record, is not getting the biography of the story straight, that would make me upset in that way. So when the critical history of the field can't figure out who did what. So I feel upset in the sense that people were getting the wrong idea in the sense of the genesis of something and can't figure out who did what.

Indeed, if the OEG's work was copied by another artist, in making a 'new work', they would want 'a general acknowledgement in any critical secondary literature'. In this way, while 'attribution' is important to Downie, like Cox the OEG's engagement with 'computer science' results in their distancing of their activities from any concept of 'authorship' as 'creation'. Yet, unlike Cox, the implications of this for Downie are that 'authorship' denoting 'ownership' or 'property' appears irrelevant.

Case Study Four: Ken Feingold's installations and Miltos Manetas' *jesusswimming.com*

Ken Feingold is based in New York. He specialises in installations using 'animatronic' sculptures of human heads or ventriloquist puppets, programmed using speech recognition and artificial intelligence software so they can have conversations with each other. Each character is programmed to have its own personality, so there are certain parameters to the conversations, but no one conversation is the same. Feingold has exhibited widely for example at the Museum of Modern Art in New York, the Centre Georges Pompidou in Paris, and at the Tate Liverpool in the UK.

Feingold explained that his 'animatronic' installations stem from his residency at the *Zentrum Fur Kunst und Medientechnology* (or 'ZKM') in Karlsruhe, Germany. This brought him into contact with computer programmers who, over a period of three years, developed complex software providing a series of modules for enabling pieces of language to interact with visuals. The software is used by Feingold, along with artificial voice technology by researchers at the University of Edinburgh which is made available for use on an open source basis. The installations also involve physical sculptures. Sometimes these are 'found' objects, for example ventriloquist dummies that are bought from a car-boot sale. More frequently, however, they involve new sculptures, occasionally, as in the case of *Self-Portrait as the Center of the Universe*, involving casts of Feingold's own head which are made at a workshop by a group of 'sculptors'. This involves moulding in latex and casting in silicone, to which fibre glass 'skin' is applied in such a manner that the mouth and eyes can open and close. Once this is done, stubble, facial hair and the feint appearance of veins is added using needles.

Feingold described his interaction with these computer programmers and sculptors as 'very close-up at times and other times very long distance'. With regards the programmers, Feingold usually develops 'a flow chart' to 'show the programmer the chain of events that have to happen', then leaving them to 'go through and write all the routines and the functions'. In the case of the sculptors of the 'animatronic' heads, Feingold provides them with photographs or drawings to give an example of what is required. The sculptors then produce a head in clay, as a model for the cast that will eventually be made in silicone. Feingold described the process of working on the clay model as follows:

I would work with the sculptor who was essentially my hands, because she had a skill to be able to sculpt in clay in a photographic way. I mean her abilities are extraordinary. She would be able to make things look so

realistic and do things that I could never attain the skill to be able to do. So it would be very simple kinds of suggestions on my part, like let's make the lips fuller, let's make the chin narrower, let's make the jaw line squarer. And then she would do that and I would say "yes" "no" "less" "more".'

More than just 'technical skill', Feingold saw the programmers and sculptors as providing 'special knowledge', which placed them in a position 'occasionally' to make 'suggestions'. For example, he described how, on one project, the sculptor made a 'suggestion' about the size of the ears of a particular head. Feingold wanted the head to be of someone in their forties or fifties, and the sculptor had 'special knowledge' about that: 'she was right and that was what I wanted.' Similarly, the programmers have 'special knowledge' of mathematics, for example, as to the algebra required in order to move a figure in virtual space in an oval.

Feingold characterised the tasks performed by the programmers and sculptors as 'creative':

I depend a good deal on the creativity of the people that I work with, they have a tremendous influence on the outcome of the project, and it is a quite interesting process to collaborate in that creative moment with computer programmers and with sculptors, because even the ones that are life cast have imperfections and they have to be adjusted in the making of them, both the physical moulding and the painting and the kinds of expressions that the faces have, lend a lot to what the experience of the work is.

However, the 'programmers' and 'sculptors' are not authors or co-authors; Feingold is the sole author. Indeed, the 'art part' consists of the tasks which Feingold performs in his studio alone:

[...] so the work is physically put together and then set up in my studio where I then undertake the actual art part, which is working and reworking, writing, editing images and seeing how things work, how they sound. Spending time with the work, watching it unfold, noticing that it does things that I don't want it to do, taking things out that I don't want it to do, putting things in that I do want it to do that it's not doing [...]

Feingold explained his position as sole author, by drawing analogies with certain interpretations of the Auteur concept of authorship of a film by a film director:

I would say that it is collaborative to the extent that people were helping me, but I always took it as one might think of a film director, that it was my project, I was not seeing this as co-authorship, neither with the programming nor with the sculptural factors, and so the works would be fabricated for me, the physical object would be fabricated for me and sent to my studio at which point I would assemble them into sculptural objects which appear in the final work.

At another point in the conversation, Feingold elaborated further on this analogy:

I think about things in the framework of film-making to give myself a precedent for groups of people working towards an end to accomplish a particular person's vision. Auteur cinema where you have the director who is also the writer and who also does a lot of the camera work who also sits in or does quite a bit of the editing, some sound and creates the entire film, still there are many people who work on the project and they are considered contributors, absolutely, and valuable contributors, but the notion of authorship is the person who is the director as the person who is the individual who takes responsibility for the entire thing¹⁸ [...]

As Feingold concluded, this 'is a monotheistic view of authorship, not a polytheistic view'. During the interview, Feingold referred to the 'author' as having an 'authority' as 'the primary creator of a particular work': '... this is the work that I've made and it's finished, I've done it. I've made this work and it's mine'. Asked whether the reference to the art work as 'mine' denoted that it was his 'property', Feingold's answer was informed by his understanding of copyright law:

We are talking about intellectual property ... I would say that art work has certain laws surrounding it. If an artist makes something they have the copyright. So how do we identify who it belongs to? Right now I think it has to do with who owns the copyright to it. Does that mean that that person has exclusive rights to do anything with it forever and ever. Perhaps legally yes, but ethically? I don't know.

Feingold said that he would object to unauthorised copying of this work, 'to the extent that it interfered with my economy'; his works are made in 'limited numbers', so their commercial value is 'in part due to their scarcity' (the installations having physical as well as digital attributes). In outlining

the kinds of copying he would consider unobjectionable, Feingold's answer was informed by his understanding of US copyright principles of 'fair use':

[...] not to rely on the law but just to think which factors had been in the notion of fair use, one of them is whether or not it competes economically with the original work,¹⁹ and I need to survive, this is what I do for a living, to a certain extent, you know my work as an analyst is one aspect and my work as an artist another, and these are my economic bases so if someone was to take one of them away because they found a way to commercialise something and I wasn't benefitting from that it would harm me and it would harm my ability to make other works. It would force me into another kind of working that I would then have to go into competition with someone who was changing my economy because of the way they were doing things.

Feingold's implicit endorsement of the general principle of copyright, contrasts with the very public denouncement of copyright law by the other interviewee in this Case Study: Miltos Manetas. Manetas is from Greece but is currently based in Rome. He founded the web art movement called *Neen* in 2000, which promotes the view of websites as art objects. As each URL is unique, each piece of website art is a 'unique edition' in that sense. The URL, therefore, provides the art work with a physical property that can be bought and sold by art collectors, through trades in ownership of the domain name at the various domain name registries. Indeed, Manetas sees the act of buying and owning the website, as 'initiating' the artwork: the 'most important step' towards 'becoming the creator of the website' and the 'most important, because it's yours'. Therefore, while the *Neen* movement is characterised by emotive claims about the 'struggle to get free from the slavery of intellectual property and copyright', it advocates a different notion of 'property' – the 'real estate' of URLs (Manetas, 2002). On the point of Manetas' stance against copyright, it was interesting to note that one of his income streams is the licensing of applications based on his website art to i-phone. When asked what he was being paid for, he did not connect this to copyright; rather he considered it as akin to receiving a conference fee for speaking.

In the art gallery environment, Manetas projects his websites onto blank canvas hung on the gallery wall. One such example is *jesusswimming.com* hosted at that URL, which was displayed in 2006 by projecting it onto a canvas 120 x 90 inches. The website depicts a simple animation of a bearded figure swimming slowly in the sea, accompanied by music. The toolbar of

the website reads 'Jesus Swimming by Miltos Manetas', but the website manetas.com, providing an overview of his work, states the following: 'Jesus Swimming, created by Miltos Manetas. Credits: Mark Tranmer (music), Joel Fox (animation)'.

When asked about these credits, Manetas explained the process of 'collaboration' as follows:

[...] many times us artists work in collaboration. So I wake up with an idea, of jesusswimming.com. So I call up an animator, and I say could you please produce a Jesus swimming. I then call up a composer, and I say could you please compose music for him. Yes. Ok. And then I make the work. It is absolutely mine. It is a work of art by Miltos Manetas only, but in that work there are credits. Animation made by this person, music made by Joel Fox.

When asked what his instructions were to the 'animator' and 'composer', Manetas explained that they were 'not very detailed at all': 'The departure point for jesusswimming.com was exactly the name of the website "Jesus swimming" and I just asked from the composer to write a music that brings in mind Jesus when he swims ... [and to the animator] "please draw for me a Jesus swimming" ...'. While the 'composer' and 'animator' were given little detailed guidance, Manetas retained the right to reject the contributions: 'if I didn't like the music or the animation, I wouldn't have used it'.

In Manetas' view, neither Tranmer nor Fox are co-authors; they are merely assistants working for a 'master', a practice which he analogises with the work of Michelangelo. Instead, Manetas is the 'sole author', a claim he supported by analogising his position to the 'director' of a film. After drawing attention to the fact that he had paid the 'assistants', he continued: 'Well, it is my art work. In that case, I am totally the artist 100%. It is my total art work. Because it is my creation. It exists only because of me'. At another point in the interview, he repeated that he was the sole author on the basis that: 'The artistic idea is completely mine in that case ... the idea of the Jesus swimming'. In this way, for Manetas, 'authorship' denoted being the 'director' or person who 'created' the idea of the piece.

In addition, it was apparent that Manetas' views of what it meant to be an 'artist' were informed by perceptions in the wider 'art world'. As Manetas described in relation to jesusswimming.com, when he registered the URL, he did so 'as a private person, but 'not ... as an artist': 'to own it as an artist I have to claim its artistic value, to somehow create interest around it and make it an artwork'. These comments were consistent with his view of an

'artist' as stemming from some form of 'art world' recognition: An artist defines himself as an artist and then if other people agree with him and he has a commercial success, he is an artist; if not he is just someone who has fantasies'. And does it matter who that other person is? 'This is the business of culture. Of course it matters. If it is the postman, it is one thing, but if it is the director of a museum, it is another thing. And if it is 10 directors of museums, then suddenly our conversation goes to the metaphorical.

As we noted above, the *Neen* approach to the work as 'property' relates to the property in the URL. Copying the content of the website is not something of concern. Instead Manetas appeared to be concerned with the use of his name, or the gallery display of the website at the URL by another 'artist'. As he explained, using one of his other website pieces, *maninthedark.com* as an example:

If now you will invite people to see the exhibition of Miltos Manetas at that gallery, I would sue you. If you will invite the people, to see *maninthedark.com*, again, I will sue you. But if you will invite the people to see an exhibition of yours, and you have a simulation of my *maninthedark.com* there [i.e. an exact copy of the website, which appears to be hosted at *maninthedark.com*, though it is not at that URL], this is your art work, it is not mine.

Manetas' position, therefore, includes expectations of attribution in relation to the registered domain name (rather than the website content).

Case Study Five: Interactivity and the role of the 'audience' or 'user'

Interactivity is frequently noted to be an important aspect of digital technology as a 'creative' medium (Stallabrass, 2003, p. 60 and Paul, 2003, p. 8). As the art historian Frank Popper expressed in a much publicised interview, 'On the Origins of Virtualism', the emphasis on interactivity, that is, 'the work's openness to reciprocal creative action' by the spectator or user, is an important feature of such work (Nechvatal and Popper, 2004, p. 71).²⁰ A number of examples of this were encountered in the interviews.

The very first interactive works were developed by Lynn Hershman Leeson, an award-winning 'artist' based in California.²¹ Her work *Lorna* from the late 1970s was issued in limited edition on a laser disc (later moved to DVD in 2002) and exhibited in galleries on a screen in a space that depicted *Lorna's* living room. Using a remote control, the audience could choose which steps *Lorna* took in her fear-dominated life. Other early forms of in-

teractive work were in the form of 'hypertext poetry' which, as Loss Pequeño Glazier recounted, involved users clicking on particular words triggering a different page to come up on screen. Most commonly, this would involve the 'user' choosing between different events in the story.²² More recently, one of Glazier's own digital poems, *COG*, relies on the viewer to click on various coloured 'cog' shapes, which turn and release further words, letters or phrases into the poem. Similarly, Jason Nelson's recent work *Game, Game, Game and Again Game* involves the user 'playing' thirteen computer-game style levels, which contain his drawings and poetry.

Interactivity is also a central component of much installation work using digital technology. Don Ritter, a Canadian 'artist' currently based in South Korea, recently created a large-scale installation called *Vested* which involves a visitor putting on a military vest and walking in front of a 14 metre-high projection depicting a panorama of famous international buildings. When the visitor pushes a red button on the vest, a large explosion takes place on the projection triggered by complex digital technology. The interaction enables Ritter's work to capture the schadenfreude phenomenon and draw attention to the mass media's vested interest in depicting images of human tragedy. Similarly, Joseph Nechvatal has also displayed aspects of his Computer Virus Projects in the form of an interactive gallery installation. Under the title *Viral Counter-Attack*, the progress of the virus in 'attacking' Nechvatal's body of work was displayed in real-time on a touch-screen. Up to two members of the audience could touch the screen simultaneously, to influence the movement of the virus 'attack'.

A number of these interviewees noted the central importance of the position of the audience to these works. As Glazier notes, in respect of his own interactive poem *COG*, the 'reader is essential because if you just turn on the piece, there is nothing there'. Notwithstanding this, all interviewees were of the view that the 'user' is not a co-author of the work, pointing to the limited number of choices which users are faced with. As Leeson expressed, users might be active and also perhaps creative in their choices but they were not authors:

Because it is pre-set. You know, somebody walks through a building, they are not the architect. But they could choose how to walk through it. The structure is already there, implanted. So in order to be an author, they have to start from scratch. Even though you can alter something and even if an interactive piece requires you to alter something, you haven't designed it, or come up with a conception, then you don't author it, then you are not really the original author.

Further, in Joseph Nechvatal's view, the role of the audience was 'mildly creative' in the 'choices' made and in 'helping explore the piece', but this did not make them authors or co-authors: 'Oh, no, [the audience is] not even close [to being authors]. ... Derrida ... claims that a reader is as much the author, as the author of a book, but I can tell you that that's not really true! ... Yes, they are using their consciousness and are anticipating an art event, but they are not creating an art event, they are receiving it'.

Similarly, Don Ritter thought that a participant in his works might be 'creative' in relation to their own experience of the work, but this did not amount to authorship. It was akin to deciding how to walk through a gallery displaying paintings and how long to spend in front of each work.

Indeed, a number of interviewees expressed the challenge of interactive work as located in how to constrain the audience's freedom of action, so as to ensure that their contribution forms part of the 'artist's vision'. Ken Feingold's early installations, for example, enabled gallery visitors to have conversations with the animatronic figures. However, he was unhappy with the result, as visitors tended to have open-ended conversations about their own concerns, rather than allowing Feingold's work to steer the conversation:

I did find a certain shifting point where I was no longer particularly happy about the ways in which viewers become participants, would interact with works, and found that people wanted things from works, because of the metaphors that were involved, essentially you thought if you really were interacting in an open-ended way with an open-ended character you could talk about anything and it started to feel like crafting a very particular musical instrument, and putting it on a stage and inviting the audience up to let them play music. Now I wanted to play the music, so the more recent works involved computers interacting with each other, or programs within computers interacting with each other.

Other interviewees noted that the key to a successful interactive work was to ensure that the scope for audience participation is fairly constrained. For example, the OpenEndedGroup's *Into the Forest*, which opened for exhibition at the Museum of the Moving Image in New York in January 2011, involves a 3D projection of painterly imagery which enables the public to sense the daydreams of childhood. For one minute in every three or four, the piece projects the public's stereoscopic shadow back through a spotlight, thereby inviting the audience to respond to the work's projections. As Downie explained, the reason why this only happens for one minute

in every 3 or 4, is because 'we didn't want the interactivity to become the point of it.' As he elaborated:

So, I mean I think you use the word "user" which is exactly the sort of relationship we want to avoid, and exactly the noun that I'd hope would never apply to any of our interactive pieces, especially a piece that uses computer vision of any kind. ... People actually act quite silly in most interactive pieces, and the relationship that they have is extremely non-contemplative, and they are trying to bring attention to them, and they are trying to push the boundaries of what the computer can see, so they start moving quickly to see if the computer can still follow them; they move in extreme ways. And none of that is what we want. If you stick a microphone in front of someone people will generally start making very silly noises, it is some sort of human desire to see what the envelope of interaction is, rather than paying attention to a particular piece. So the interactive pieces we've made have all tried to be completely autonomous, to have integrity by themselves, so the interaction is quite constrained in time like it was in *In the Forest*, or optional or invitational.

Instead of 'user' of an interactive work, Downie prefers the term 'participant'. In his view, this provides a different emphasis. As he explained, a 'participant' denotes a person 'who accepts the invitation from the work; who has accepted the invitation to walk into the spotlight and to follow and be part of the piece'.

Conclusions

As we noted at the outset, a perceived challenge of the digital for copyright stems from the assumption that the 'creative' practices of the 'digital age' involve the contributions of many. Not only is this thought to make the identification of the author more difficult but the presumed collaborative nature of such practices is thought to pose problems for authorship as a proprietary category. As we have seen, the interviews revealed that technology has in many cases in fact facilitated solitary work: as technology becomes ubiquitous, a number of interviewees today work alone on processes which in former times were collaborative. Further, as solitary work is now feasible, in certain spheres it is considered to be the working practice of preference.

Where collaborative practices do prevail, the case studies revealed diverse ways in which relations between contributors are understood,

reflecting diverse ideas about authorship. Indeed, a number of interviewees articulated positions which were diametrically opposed to each other. For example, Donna Cox juxtaposed her 'egalitarian' notion of the whole team as authors of the 'visualisation', against the solitary view of authorship inspired by Auteur cinema, of the 'artist' as 'director'. This was the very 'monotheistic' view of authorship, adhered to by interviewees such as Ken Feingold.

Another point of difference of opinion was on how the role of technology impacted on authorship. For the OEG, technology is a 'collaborating agent' restricting the 'control' that the Group felt over their work. The result is that the Group felt as if they were engaged in a process of 'discovery', and Marc Downie was uneasy with any concept of authorship related to 'creation'. By contrast, the language of creativity frequently featured in the interview with Joseph Nechvatal, who saw technology as subject to his human 'creative vision'.

The diversity of ideas about authorship revealed in the interviews means that it would be simplistic to use the views articulated by any one interviewee, as the basis for the reform of legal tests. For example, while the views of interviewees such as Joseph Nechvatal might accord with the legal test of originality as 'free and creative choices', explored by Stefan van Gompel in his contribution to this volume, other interviews such as that with Marc Downie, revealed the difficulties of a test that defines 'creative choices' in opposition to constraints: for the OEG the constraints posed by technology are an intricate part of their process of making 'art'. Notwithstanding this, a number of more general concluding observations can be made, with a view to presenting a more nuanced account of the perceived challenge of the digital.

First, authorship is an important category for the 'artists' and 'poets' interviewed. This is the case, even in the face of interactive technologies enabling audience participation which was the very development which scholars had thought would pose the most significant challenge to authorship (Woodmansee, 1994, p. 26).²³ Indeed, while there may be differing positions as to the degree to which technology limits human action, as is evident from his much publicised interview 'On the Origins of Virtualism' with art historian Frank Popper, the over-arching theme of 'digital art' discourse is 'how technology is – or can be – humanised through art' (Nechvatal and Popper, 2004, p. 72).²⁴ In this way, the discourses of 'digital art', with their focus on humanising technology, contrast to what one commentator thought to be the implications for copyright's concept of authorship of new technologies: the 'struggle over the soul of copyright' when the law protects

the products of machines, rather than human authorship (Ricketson, 1991–2, p. 2).²⁵ The implications of this for law are that tests that defer to some extent to social understandings of authorship, such as the US requirement of ‘intention’ as to co-authorship, remain relevant in the ‘digital age’, as ‘authorship’ remains a meaningful category.

Secondly, in some instances (though not all), it was striking that the law actively contributes to concepts of authorship. As we saw in the above case studies, law contributed to certain interviewees’ understandings of authorship as denoting ‘ownership’ (in Case Study 1), or to the demarcation of the limits of authorial control (in Case Study 2 and Ken Feingold in Case Study 4), though, as we noted, the interviewees’ understandings did not always accurately reflect current copyright law. Other interviewees directly resorted to copyright law to give their views on authorship as a proprietary, normative force. For example, David Em commented on his relation to his work as follows: ‘Do you consider the work to be your property?’ ‘Absolutely.’ ‘And what do you mean by that?’ ‘If you take seriously the idea that there is such a thing as intellectual property, who else does this belong to, it came whole cloth out of my head, no one else could have come up with this, in a million years. And that makes it mine ... when it comes down to it, this is what I’ve made. This is the only thing that I can attach my thumb print to in a sense and say this is something that I created. Nobody else created this. And I am very strong about defending that.’

Similar comments were made by Casey Reas²⁶ and Herbert Franke.²⁷ Moreover, copyright also appeared to influence other interviewees who, at a first glance, rejected proprietary authorship. For example, Jason Nelson initially rejected the idea that his work was his ‘property’ because: ‘I want my work to spread and I love that notion that you have people in strange corners exploring my work’. Yet, later in the same interview, when asked how he would earn a living if he did not have his current academic position (at Griffith University, Queensland), he referred to revenue streams that are dependent on copyright. As he commented:

I think that digital artists, especially net-based artists, are better positioned for making a living than a lot of other artists, and the reason for that is that there is beginning to be more streams of revenue for that sort of thing, so for example making an app, an i-phone app sort of thing ... the ability to charge a dollar or two dollars for people viewing or playing around with your work is beginning to be an amazing stream of revenue for artists working in this genre.²⁸

While these examples²⁹ illustrate that copyright law influences certain of the interviewees' understandings of authorship, the connection between 'art' and law should not be overstated. As we saw in Case Study 1, even where 'artists' conclude legal agreements about copyright, 'vetted very carefully with lawyers', the criteria which they use to determine who is an author, appears uninfluenced by that in law. Also, other interviewees, such as Milto Manetas, articulated ideas which were antithetical to copyright concepts.

Drawing this chapter to a close, what is the significance of these observations for how we understand the challenge of the digital for authorship? As noted at the outset, no claim is made that the interviewees are representative of all practice involving digital technology. Indeed, a number of other qualitative empirical studies are currently in progress, investigating different 'spheres' of practice using digital technology and preliminary indications are that these uncover quite different experiences. For example, a recent Arts and Humanities Research Council (AHRC) funded study which is being conducted by Smita Kheria and Penny Travlou at Edinburgh University on Creation and Publication of the Digital Manual: Authority, Authorship and Voice, is examining authorship in the context of digital 'manuals', which function as resources for online communities, for example in providing a platform for online performances or instructions for using open source software or a medium for exchanging information about farming practices. The 'manuals' involve the contributions of many in the online environment. Travlou and Kheria's preliminary conclusions are that the interviewees 'struggle with the term author and the notion of authorship'. Further, a European Research Council-funded project in progress Music, Digitization, Mediation: Towards Interdisciplinary Music Studies (MusDig), lead by Georgina Born at Oxford University, has uncovered, amongst other things, the views of a younger generation of 'digital musicians' who would rather describe themselves as 'researchers' than 'authors', with the consequence of a lessening of feelings of authorship as an 'exclusionary' or 'boundary making' category.

In this way, placing the observations of the current study in the context of these other qualitative studies reveals a complex picture about authorship in practices involving digital technology. On one level, these differences are unsurprising: the interviewees of the current study were taken from a list of 'notable individuals' and were all 'artists' or 'poets' whose work is directed towards fora for which authorship is well established as a structuring category. Donna Cox, for example, explained that 'the marketing model for art' in the 'high end art market' is geared towards 'the artist as a sole producer', and that she instead preferred working on films, as these had 'established'

models for multiple authorship. Similarly, Joseph Nechvatal presented 'digital artists' as working within the context of 'historical precedent':

I think when someone is audacious enough to call themselves an artist ... you put yourself in the context of all the artists that have come before and have come after and that are contemporary with you, so you have already conceptualised your activity [...]

This empirical study, therefore, encompasses interviewees whose channels of work differ significantly from those engaged in making digital 'manuals' for use by online communities (interviewed by Kheria and Travlou), or musicians at the PhD stage (interviewed, amongst others, by Born). This suggests that the challenges to authorship may stem from the objectives of particular practices, informed by their context (e.g. online community resource as opposed to art gallery display), rather than the use of digital technology *per se*. Indeed this may go some way to explaining why a number of the 'digital' case studies explored in this chapter (e.g. Case Studies 3 and 4), evidence greater affinity with the hierarchical divisions between contributors described by Jostein Gripsrud in his empirical study of the 'analogue' practices of theatre (in this volume), than with each other. As well as indicating the variety of digital practice, placing the current study in the context of others, may therefore lead us to a more nuanced analysis of the challenges currently facing authorship.

Notes

1. This is, of course, not a new challenge. See, for example, the nineteenth century case of *Nottage v. Jackson* (1882-83) concerning authorship of a portrait photograph: 'The idea of photographing the Australian Cricketers no doubt was the idea of one of [the photographic firm's] managers. The man who went to the Oval was the man who took the photograph. They said, 'Go to the Oval and photograph the Australian Cricketers,' and he had to do it. Well, he goes to the Oval. What had he to do? He had to arrange the group, to put them in the right position and the right focus. But he does not do it all, because I suppose there is another man who gets the plate ready; and there is another man who, when the thing is ready, takes the cap off. It is difficult to say who is the author of the photograph.' (Per Brett M.R. at 632).
2. Similar observations were expressed by Georgina Born in a paper entitled 'Composer and Work Revised: Ontological Politics in Digital Art Music' at the conference Music and Digitisation held at Oxford University in January

2013. In the context of qualitative empirical interviews with 'musicians' who use digital technology, Born presented, amongst other things, the views of a new generation who saw themselves as 'researchers' rather than 'authors', with the consequence of a weakening of the exclusion or 'boundary making' denoted by 'authorship'.
3. Aspects of this paper were presented twice at the University of Amsterdam: in December 2011, at the HERA workshop *Trends in Authorship: Empirical Studies and Legal Implications* and in April 2013, at the HERA conference *Creativity That Counts*. I thank Lionel Bently, Paul Heald, Martin Kretschmer and Charlotte Waelde for their comments.
 4. The general structure of each interview was as follows: the interviewees were first asked to introduce their work and how they use digital technology. Following this, interviewees were asked to give an example of a recent work and talk through how it was made, who was involved, whether it had an 'author' and if so the justifications for why 'authorship' was conferred on some contributors but not others. The interviewees were also asked whether they considered their work to be their 'property' and about how they had felt/would feel when/if their work was copied without their consent. In relation to the latter, the interview explored the different factors that impacted on how they felt, in particular whether or not they were attributed and whether the copying was exact or modified.
 5. The names were verified as genuine by Simon Biggs of Edinburgh College of Art, the Project Leader of the ELMCIP project, a HERA funded sister project to *Of Authorship and Originality*. No claim is made that the sample is representative of all creative practice in the digital arts. However, it was considered by Simon Biggs as providing a good spread of examples. I was also grateful to Nicholas Lambert of Birkbeck College, London and Bronca Ferran of the Royal College of Art, London for early discussions regarding project design. The full list of interviewees is as follows: Philippe Bootz, Donna Cox, Marc Downie (of the OpenEnded Group), David Em, Ken Feingold, Herbert Franke, Loss Pequeño Glazier, Lynn Hershman Leeson, Miltos Manetas, Michael Mandiberg, Joseph Nechvatal, Jason Nelson, Casey Reas, Don Ritter, Lillian Schwartz and Alan Sondheim. The interviews took place in August 2011. A second round of interviews was conducted in August/September 2012 with interviewees whose work today frequently involves the contributions of others: Donna Cox, Marc Downie (of the OpenEnded Group), Ken Feingold, Lynn Hershman Leeson, Miltos Manetas and Joseph Nechvatal. Philosopher Laura Biron participated in the second round of interviews, asking a separate line of questions about the interviewees' views on 'relational' theory concepts, which relate to the subject of a separate paper.
 6. Lillian Schwartz joined Bell Labs, the research and development arm of AT&T in the late 1960s, where she worked closely with a number of computer scientists such as Kenneth Knowlton. See further Schwartz, 1992.

7. Jet Propulsion Lab, Pasadena, USA, specialised in the creation of visualisations from data collected by NASA missions. David Em was 'artist in residence' from 1977 to 1984.
8. Herbert Franke was based at the Academy of Fine Arts, Munich from 1973-1997, and is author of one of the earliest books on the subject of 'computer art', which was published in 1971 under the title *Computergraphik – Computerkunst* (Franke, 1971). Speaking through his translator Franke explained: '[collaboration] was in former times very usual. Because all these machines that he was using in former times were not accessible to him without collaboration. Always a scientist or a programmer is, in early times where you haven't had a PC at home, where he had to go in laboratories, to the industry, in new research centres, and he asked, "is it possible to get your instruments to do some artistic work with those instruments?", instruments which had a totally different purposes, for medicine for instance. So scientific research tools... in the medical field, or big computers for space flight and so on, and he got there and got the possibility to work there at night for instance, he had to find somebody there who would be interested in working with him together, and with those guys together he did work. It's changed in the last twenty or thirty years.'
9. The website of the Electronic Poetry Center can be found at: <http://epc.buffalo.edu/>. See further Pequeño Glazier (2002).
10. See Petry (2011), who traces this practice back to the work of Marcel Duchamp, who in 1917 famously submitted a mass produced porcelain urinal signed 'R. Mutt' for exhibition at the Society of Independent Artists in New York.
11. Donna Cox is also Professor of Art and Design at the University of Illinois Urbana-Champaign (UIUC).
12. For a detailed exploration of these differences see Abrams (1971).
13. In the USA, the 'scientific visualisations' will be copyright subject matter, as audiovisual works (S.101 US Copyright Code defines 'audiovisual work' as a 'series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers or electronic equipment...'). The statutory definition of 'joint work' is contained in s.101 of the US Code: 'a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.' Amongst other things, the US doctrine of 'joint works' requires that each co-author's contribution is 'independently copyrightable', such that it amounts to an 'original expression that could stand on its own as subject matter of copyright'. See *Erickson v. Trinity Theatre* (1994, para. 46). In this way, for example, if the computer scientists contribution to the 'audiovisual work' is merely to facts and ideas (e.g. to background research or to technical facts regarding the scientific principles which the still/moving images illustrate), they may not be co-authors as a matter of law. This is illustrated by the facts of *Childress v. Taylor* (1991) where it was held insuf-

- ficient for joint authorship of a play to merely contribute facts and details about the play's leading character. Further, following the Ninth Circuit District Court decision in *Aalmuhammed v. Lee* (2000), co-authorship doctrine in the case of audiovisual works focuses on the question of 'creative control' and it might well be held that this rests with the 'artistic decisions' of Pat-tison and Cox, and not the 'computer scientists'.
14. When explained that the legal doctrine of co-authorship includes a require-ment of 'intention', Cox responded: 'No I had never heard of that... The reason why I talk about intention is because in my art history, when I was taking classes at Madison, intention in the books that I'd read, was the definition that really changed artists in the 1970s. It was why certain artists could put stripes on trains and call it art... And it is my understanding that these conceptual artists that would do these large projects, or... have piles of dirt inside an art museum, it was their intention, their intention to contextualise, or Marcel Duchamp, it was his intention to contextualise the urinal or a bicycle to make it art. That's where I got that.'
 15. Other comments made by Cox during the interview, illustrating this tying of co-authorship/co-creator status to copyright ownership are as follows: 'I co-author with my group and I share all the royalties with my group'. The 'final images of that work are co-owned by the company with whom we are contracting and the University of Illinois, and with myself and members of my group who are the primary creators because we create the visualisations from the numerical data...'
 16. Cf. Cox's critique of treating 'technologists as technicians' above.
 17. This is explored in detail by another member of the OEG, Paul Kaiser in Kai-ser (2004): 'you also collaborate with your materials, onto which you do not simply impose your vision, but rather discover it there... The responsive and even intelligent quality of our "material" (ie, the program itself) deepened my sense of tools and materials as active collaborating agents. Who can doubt that this sort of man/machine collaboration will only intensify in the future?'
 18. Also on the comparison with the film director, Feingold explained: '... in the sense that we talk about it in art, in a way again I use the analogy of a film, people have roles, and who would call the film theirs, generally the director.... yes there are a lot of people that worked on it, but you would say that this is a new film by so and so, Jean Luc Godard has made this film. We know that he had camera people, lighting people, sound people, make up, costume, sets you know people who were moving the equipment around and who drove the trucks to bring it from one location to another. People who made the food you know, people who edited it, people who made the copies and who distributed it, but still we say this is a film by Jean Luc God-ard.' Another analogy that Feingold used is with the position of a writer of a literary work, who may rely on the skill of those with knowledge of type-set-ting, yet will still be accepted as the author of the book: 'the analogy I might

- use is if you are going to do an old fashioned book, where you have to take it to a printing-press, and you needed someone to set the type. So they might suggest using Baskerville instead of Times New Roman for the book because it is going to read better or because the ink sits in the paper better, or they might suggest a certain binding or page size or something like that. And you would rely on their experience and their ingenuity to present you with choices and I like making choices, I like it when someone would say “we could do it like this or like that”, and then I’d say “oh, that’s good, what about doing it like that?” And then they’d say “oh I can do it like this” or “I can’t do that”, and if it wasn’t possible we would come up with a solution.’
19. This is most likely a reference to the fourth ‘fair use’ factor set out in Section 107 US Copyright Code, which requires the court to consider, amongst other things, ‘the effect of the use upon the potential market for or value of the copyrighted work.’
 20. See also Popper, 2007, p. 1, after terming developments in the relationship between ‘art’ and ‘technology’ as giving rise to ‘virtual art’: ‘virtual art represents a new departure – new in its... emphasis on interactivity, its philosophical attitude toward the real and the virtual, and its multisensorial outlook.’
 21. In 2010 Hersmann Leeson received a ‘ddaa’ lifetime achievement award from the Museum of Digital Arts, Berlin.
 22. To quote the example that Glazier gives: ‘Jane is stuck in the woods, should she go in the direction of that rock or follow that frog, and then you click on it’
 23. Martha Woodmansee commented, at the advent of the internet, as follows: ‘More significant... however is that hypertext can be interactive; and when the reader begins actively to intervene in the text, adding to, subtracting from, and modifying it from his or her keyboard, the boundaries between author and reader disintegrate.... By contributing... the reader becomes an overt collaborator...’ (Woodmansee, 1994, p. 26). Cf. in particular to Nechvatal, quoted above.
 24. The passage continues: ‘A main thread in your new book, and the reason that you stress the biographical details of the artists, I believe, is your desire to show how technology is – or can be – humanized through art.’
 25. Ricketson was considering the implications for authorship of the expansion of copyright subject matter to include ‘computer programs’ as a category of ‘literary work’ as well as the UK’s protection of ‘computer generated works’ (defined under by s.178 of the Copyright Designs and Patents Act 1988 as works for which there is ‘no human author’). He presented this as a challenge of the ‘machine age’ and stemming from ‘a fundamental dispute about the nature and meaning of the concept of authorship.’ (Ricketson, 1991-2, p.1 and 2). For a discussion of how the computer programmer was presented in the interviews and how this compares to copyright concepts of ‘authorship’ of software, see Cooper (2012).

26. 'And you say that you... feel that you have "ownership" over the work, why do you feel that way? Well, because it is a product of my mind and something that I worked hard to produce. It is my labour... I do this work out of interest and passion and it is incorrect and unethical to use the work if I am not consulted or if it's used against how I've chosen to license the work or how I want it to be used. As far as I understand, under copyright law, it is illegal as well.'
27. Speaking through his translator, Herbert Franke commented as follows: 'does Herbert consider his work to be his property? Yes. It is his work and in this sense it is his property, yes. And what is it that makes him feel that it is his property? Because it is his creational work.... It's his intellectual property.'
28. Unlike Milto Manetas (see above), Nelson accepted that these licensing transactions were dependent on copyright.
29. Another example is Michael Mandiberg. He is well known for his 'appropriation' work www.afterSherrieLevine.com which enables visitors to the site to print off copies of digital photographs which he took of photographs by Walker Evans (1903-1975), as a means of playing with the concept of 'reproduction', explored in the analogue environment by Sherrie Levine. Yet, other aspects of his work fall firmly within the copyright framework through his use of attribution Creative Commons or GPL licences. This is well illustrated by his response to a comment left on his page entitled 'Michael Mandiberg – Three Creative Commons Case Studies' at <http://vimeo/6303349> (accessed 19 August 2011) which complained that the problem of 'open source' projects was that others 'use them "word for word"' and then 'credit themselves'. Mandiberg replied by invoking the legal framework: 'but they have to credit you, and keep the code GPL licensed. If they don't they are breaking the contract of the GPL. How you choose to remedy that situation is up for debate (a polite email to their creative director, calling them out publicly, or getting lawyered up)... it is imperative that these covenants are kept. And that requires us to force the issue when someone breaks the covenant.'

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Creativity and the sense of collective ownership in theatre and popular music

Jostein Gripsrud

If one asks people what they think of when hearing the expression 'the artist at work', the chances are overwhelmingly that they will picture a painter in front of his (rather than her) canvas or a writer alone at a desk or table where there is a piece of paper, a typewriter or a computer. What lies behind this, is of course the Romanticist idea of the artist as an individual with particular expressive needs and gifts. The simple historical fact that much or perhaps even most art has routinely been created by more than one person – from the work of Michelangelo's assistants to the creation of performances and orchestral concerts – has not significantly altered this standard image of the lone creator. The image even pops up in recent arguments that digital technologies are challenging it (cf., e.g. Woodmansee, 1994, p. 25) – as if it had not been challenged already by actual artistic practices.

Clearly, to the extent that such an individualistic notion of creative practice underlies copyright law, a critical look at how art is actually made may be useful with a view to possible sensible revisions of such laws. On the other hand, even when the production of art takes a collective form, the individuals involved may still think of themselves and their work in terms of the Romantic image of artistic creation, regardless of the extent to which this is adequate.

With this as a background, the purpose of the research presented here has been to investigate empirically how practising artists, in art forms where production is predominantly of a collective nature, feel and think about the nature of their contribution to the finished whole. More precisely, the idea is to explore to which extent those involved in the collective production of art have a sense or feeling of ownership vis-a-vis the outcome of the creative process, and what they think this might entail in terms of financial and other rewards. On this basis, I wish to raise some questions regarding the role of current copyright law in relation to actual artistic practices.

Norwegian law closely follows copyright laws of other Nordic countries as these have traditionally developed copyright policy in cooperation. Because of Norway's membership in EFTA, the large body of EU copyright norms is also implemented in Norwegian copyright law (see G. Karnell, 2012). Both in theatre and music the roles of creative contributors are governed

by either copyright law (copyright in a play, set design, costume design, choreographies, and other works of authorship) or so-called neighbouring rights for performing artists (visual, musical, dance). Rights of performing artists are typically limited and centre on their right to authorise the recording of their performance. Subsequent copying and distribution of such recordings also requires their authorisation. Unlike authors protected under copyright law proper however, the law does not give them a claim against adaptations or copying of the performance by other performers. That is, rights only rest in a particular recording of their performance, not in the performance as such. The director of a play has, from a legal point of view, a less clear position. In the intellectual property landscape, the director seems situated between authorship (creating a work) and performance. The details of the legal distinctions made in black letter laws do not necessarily feature in contractual practices.

Imagining that perceptions of and practices relating to these matters might vary from one form of collective art to another, I decided to look more closely at production practices in two very different arts: Professional theatre and popular music, both professional and semi-professional. Theatre is an art form with ancient origins that still relatively low-tech in terms of production, relying almost completely on live performances before a public assembled in the same space at the same time. Popular music certainly also has ancient origins, but it has to a much greater degree become a relatively high-tech art form in several respects: Its history over the last 100 years is closely related to modern (and changing) technologies of recording, reproduction and distribution and it now relies to a great extent on electronic equipment also for the composing as well as for the live performance of musical works. A comparison between the two arts may thus be interesting also in terms of how very different forms of production, distribution and consumption might influence how participants in the respective creative processes experience their contributions and their relationship to them.

The data was gathered in two periods – October/November 2011 and March/April 2013. The first of these periods was mainly devoted to the study of theatre. I observed rehearsals of a play by Australian playwright Alan Bovell, *When the Rain Stops Falling*, at the public repertory theatre in Bergen, Norway, *Den Nationale Scene* ('The National Stage'), and I did very loosely structured interviews with a middle-aged male actor, Stig Amdam, and a young female actress, Ida Cecilie Klem, the female art director (*scenograf*), Siri Langdalen, and the male director (*regissør, iscenesetter*) Svein Sturla Hungnes. I also interviewed the theatre's male director at the time, previously and currently a nationally prominent actor, Bjarte Hjelmeland, and an

experienced playwright, who is also one of Norway's most acclaimed poets, Cecilie Løveid. As for popular music, I interviewed Mats Lyngstad Willassen and Aksel Gaupås Johansen, two amateur musicians in their twenties with some experience of contributions to the professional music scene (mainly record productions) in October/November of 2011 and then, in March/April of 2013 a leading, very internationally-oriented male owner of record labels and a management agency in Bergen, Mikal Telle, plus two professional musicians, Frank Hovland and Eirik Glambek Bøe, and a (female) singer and producer with considerable professional experience, Kate Augestad. In terms of genres, the interviewees represented a broad variety of popular musical forms, including rap, r&b, largely acoustic pop, rock, electronica and jazz. I further studied the media coverage of and documents pertaining to a recent (February 2013) court case in Bergen over the rights to two electronic pop songs associated with the internationally renowned group Röyksopp.

The following account of my findings is organised around three key questions: (1) What is the nature of collaborative creative work in these two art forms – how is it organised, which structures or relations of power can be discerned? (2) What are the current copyright regimes like in theatre and music respectively? (3) Do copyright issues influence creative processes, and if so, how? But I will start out by sketching the Romantic notion of artistic creation against which the specificities of collective authorship are to be interpreted.

The Romantic notion of artistic creation

The modern understanding of artistic work as 'creation' has a long prehistory, but basic elements in its present form were established in the 18th century and decisively shaped by representatives of the Romantic movement in the arts from the late 18th century on.

It is on the one hand tied to spiritual, i.e. religious, thinking, in that it links artistic creation to the original divine creation of the world out of nothing (cf. the notion of inspiration from above). According to the Romantic German author Novalis, for example, artistic creation is 'as much an end in itself as the divine creation of the universe, and one as original and grounded on itself as the other: because the two are one, and God reveals himself in the poet as he gives himself corporeal form in the visible universe' (cited in Taylor, 1985, p. 230). As once pointed out by Danish literary scholar Morten Thing (1973), many portraits of poets in the Romantic period show them looking upward into the air rather than downward on the piece of paper

they are supposed to write on. The religious understanding lingers in the many statements by much more current artists who describe themselves as the mouthpieces of a muse or some other extra-worldly force. For instance, John Lennon is said to have distinguished between the songs he wrote just to complete an album, and the 'real music ... the music of the spheres, the music that surpasses understanding ... I'm just a channel ... I transcribe it like a medium' (Negus and Pickering, 2004, p. 3, citing Waters, 1988).

On the other hand, the Romantic idea of authorship also attributed creativity to the psychology of the artist. The voice of the spirit, also known as the voice of Nature, was to be found within the individual artist. As put by Keith Negus and Michael Pickering, the artist was seen 'as someone whose 'inner' voice emerges from self-exploration and whose expressive power derives from imaginative depth' (ibid., p. 4). They argue that artistic creation has since 'become synonymous with this sense of exploration and expressive power', but also note that this understanding has exerted considerable 'influence over the development of the trend towards subject-centredness in modern culture, along with the accompanying ideal of authenticity' (ibid.).

Importantly, it is also inextricably linked to the modern notion of the individual, which underpinned not least the pioneering declarations of human rights in the late 18th century. American historian Lynn Hunt (2007) has convincingly argued that these declarations were fundamentally marked by Western élites' experience of reading epistolary novels such as those by Samuel Richardson, primarily *Pamela: Or, Virtue Rewarded* (1740) and *Clarissa: Or, The History of a Young Lady* (1748), and Jean Jacques Rousseau: *Julie, ou la nouvelle Héloïse* (1761). These inspired empathy across divisions between nations, classes and genders, based on an understanding of an 'inner life' that all humans have in common in spite of differences. Rousseau's novel has, along with much else of his work, been regarded as a source of inspiration for Romanticist criticism and thinking more generally. What the understanding of the artist's creativity is tied to is thus no less than the tenets of our modern understanding of the individual, of subjectivity, of the self. One cannot simply declare it dead – it won't lie down since it is thoroughly bound to fundamentals of (Western, at least) civilization.

Even the structuralist and post-structuralist critiques of Romantic notions of authorship can be seen as moving around in the same old paradigm. They have (officially) refused to accept that authors are 'ventriloquists who speak through their works', i.e. the psychological dimension of authorship according to Romanticism; instead they cast them 'in the role of dummy, manipulated by the hidden hands of language' (Murdock, 1993, p.131). 'Lan-

guage' or the total 'Text', in principle consisting of all texts ever produced, has taken the place of the external, higher spiritual powers that inspired artists in the Romantic understanding. I for my part think it is simply naïve to take eminent French structuralist and post-structuralist writers such as Roland Barthes and Michel Foucault in complete earnest when they argue for 'the death of the author':

It is particularly ironic that Barthes, who insisted so forcefully on the death of the author, should have taken so much care to develop a voice that is instantly recognisable as his. While this is entirely understandable in the context of Parisian intellectual life, where style is a decisive weapon in the struggle for ascendancy, it hardly squares with his stress on the relative autonomy of textual codes. If Barthes served a life sentence in the prison house of language, his works strive remarkably hard to give the impression that he is out on parole' (ibid.).

What all of this entails is that artistic creation is undeniably and irreversibly tied to culturally ingrained notions of individuals and their interiority – their experience, sentiments and knowledge – their subjectivity. We can hardly envision it otherwise, in practice. We are moderns, and therefore in a sense Romanticists, to some extent. However, if authorship, in the Romantic understanding, remains fundamentally tied to the individual, how can we then understand collective creativity, collective creation of works of art? Is it possible at all?

Creation in the collective arts: theatre

The production of a theatre performance in today's publicly funded repertory theatres in Norway is a rather complex affair, involving a number of decisions made at different levels of the organisation. First, the theatre's director, who is responsible for its repertoire, selects a certain play from the vast list of options, ranging from international and national classics to current or recent pieces available in the market. In some rare instances, a play might also be ordered from a particular playwright whose talent the theatre director trusts. Having made a choice, and signed a contract, the theatre director then chooses a director (*regissør, iscenesetter* – in French '*metteur en scène*') for the play. The theatre director is thus a key person in what appears like a pyramidal structure of power. In the context of copyright, however, it is worth mentioning that theatres, contrary to film

production companies, do not have any formal rights to their own productions in Norway, say, in the case of recordings or transmissions.¹

The director of *Den National Scene*, born and raised in the Bergen area, was near the end of his successful four-year term when he chose to have *When the Rain Stops Falling* staged. He turned 41 in the autumn of 2011, and could already look back on a long and varied career in Norwegian theatres. Having decided already very young that he wanted to become an actor and not a rock star as he originally had dreamed of (he played in a few bands as a teenager and in fact released a country music CD recorded in Nashville, Tennessee, in 2008), he chose a high school offering drama as a specialty at 16. He entered the school but he almost immediately 'ran away with the circus', as he put it, i.e. he left school and joined a touring group at the regional theatre. He says he had set aside several years for preparing his entry to the national school of acting in Oslo, but was accepted at his first try when he was only 17 – much too early in his view: He was not mature enough to make proper use of what the school offered. He 'entered the school as a natural talent and left it as a natural talent with a poor education', he said. But his barely cooked talent was evidently much appreciated and he was given a variety of important roles early on. After only a few years he ended up in the most prestigious of Norwegian theatres, the National Theatre in Oslo.

After developing very much as an actor there, he was given together with two other young actors, the responsibility of running the National Theatre's branch *Torshovteatret*, which is situated in a working class area of Oslo in the process of being gentrified. They did so successfully, both in terms of critical acclaim and audience numbers, for a few years. Having been warned by friends not to get stuck in the safety of the grand old theatre institution, he then joined a group of freelancing comedians, *Lompelandslaget*, where he also contributed to the writing of sketches and gags, before returning to *Nationaltheatret* where he again took on several high profile roles. He was continuing the practice of participating in outside projects, including at least one in Copenhagen, and also worked as a director of several plays. Wanting to realise his interest in (and previous experience of) selecting a repertoire in a regular repertory public theatre, he applied for the job of Director at the Theatre in his hometown and got the job.

The point of telling this story in such detail is to show how this artist's successful career indicates the importance of a strong 'natural talent' combined with a daredevil's taste for new challenges and risky choices – of several sorts: Early on he went public with his being gay (useful not least since his appearance is far from the stereotypes of gay men); and he is

probably the only director of a high culture institution anywhere in the world to have released a country music CD when in office. He has done practically every possible type of role in the theatre, including drag show characters. He said his engagement with every role probably made him a demanding collaborator for directors, since he would argue quite hard for his own conception of the character if it differed from the director's. His interest in directing came from his interest in the interpretation of a play as a whole, and his interest in directing a whole theatre sprang in a related way from his interest in public theatre as an institution, in negotiating the demands for artistic quality on the one hand and popular entertainment on the other. Typically, at the time I interviewed him, in January 2012, he was in the process of co-writing a character-based one-man show with strong elements of stand-up comedy – which ended up commercially successful. What all of this also entails is that his choice, both of the play *When the Rain Stops Falling* and the person who was to direct it, was very well informed. While he had at other times chosen to give quite inexperienced people a chance to direct a play, several times having to step in himself to make a performance work toward the end of rehearsals, he knew this Australian play was so demanding there was a need for a highly competent, strong director.

A theatre director is as a rule of course not (unless there is some major crisis) directly involved in the practical creative process leading to the actual performance. Neither normally is the playwright: In my interview with the experienced poet and playwright Cecilie Løveid, who started her writing career in her teens, she described the organisation of the production of a play as a 'Christmas tree' where the director is the star at the top – the playwright is expected only to look at the tree from a distance. She or he is normally not consulted when changes are made in the original manuscript.

The director of the play is the star of the Christmas tree because he or she is expected to 'translate' the written text into an on-stage, live performance. This involves developing a thorough, coherent interpretation of the text in question as a whole, based on an analysis of its concrete motif(s), its thematic content (i.e. its key conflict(s)), its narrative (if any) and its characters. It is by way of this analytical and interpretive work that the director then arrives at decisions on how to realise the text's potentials in the most artistically rewarding way: What are the play's most important elements and how can they best be communicated to the theatre's public? What will this entail in terms of the visual aspects of a performance, i.e. the décor, the ways in which characters move and gesticulate, the way the stage is lit and so on?

How should the play sound, i.e. what sounds are to be involved outside of the characters' voices, how should these voices be used?

The Norwegian Intellectual Property Law (*Åndsverksloven*) mentions in its list of examples of protected works in section 1: 'stage works, both dramatic and musical-dramatic as well as choreographic works and pantomimes, and radio plays' (my translation of '*sceneverk, så vel dramatiske og musikkdramatiske som koreografiske verk og pantomimer, samt hørespill*'). The specific roles of directors and scenographers are not mentioned in the law. But according to the standard agreement concerning the work of directors and scenographers/costume designers in Norwegian theatre², any particular staging of a play is the director's 'property' and cannot be used again after two years of the original staging unless the director agrees and is compensated again. This agreement is between the national association of orchestras and theatres (NTO) on the one hand and the national organisations of 'stage directors' and scenographers and applies to both categories whether in permanent positions or hired for a particular staging. Amateur theatres hiring professional directors and scenographers are to follow the agreement as well. Interestingly, the director I interviewed seemed not to be aware of his legal rights to his conception and solutions; he seemed only to think of moral rights: He thought of what he regarded as a German copy or near copy of his Norwegian outdoor staging of Ibsen's *Peer Gynt* as immoral rather than illegal.

In the course of this work, the director will most often make changes in the playwright's text. The current agreement between Norwegian theatres and dramatists³ states in point C 5 ('Alterations in the work') that '[t]he theatre cannot make significant changes in the work except by agreement with the dramatist'. What 'significant' means is not clarified there, but two of my informants mentioned what appears to be a rule of thumb: The director may delete or otherwise change up to 30 per cent of the drama text without consulting the playwright. In practice, the counting of percentages never takes place, and in the production I studied, it is likely that much more was deleted or altered in other ways – and this is not an extraordinary case. I asked the director how he would react if the playwright showed up and protested these changes. 'I would lose all respect for him.' The director was very much convinced that the changes he had introduced vastly improved the play.

This strong confidence in his own interpretation and aesthetic judgement is also clearly useful when the set design is to be discussed with the scenographer. While the scenographer has her or his own artistic competence and ideas, it is the director's comprehensive vision of the performance as a

whole that must guide the design job. It is most probably quite normal to do as the director and scenographer did in the case at hand, i.e. meet early on and several times later for discussions on how to solve questions raised by the director's interpretation. This may well entail forgetting much or most of the playwright's descriptions of the space in which the action takes place. In the case I studied, the director selected an experienced scenographer he knew and whose previous work he knew and liked. In other words, he chose a scenographer he knew he could cooperate well with and whose creative contributions would be likely to support and possibly improve his own ideas. While the scenographer obviously contributes significantly in her or his own right, it still seems reasonable to say the director has the upper hand in this relationship.

The director also most certainly has the upper hand in the relationship with the play's actors. Not only is it the director who selects which actors he wants to work with (choosing mostly from among the public repertory theatre's regular staff), the director also almost totally controls the interaction that takes place during rehearsals. As I followed two rehearsals on *When the Rain Stops Falling*, I was very impressed with the thoroughness of the director's preparations – and his instructions to the actors addressed their performance in minute detail.

The original manuscript had not only been cut and altered in other ways, it had also been segmented in small bits, each of which seemed to carry a particular significance related to the overall conception of the play. The director required not only certain movements across the stage, not only particular ways in which the actors should position themselves vis-à-vis each other, not only particular intonations of lines – he also had particular ideas on arm movements and other gestures much as a choreographer of a dance performance would have.

Both the director himself and the actors I interviewed were well aware that this directorial style would be located quite far toward an authoritarian pole in an imaginable spectrum of such styles, which vary greatly from one director to another. I was told stories of directors who would start the rehearsal period with exercises reminiscent of psychodrama or related practices – also instances of the power awarded to the directorial function, one might add – but then, during the actual rehearsals would be much more open to the creative contributions of the actors involved. This is not to say, however, that the director in my case study did not allow for such contributions, there were very short discussions and occasional signs of disagreement, but on the whole the actors appeared to be held on a pretty tight leash.

Given the above, my interviews with actors were not least about the ways in which they experienced their ability to actually contribute creatively to the final shape of the performance. Interestingly, it turned out that both the young female and the middle-aged male actor I talked to were also artistically active in other media – the female was painting and the male was writing, predominantly drama. This gave them a basis for comparing the space for creativity in the two artistic professions. They both commented on the ways in which the very strict directorial style I had observed limited their possibilities for co-creativity. But they still insisted that there was a space for them (albeit minimal) in which to manoeuvre, through ideas they had accepted by the director and through (attempted) protests where their own understanding of their role conflicted with that of the director. Still, compared with the freedom experienced when painting or writing, they also agreed that the space for creativity was very limited for an actor.

In fact, the limitations of the role of actor was a primary reason why the director had decided to quit his long, varied and critically acclaimed acting career in stage drama, film and television. He talked about his interest in being an actor as if it were a youthful folly; it was definitely something he 'grew out of'. He was for a while, he said, the sort of argumentative actor he himself now hated to work with. The middle-aged male actor's attitude seemed akin to this – his artistic interest was increasingly in his activity as a playwright. The acting was still of considerable interest, but it was perhaps more importantly what paid for his bread and butter. The young actress also treasured the freedom she experienced when painting, but she was, not surprisingly, less inclined than the middle-aged actor to think of an end to her acting career for this reason.

The scenographer (born 1957) had a solid education. She first studied at the Academy of Fine Arts and Design in Oslo, originally in furniture design, but early on oriented herself toward scenography, also doing stage design for student productions at the Opera School in Oslo while still a student herself. In order to perfect her skills she took a year of painting classes in the same school after her diploma, before embarking on her career as a scenographer at various Norwegian theatres. She also did work in film and television and was, about 25 years ago, hired in a regular position in the public broadcaster NRK's drama division. Since then (2000–01), she also studied film and production design in film and television in London. Regularly taking unpaid leaves of absence between NRK productions she has worked on a large number of theatre productions and other projects over the years.

The scenographer described her contribution to the production of *When the Rain Stops Falling* as an original idea she arrived at having read the play. She brought it to her first meeting with the director, who she knew well from previous collaboration. He also brought some sketches and ideas to the first meeting, but quickly agreed to work with her proposal. She saw their relation as one between equals, but conceded that in case of a conflict, his opinion would be decisive: 'it was his production'. Somewhat surprisingly, she seemed not to be aware she had any legal rights to her scenography, which she has in accordance with the same agreement as directors. She had, however, in fact exercised her (moral) rights, for example when refusing the use of props she had designed for particular drama productions outside of the original context in NRK television programs.

The scenographer thought of herself explicitly as an artist, doing creative work much like any other visual artist. She was constantly working on new ideas – also for plays not yet written! This free artistic work might one day be exhibited. But she also saw some of her stage designs for actual performances as installations that could well deserve exhibition as stand-alone visual art and might one day choose to concentrate on work as an independent visual artist. She was, however, very content with her present situation, especially since she was able to take on such different projects: Between two major productions of television drama, she would soon after my interview travel to Greenland to do the scenography for an Inuit dance performance.

The two major differences between her work as a scenographer and work as a free visual artist were first, that it involved a lot of communication with other people involved in a production and might include that changes to her original ideas were made necessary by other people's opinions (the director's in particular) and, second, that she had to work within much tighter time frames: a production process, whether in film, television or theatre involves a large number of people and is very expensive – all of these people can't be asked to wait around while she refine her ideas. A scenographer is simply a team member and must adapt her work to the organisation of the production process.

As for the question of the relationship of copyright to artistic creativity in the theatre, it is well worth noting the following: All of those interviewed decided early on in their lives that they wanted a career in the theatre or related arts. The issue of copyright law appears marginal at best to all, with the possible exception of the playwright, while the copying – more or less – of someone else's work or ideas was morally condemnable, not *comme il faut* in any of the involved arts or professions. An exception worth mentioning

here is the theatre director's opinion that if he saw a performance he liked and someone said the staging had been stolen from London, he couldn't care less: What works well, works well. When I mentioned this position to the CEO of the Association of Norwegian Theatres and Orchestras, he said the theatre director thought like that because he is 'a theatre animal'. What the theatre director did, however, was take the point of view of the audience. Maybe this ability is what basically defines a true 'theatre animal'?

The alleged copying of the director's staging of *Peer Gynt* in Germany did not lead to his hiring a lawyer to punish those involved. The scenographer said it would be damaging to the reputation of someone in her profession to be caught replicating solutions successful in London or elsewhere. Both seemed unaware of – or at least did not mention – the rights they had to any performance they produced according to the standard agreement I referred to above. I had myself, at the time of the interviews, the impression that the director's work did not have any copyright protection while the work of the scenographer did. This misunderstanding was expressed in some of my questions to the director, the scenographer and the theatre director but not corrected by any of them. This low level of awareness, knowledge and interest in copyright law, in addition to the strong impression they all conveyed of being driven into the arts by wishes, desires and dreams that were at work no matter what the legal status of their work would be, may be said in itself to testify to the modest importance of copyright protection of creative work in the arts for creativity itself.

Creaton in the collective arts: popular music

Music is as old as mankind, but popular music is a considerably younger phenomenon if a distinction between folk and popular music is accepted. Common usage of the term popular music refers to music in the age of mass communication, and developed at first through the mass distribution of printed songs and sheet music. In England, it has been estimated that popular music in this sense replaced traditional folk music in many areas before the mid-19th century.⁴ Since the introduction of recorded music in the early 20th century, this has been a primary medium for the production and distribution of popular music. The use of various kinds of sound technologies in live performances has also been a characteristic of popular music, even if acoustic instruments and singing has retained a place within the field. The recording of popular music was for decades little more than the quite straightforward recording of studio performances, but this changed decidedly in the mid-1960s when

The Beatles – in an interesting sort of dialogue with serious contemporary music's experiments – made the studio itself a laboratory and instrument for new sounds, new forms of musical expression. Technological developments since then have made significant parts of modern popular music more or less unimaginable without advanced electronic and digital technologies in composition processes, production, recording, distribution and live performances.

Over the last ten to fifteen years, digital technologies have radically changed the ways in which most popular music is produced and especially distributed. Outside of the folk and singer-songwriter genres, it has always been a collective enterprise, but with digital technology the possibilities for cooperation in a variety of forms grew tremendously. Music began to consist of pieces assembled from a multitude of sources, anything from everyday sounds, bass lines, rhythmic figures and melodic motifs could be voluntarily or involuntarily contributed by a number of creators in the form of samples or more or less sketchy drafts or complete elements of a final recorded product. These developments challenged previously established notions of single artists creating musical works, perhaps with the product of a similarly single lyricist added in songs to be performed by a singer and/or an orchestra/band. However, the lone creator was already a somewhat problematic character in popular music, especially since the group or band format gained hegemony in the 1960s. Which band members actually contributed what to which songs have been the subject of innumerable quarrels in thousands of bands worldwide since then.

In order to have a closer look at the conditions of creativity in popular music and the conundrum of copy- and other rights in this area, I interviewed people in Bergen, Norway involved in popular music in very different ways at very different levels and the following is a report on what I was told.

My first two interviews were with two men in their twenties both of whom had been involved in the production of music as amateurs who occasionally contributed to concerts and/or recordings – also recordings which generated significant sales internationally. They both discovered the joys of music early on, including the joys of making music – composing and writing lyrics. One of them, Johansen, talked about playing with cassette recorders with friends, eventually composing music with them; the other, Willassen, talked of playing in bands and eventually discovering hip hop music, especially rap, to which he had since devoted his musically creative energies.

They had both in more mature years – late teens, early twenties – actually contributed bits and pieces to professional productions, as mentioned above. One of them had, for instance, contributed beats (a sound sequence of chords and rhythm instruments to which one writes a melody and lyrics) to two albums in a genre located somewhere between r&b and rap, by an

originally Canadian artist, the former opera singer Kinny, who has been living and recording on and off in Bergen and performing and selling records internationally.⁵ The other had contributed to several hip hop recordings and performances, including rapping and singing in his northern Norwegian dialect on a successful record where the featured artist was a Norwegian artist living in Los Angeles (Big Ice: *Trunk of Funk*, 2010). The very international nature of current popular music is something I will return to shortly.

Perhaps the most relevant information to be gained from these two interviewees in relation to the issue of copyright is their confirmation of the perception that the motivation for productive efforts in music is not money or careers in the music business. The love of music, perhaps certain genres or styles in particular, is what inspires the largely playful creative activities that take a collective form from early on. Both talked about the sharing of musical ideas and sketches between friends via mobile phones or via computers hooked up to the Internet. G-mail was a very useful service, since it allowed for very large (in term of bytes) attachments that could be stored in people's mailboxes if necessary. Bits and pieces communicated in this way could later form the basis for the actual making or construction of a finished piece in a professional studio. If others used these pieces the answer to questions of rights could vary. In some cases it would just feel good to know they had contributed something to a piece that sounded good. In other cases they would feel that a mentioning of their names on the cover of the record would be sufficient compensation, adding to their 'cred' and self-esteem. If they felt they had contributed considerably to a production that became commercially successful, however, they would feel entitled to a share of the profits. But such success is very hard to foresee, and the money to be derived from a success at the level in question would be limited anyway, so generally neither of the two were very concerned about the issue of rights.

I also talked to a mature professional musician, Frank Hovland, born 1962, whose main instrument is the electric bass but who is also a singer and songwriter who has worked extensively as a record producer. He has been a leading member of a number of Bergen rock groups with national reputation, he has participated in innumerable recording sessions and one-off band constellations, and he has over the last fifteen years toured Europe and North America with artists such as Chris Thompson (once member of Manfred Mann's Earth Band and a contributor to a large number of records, concerts and international tours with celebrity artists besides his own career) and Terje Rypdal (globally acclaimed Norwegian jazz guitarist with a rock background). Hovland agreed with my two younger interviewees that money

was not the motivation for his embarking on a musical career, and money or sales would never be the basic motivation for his creation of songs and writing of lyrics. Once a song was written, however, and especially when it had been recorded, things were different. For Hovland, when music becomes a full-time profession, money and issues of rights are certainly not without interest.

When playing the bass as a member of the orchestra at the city's public repertory theatre, or in recording sessions where other musicians realised their projects, Hovland was okay with a regular salary or, in the latter case, a one-off honorarium. He mentioned that this would be normal also for session musicians in studios where world famous stars record their material, even if it is often these musicians and their ideas that make these records interesting and successful. But his work as a composer and writer of songs was something else. In some cases, he did everything himself – and would of course expect the complete rights to such a musical and lyrical piece of work. But he also provided an example of a somewhat more complicated process: A friend had approached him with something he had created – a drum pattern, a couple of guitar riffs, a vague idea of a form. But there was no melody and no lyrics. My interviewee wrote a melody and lyrics for the song and so wanted the rights for music and lyrics attributed to him. The guy who came with the bits and pieces actually only provided key elements of the arrangement of the song, and so he should settle for arrangement rights, the bass player and songwriter thought. But his collaborator protested: There would have been no song had he not approached the bass player with his drum pattern, riffs and formal ideas, or, perhaps there would have been a quite different song written by himself. 'There was a bit of shouting and teeth-grinding, but we arrived at a 50/50 share of all rights to the song.' The reason for this was of course social – he referred to this solution as 'doing a Lennon-McCartney': They both wanted to remain friends and collaborators on future projects, and a struggle over who did what on this particular song should not be allowed to jeopardise this.

This sort of solution is quite common in bands, since it is common knowledge that struggles over who contributes most to what in a production are also among the most common reasons for bands – and friendships – breaking up. I also interviewed one member of the Bergen based duo Kings of Convenience, Eirik Glambek Bøe, who have sold over one million copies of their three first albums and are among the most streamed artists in services such as Spotify⁶. Their success internationally has led to their touring the world, e.g. all over South America and in several Asian countries such as Indonesia – and they recently received an invitation to do a gig in Ulan Bator: 'You guys should come to Mongolia, people love you here'. My interviewee admitted there had been a lot of quarrelling between the two partners over the years,

but that they had arrived at a 50/50 share of the rights for all songs – ‘even if I would argue that the correct figures would be 60 for me and 40 for him, and he would, given his character, probably say 70 for him and 30 for me’. Income from the use of their recordings in movies and advertising would consequently always be equally shared. Concert revenues, that constitute the major part of the duo’s income, would of course always be split 50/50.

These musicians thus saw the issue of rights as partly distinct from the question of who contributed what to the creation of a piece of music: They may maintain a special feeling in relation to some songs as being their offspring, so to speak, but handle the question of legal and economic rights in a pragmatic manner. The actual act of artistic creation is one thing, rights and income something else.

Further underlining this distinction is the complex area where the music industry operates between musicians and their audiences. I interviewed a key person in Bergen popular music, Mikal Telle, who started his career at nineteen, in 1995, when he opened a shop in the city centre exclusively for vinyl records – the shop was called Primitive Records – some three years after the CD had (seemingly) completely taken over the market. The shop became a hangout for young people seriously interested in music and eventually, in 1998, he started a record label – the first of several, one for each genre or style. The background for this was that he discovered his international suppliers of records could also function as distributors for vinyl records produced in Bergen. He had no contracts and made only about 500 copies of each. Working exclusively from his social capital (his economic capital was close to zero) and his gut feeling for interesting music (he has no musical education, plays no instrument) he became the key person behind a series of Bergen-based bands and artists, several of which have had national and not least international success – among the artists who originally launched their international careers through his tiny labels are Røyksopp and Kings of Convenience.⁷ He is currently concentrating mostly on the management of a number of artists, mostly people who are up-and-coming.

The experience Telle has with negotiations on all levels and in all areas of the music business makes him an interesting source on rights issues. He talked, for instance, about the need for bands to accept very meagre deals with major record companies in exchange for the distribution and attention such deals may provide, crucial not least in today’s business where live performance is the major source of income for most if not all musicians. According to Telle, Norwegian musicians in general are inclined to be too inflexible in rights issues for their own good, i.e. they would intuitively refuse record deals that give the lion’s share to an international record company

even if the deal would move them up to a different league internationally. Composers of a song would not always themselves think of sharing a bit, e.g. a third, of their rights with the other members of their band for the sake of peace and collective creativity. So a part of his job as a manager would be to convince his clients through discussions of the benefits of strategic thinking in this area. Still, as evidenced in my interview with Frank Hovland, the bass player, as well as in the interview with Eirik Glambek Bøe, one of the two members of Kings of Convenience, pragmatic solutions to such issues are not at all alien to the musicians themselves: They mostly arrive at them without the intervention of a manager.

Solutions such as an equal 50/50 split of revenues are probably easier to arrive at when there is (relatively) little money at stake, though. Furthermore there may be cases where a composer may grant rights to someone because he or she feels under pressure from a record producer or manager with some sort of hold on them. This is indicated also by a high profile lawsuit in Bergen in February 2013 concerning publishing rights to a particular Røyksopp song. The history behind the case is complex and it is impossible here to go into the details of the court proceedings and the decision. But for our purposes the following summary, based on Røyksopp's view of the case, confirmed in court, should suffice.⁸

When the members of the duo Røyksopp were still teenagers and living in the northern Norwegian city of Tromsø, they were perceived as electronica musicians with remarkable talents by a considerably older DJ, Rune Lindbæk, who also participated in the popular music milieu there. They formed a band/group where Lindbæk became a leading member because of his contacts and management skills – he had ideas concerning sound and marketing, but never produced a melody or anything else that was musically important. His younger partners later discovered that he had credited himself as one of the composers for every piece of music he registered with the Norwegian musical rights organisation TONO.

When living in Oslo in the late 90s, one of Røyksopp's later members, Torbjørn Brundtland, recorded songs for an album and Lindbæk was present in the studio some of the time. A particular song, 'Lift', was already more or less created in Brundtland's head when he arrived at the studio one morning, and the recording of it was almost done when Lindbæk showed up. Lindbæk suggested there should be a 'take off' effect, with no further specification, when the last part of the song started after a 'breakdown', but otherwise contributed nothing. He used to repeat 'nothing leaves this studio without me being credited as composer', and so the song 'Lift' was registered with TONO with him as one of its creators. The real creator was at that point so

tired of Lindbæk and his practices that he moved to Bergen where he teamed up with his old Tromsø friend Svein Berge to form Röyksopp.

A first single, 'So Easy', was released on one of Mikal Telles' local labels, and led to Röyksopp being signed by the international company Wall of Sound Recordings (according to Mikal Telle, he told Wall of Sound to talk to the musicians directly, wanting nothing for himself). Eventually, their major international hit, the album *Melody AM* was released. One of the tracks on this album was called 'A Higher Place'. Years later, Rune Lindbæk approached Röyksopp and wanted to be paid for his composer's rights in that track, arguing that it was a near copy of the song 'Lift' that Brundtland had recorded in Oslo back in 1998. He pointed to two elements in the song as his creations, one of them the 'take off' before the last part of the song, the other a melodic motif. After a number of attempts to get his way through e-mails and the like, he had his story of 'theft' by Röyksopp told in a ten-page article in the weekend magazine of a major national daily, *DN*, and then, finally, sued Röyksopp.

The court case in Bergen in February 2013 was highly publicised and involved, among a number of witnesses and others present, Röyksopp demonstrating concretely, with all or much of their technical machinery in the courtroom, how they go about composing a song/musical piece. The court finally ruled in favour of Röyksopp on all accounts. The verdict contains a highly informed and interesting piece of musical analysis that compares the songs 'Lift' and 'A Higher Place' in detail, most probably written by one of the two lay judges in the case, an internationally acclaimed composer of contemporary serious electronic music, Asbjørn Schaathun.⁹ It concludes that the two pieces are very different, that the idea of a 'take off' does not constitute a significant contribution without any further specification, and that the melodic motif Lindbæk claimed to have created, and which was used in both recordings, in fact had been sampled from the work of Jean Michel Jarre and thus was no product of Lindbæk's.

What this case illustrates, I think, is the following points: 1) Popular music is, at its highly creative, lower, local levels, marked by a shared, strong interest in music and productive collaboration where the interest in issues of rights and revenues are of anything from low to modest importance. 2) If sales take off, though, these issues may become important. Strong feelings regarding the moral ownership of a piece are at work also in battles that may take a juridical form – Röyksopp had no interest in any compromise with Lindbæk. 3) Between musicians, solutions are as a rule pragmatic, as evidenced in my interviews with the bass player and the member of Kings of Convenience above – there has not, to my knowledge, been a struggle over rights between the two members of Röyksopp. 4) The verdict is of course based in copyright law, but would have

been impossible without the solid musical competence of one of the lay judges, since he was able to convincingly argue for the conclusion with reference to the musical material itself. This is probably an example of the most important place in copyright law for people in aesthetic academic disciplines: The best of them have skills that can meaningfully analyse a piece of art and make sustained arguments about the importance of this or that element.

Comparison and tentative conclusions

In spite of all the differences between a publicly funded repertory theatre ('high culture') and the private enterprise-dominated (yet now also publicly supported) field of popular music ('low culture'), it seems to me that some important similarities or parallels may be pointed out. They are tied to the fact that both cultural arenas are marked by the persistence of a modified version of the Romantic notion of creativity. But both are also marked by a willingness to operate in pragmatic ways if real life conditions challenge a clear-cut, dogmatic version of the ideal norm.

First, there are notions of talent (genius), self-realisation, self-expression and recognition. All artists involved in both media have as a rule been drawn to the art in question at an early age, i.e. in their teens or even as children. They tend to experience their choice of profession as resulting from a particular gift for such work and as something tied to quite intense pleasures experienced when performing it. Being an artist is more so than most professions tied to self-realisation and self-expression – and to gaining public recognition for this. The traditional, romantic understanding of creativity lies behind this and is further supported through its being practised in the arts.

Second, there is an undisputed distinction between creative and non-creative contributions to the realisation of a collective work of art. There are office workers, artisans and people doing all kinds of necessary physical labour involved who never get credited for their efforts (unlike film credits, where every driver et cetera may be mentioned). In music, there may be studio technicians and, 'gofers' and sound and lighting people at concerts who basically do what they are told to do, and so are as a rule not counted as creative. A record producer is mostly seen as creative, though, and there are light designers who would be counted as creative personnel. In other words, there are sliding scales involved in some technical functions in spite of the apparent absoluteness of the creative/not creative distinction.

Third, related to the sliding scales just mentioned, there are hierarchies of creativity in both fields. Actors are at or near the bottom of the theatre

hierarchy, but are still seen as creative and in some cases highly important to the end result of the collective process. This is roughly equivalent to the role of 'rank and file' band members in a rock band where one or two people do the writing of songs. Their creativity is invited and welcomed but they also basically told what to do.

The scenographer is or at least may be much more independent in her or his work than an actor and bases her or his work on an interpretation of the dramatic text in question as a whole. The director is above the scenographer, though, deciding which solutions the scenographer should work on or not. It should perhaps be mentioned that the strong position of the director in Norwegian theatre is due to it being tied to a strong continental European tradition of a 'director's theatre'. Still, the tensions between the director and the other obvious key person 'behind' a performance, the playwright, indicate that the director is not necessarily at the top of the hierarchy. This may for instance vary with the position of the playwright in the larger cultural field. I know of no Norwegian court cases on the copyright of a director versus that of the playwright, such as the *British Brighton & Dubbeljoint v. Jones* case.¹⁰

In popular music there is no exact parallel to the relation between the director and the playwright, but there is quite a bit of similarity in the tensions between those who created a song over who contributed the most important part. And if, for example, the lead singer in a band also wrote the song, he or she would be the undisputable top of the pyramid, even if every other member of the band, as well as the producer, have thrown in a variety of ideas as to the arrangement of the song in question.

Fourth, pragmatism in the handling of issues of rights is common in both the theatre and in popular music. In the theatre, it was striking how little the artists I interviewed seemed to know about their legal rights to their work, and so they were not inclined to feel very bound by them either. Neither were they seriously worried or irritated over a limited recognition of their rights. The playwright's say in the staging of a play would vary with a number of factors, and especially with the extent to which he or she had clout in the form of cultural and social capital.

Musicians for the most part knew more about rights than theatre people. But this is understandable given the fact that they make a living by way of copyright and people in the theatre don't. Still, there is, as exemplified above, considerable room for pragmatic solutions to disputes simply because of the fact that maintaining friendship and productive cooperation is in most cases seen as more important than the extra money gained from a higher percentage of revenues from a particular song or record. A different sort of pragmatism is involved in the negotiations between musicians and

their administrative associates – management and record companies. This is about strategic thinking about marketing – where the limits seem mostly to be drawn on the basis of artistic integrity, much less on the basis of percentages and up-front settlements.

This latter point actually leads to a final one, which concerns possible future research in this area. It seems to me that the role of various kinds of social power in the cultural fields is of great importance when it comes to the actual handling of copyright issues both in theatre and in popular music, and I see little reason why it would be much different in other art forms. The ways in which *stars* can dictate conditions for their participation in both artforms is one indication: The bass player I interviewed is highly competent but has to accept a fixed honorarium for a job that an internationally famous bass player might demand to be listed as co-composer for. The nature of different kinds of bargaining power in the complex variety of music industry contexts as well as the worlds of theatre, film and television, would be a good topic for highly interesting and useful research both for copyright scholars and the sociology of culture.

Notes

1. Point made by Director Morten Gjeltén at Norsk Teater- og Orkesterforening (Association of Norwegian Theatres and Orchestras) in telephone interview, 22 April 2013.
2. The agreement can be found here: <<http://spekter.compendia.no/kunder/nto/avtaler.nsf/oversikt?ReadForm&kuni=COMW-7RZBU3>>, accessed 15 April 2013. This is the relevant part of the Norwegian text of the agreement's § 9.1.: Sceneinstruktør og scenograf/kostymetegner har de rettigheter til sitt verk som følger av lov om opphavsrett til åndsverk mv. av 12. mai 1961. Verket er opphavsmannens eiendom, og denne overenskomst gir teatret bare rett til (ikke enerett) i inntil 2 år (for Den norske Opera i 6 år) å fremføre verket på de av teatrets faste scener det er laget for.
3. Agreement between Norsk Teater- og Orkesterforening and Norske Dramatikeres Forbund, dated 28 October 2012, downloaded from: <<http://dramatikere.no/wp-content/uploads/2012/09/Protokoll-og-avtale-26.10.2012.pdf>>, accessed 6 April 2013.
4. The historian Eric Hobsbawm suggested that the 1840s in England 'marked the end of an era when folksong remained the major musical idiom of industrial workers' (Chambers 1986, p.30).
5. One example: <<http://www.youtube.com/watch?v=jECbrAoCXs4&list=RD02WjTg8UtClNc>>.
6. An example of their music: <<http://vimeo.com/32738987>>.

7. Cf.: <<http://en.wikipedia.org/wiki/BergenWave>>, and this recent piece from *The Guardian*: <<http://www.guardian.co.uk/music/2013/mar/15/bergen-norway-new-music-scene>>..
8. The following is based on a 45-page document originally published on the internet at *royksoppvarer.com*, dated 20 April 2011 (on file with the author), and the decision from Bergen Tingrett of 6 March 2013, published in the database *Lovdata*, document no. TBERG-2012-86032-2.
9. Cf.: <<http://www.schaathun.org/en/>>
10. For an overview of the case, cf.: <<http://www.5rb.com/case/brighton-dubbeljoint-v-Jones>>. <http://www.5rb.com/case/Brighton--Dubbeljoint-v-Jones>. Reference: [2004] EWHC 1157 (Ch); [2004] EMLR 507; Court: Chancery Division; Judge: Park J; Date of Judgment: 18 May 2004.

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Discontinuities between legal conceptions of authorship and social practices

What, if anything, is to be done?

Lionel Bently and Laura Biron

Authorship is central to the operation of copyright as a regulatory tool, but copyright law's conception of 'authorship' appears to be 'out of sync' with a wide range of social practices: either copyright makes authors-in-law out of social 'non-authors', or vice versa. After offering three examples (scientific credit, conceptual art and literary editing)¹ this contribution considers why these differences have emerged and whether these discontinuities should be thought of as a matter of concern. It appraises a number of academic proposals as to what might be done about these discontinuities, and offers its own suggestion, namely, the deployment of a more open-textured concept of authorship, one that is able to respond flexibly to varied contexts, social understandings and practices, but limited in application to matters of attribution.

Legal conceptions of authorship

Although there is no universal 'copyright law', so that statements about copyright depend on the specific laws and jurisprudence of any given territory, 'authorship' typically plays a number of different roles in any particular jurisdiction's copyright law. These include circumscribing the term of protection (by reference to a fixed period after the life of the last author to die), and, perhaps most obviously, identifying the initial beneficiary of economic rights. Although copyright laws take a single author model as the paradigm, they also recognise the need to find rules for determining authorship of works to which more than one individual may have contributed. One such set of rules relate to joint authorship (though many jurisdictions also operate rules of collective authorship and some recognise notions of corporate authorship).² In determining claims to joint authorship, most regimes consider three elements: the relationship between the participants;

the level and kind of participation; and the degree of integration of the contributions. For example, section 10 of the UK's Copyright, Designs and Patents Act 1988 (CDPA) defines a work of joint authorship as: '[a] work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors'. Here the relationship must be one of 'collaboration'; the level and kind of participation is referred to as a 'contribution'; and the level of 'integration' is 'non-distinctness'.

The 'relationship' dimension refers to the context of the putative joint author's creative activity. At the very least, it requires that the activity is undertaken in coordination with the other author, as opposed to independent addition, alteration or improvement, which may create an original derivative work of its own. Under British law, the requirement of 'collaboration' means that, when setting out to create a work, there must have been some common design, cooperation or plan that united the authors, even if only in a very loose sense (*Levy v. Rutley*, 1871, pp. 528–530; *Cala Homes v. McAlpine*, 1995, p. 835; *Beckingham v. Hodgens*, 2003, pp. 389–90, [51] (CA)). This is to be distinguished from the 'subsequent independent alteration of a finished work', such as a translation or a serialisation, which would not count as a collaboration (*Beckingham v. Hodgens*, 2002, p. 58, [44]). In some other jurisdictions, the relationship aspect of joint authorship may require something more than collaboration: for example, in the United States there must be an intention to become joint authors.

The second requirement is that a putative joint author participate sufficiently in the creation of the work. Once again, the details vary from jurisdiction to jurisdiction as to the precise kind and level of participation. In the United States there is a debate amongst scholars, reflected in a division between circuits, as to whether the contribution must itself be copyrightable. In the UK, the test demands that a co-author provides 'a contribution', the nature of which case law has clarified in the following ways. First, the contribution must be of 'the right kind' – to the creation of the work, not to the performance or interpretation of the work (*Tate v. Thomas* (1921), pp. 510–11; *Hadley v. Kemp* (1999), pp. 643–644; *Brighton v. Jones* (2004), p. 304, [34]). Second, the author must contribute to expression, not simply to 'ideas' or subject-matter (*Evans v. E Hulton & Co Ltd* (1923–8), 131 LT 534; *Springfield v. Thame* (1903), 89 LT 242; *Nottage v. Jackson* (1883), pp. 632, 634, 636). Third, although the author need not literally put pen to paper for their contribution to count (*Cala Homes South v. Alfred McAlpine Homes East Ltd* (1995), p. 835), they must display 'something akin to penmanship' in the sense of being directly responsible for the expressive form of

the work (*Robin Ray v. Classic FM* (1998), p. 636). Finally, the contribution must be ‘significant and original’, as would be the case for a contribution of single authorship (*Godfrey v. Lees* (1995), p. 325; *Hadley v. Kemp* (1999), p. 643), though each author need not contribute an equal amount (*Levy v. Rutley* (1871), pp. 528–530).

The third requirement for joint authorship is one of ‘integration’ of the contributions of each author into some sort of whole. Article 7 of the Spanish Copyright Act similarly defines a collaborative work as ‘a work that is the *unitary* result of the collaboration of two or more authors’. Under UK law, it is required that each author’s contribution is ‘not distinct’ from that of the other contributors. In more positive terms, this means that the contributions must merge to form an integrated whole, rather than a number of distinct works (*Beckingham v. Hodgins* (2002), p. 59, [46]). In Italy, it is required that the contributions are not only dependent upon one another, but are ‘indistinguishable’ (Perry and Margoni, (2012), p 23). In some legal systems, most notably France, there is no such ‘integration’ requirement at all. Article L. 113–2 of the French I.P. Code defines a ‘collaborative work’ as one ‘to the creation of which several natural persons have contributed together’, implying collaboration and contribution, but not necessarily integration (Lucas and Kamina, in Geller, 2012, sec. 1[3]). The Belgian Copyright Law explicitly distinguishes between two types of collaborative work – referred to as ‘divisible’ and ‘indivisible’ – each category having particular rules as to whose consent is required to exploit the contribution.³

Discontinuities between authorship in law and practice

A number of ‘social practices’ seem to be at odds with legal notions of authorship. These illustrate both the ways in which copyright law is unable to recognise authors as such, turning ‘social authors’ into ‘legal non-authors’, as well as copyright law’s capacity to turn ‘social non-authors’ into ‘legal authors’, constructing authors-in-law out of practices that are conventionally self-defined as non-authorial. Here we highlight three examples.

Scientific authorship

The first example we consider is that of scientific authorship.⁴ It is commonplace to think of scientific authorship as collaborative, and to expect scientific publications to identify a number of named authors. Indeed, as long ago as 1963, Derek de Solla Price described the dramatic increase in

the numbers of authors as 'one of the most violent transitions that can be measured in recent trends of scientific manpower and literature'. Examining the trend for authors cited in *Chemical Abstracts*, Price found that the number of articles with four or more authors had increased from about 2.7 percent in 1946 to about 9.5 percent in 1963, and he predicted that 'if the trend holds more than half of all papers will [have three or more authors] by 1980 and we shall move steadily towards an infinity of authors per paper' (de Solla Price, 1963, p. 89). While this predicted growth has of course not occurred, the first paper to be issued from the collaboration over the Large Hadron Collider at Cern, from the Compact Muon Solenoid (CMS) project, in 2009, is formally attributed to the CMS Collaboration, but also contains an appendix listing over 2400 contributors. In the medical field, one article in the *New England Journal of Medicine* in 1993 was attributed to 976 authors, and another in *Nature* in 1997 to 151 (Smith and Williams Jones, 2012, p. 201). Meanwhile, concern with the increase in scientific authorship spread from chemistry to bio-medicine, astronomy and particle physics, and from there, to ecology (Weltzin et al., 2006) and even the social sciences.

There are, of course, many reasons for the expansion in scientific collaboration, and related increase in attribution. Most obvious is the changing nature of scientific research which has often come to require massive teams designing and building machines that ultimately produce information that in turn will be analysed by others (Haeussler & Sauermann, 2013, p. 688; Wuchty et al., 2007; Dreyfuss, 2000, p. 1162). Many of these projects, such as the Large Hadron Collider, involve co-operation between institutions and academics from all around the world. (If author citations for the LHC look extraordinary, it is worth bearing in mind that the LHC involves 111 nations at a cost of over US\$2.65 billion). However, even where the subject is more modest, it has become more and more common for academics to collaborate across disciplines, in recognition that the research goals can only be reached with the benefit of multiple disciplines (Smith and Williams Jones, 2012, p. 200). In addition to these, some responsibility for the shift in attribution can also be explained by the ways in which research is funded, the ways academics are appraised and rewarded, and changes in mechanisms of appraisal (Dreyfuss, 2000, p. 1190; Biagioli and Galison, 2003, pp. 2–7; Fisk, 2006, pp. 81–85).

These changes have been accompanied by transformations in notions of 'authorship', such that the definition of authorship in science has come to encompass a wide range of contributions, and this in turn has led to intensification of attribution. As the ethical guidelines for publication

issued by the *Royal Society of Chemistry* state, '[t]here is no universally agreed definition of authorship'. Different fields, such as chemistry, particle physics, astronomy, biological and medical science and ecology, it seems, can and do define authorship differently and operate their own sets of attribution practices (Smith and Williams-Jones, 2012, p. 200). As we will see, many such definitions require authorship attribution to a wide range of participants in the research process (many of whom will have had little role in structuring, phrasing or editing the final paper).

For example, the guidelines issued by the *Royal Society of Chemistry* further state that:

As a minimum, authors should take responsibility for a particular section of the study. The award of authorship should balance intellectual contributions to the conception, design, analysis and writing of the study against the collection of data and other routine work. If there is no task that can reasonably be attributed to a particular individual, then that individual should not be credited with authorship. All authors must take public responsibility for the content of their paper. The multidisciplinary nature of much research can make this difficult, but this may be resolved by the disclosure of individual contributions (1995, p. 12A).

The guidelines seem to recognise that both intellectual contributors and those involved in more routine work should be recognised. This no doubt recognises the importance of cohesive teamwork, thereby avoiding the development of divisions or cliques. There is no laboratory aristocracy. Moreover, literary notions of authorship that focus on expression are sufficient, but by no means necessary. Pre-expressive intellectual contributions that are recognised as equally sufficient include conception, design and analysis. The only overarching requirement seems to be that authorship is linked to responsibility (Biagioli, 2000, p. 90; Dreyfuss, 2000, p. 1208; Fisk, 2006, p. 83; Smith and Williams-Jones, 2012). If a contributor is not prepared to stand by the paper, then they should not accept or permit attribution. The American Chemical Society guidelines, which are similar in their inclusiveness, equally emphasise responsibility, stating that '[t]he co-authors of a paper should be all those persons who have made significant scientific contributions to the work reported and who share responsibility and accountability for the results'.

Another example is provided by the Ecological Society of America's Code of Ethics. This states that:

[...] researchers will claim authorship of a paper only if they have made a substantial contribution. Authorship may legitimately be claimed if researchers

- (a) conceived the ideas or experimental design;
- (b) participated actively in execution of the study;
- (c) analyzed and interpreted the data; *or*
- (d) wrote the manuscript (ESA 2006, emphasis added).

The criteria suggested are alternative, so merely conceiving ideas, designing a study, collecting or interpreting data might do. So, as with the Royal Society of Chemistry, involvement in writing an article is a sufficient but not a necessary condition of authorship. However, in contrast to the examples from Chemistry, responsibility is not emphasised.

What is of interest to us is how widely some of these definitions vary from the definition of authorship recognised in copyright law (Biagioli, 2012, pp. 454, 458; Fisk, 2006, p. 82). Indeed, from the perspective of copyright law, the majority of co-authored scientific publications would not, if challenged, meet the legal test for co-authorship. For example, many of the contributions that count as authorial from the standpoint of science – data collection, experiment planning, project supervising, and so on – would not usually be considered to be ‘of the right kind’ to meet the legal test of ‘contribution’, because they are contributions of ‘ideas’ rather than to expression (see section 2 above). With copyright, authorship is a matter of the work, i.e. the manuscript, rather than the research project, and thus for copyright the focus is on the verbal expression, the choice and ordering of the words, rather than generating the data or ideas (*Anya v. Wu*, 2004). Moreover, copyright has nothing to say about the order in which authors are to be credited, a topic which is, in contrast, of some significance in many scientific fields, where in some cases the first author is regarded as the primary contributor, and in others the final author listed is assumed to be the senior author (Kwok, 2005, p. 554; Baerlocher et al., 2007, p. 177; Tschardt et al., 2007, p. 13; Smith and Williams-Jones, 2012, p. 200).

This disparity between legal and scientific authorship is even more pronounced when it comes to mammoth collaborative ventures such as CERN’s Large Hadron Collider, the LIGO Scientific Collaboration, the ALICE (A Large Ion Collider Experiment) Nuclear Collaboration, the Belle Experiment (based in Tsukuba, Japan) or the collider detector at Fermi National Accelerator Lab (Fermilab) project in Tevatron (near Batavia, Illinois). In these situations, most of the publications emerging from the lab include the

names of everyone who has put substantial work into the project, including those who have left within a specified period (LIGO, [2A], sub-para 1). That is, the default position is that the authorship is attributed to the complete author list for the project as a whole, though it is usually possible for persons to decline to be included (LIGO, [2A], sub-para 6; ALICE, [9.1]). The norm is that names are cited in alphabetical order (LIGO, [2.B], para 1; ALICE, [9.2]). In the ALICE guidelines each qualified author has to confirm that he or she has read the paper and agree with the contents (ALICE, section 9). The LIGO policy recognises that 'in keeping with the goal of the LSC to promote the visibility of its members in the scientific community at large, there may be cases where a limited author list is more appropriate' (LIGO, [2.B] sub-para 3).

As Mario Biagioli describes, in his discussions of Fermilab policies, the sense of authorship at play here is 'credit for accumulated labour' (Biagioli, 2000, p. 101). All scientists and technicians, including the designers of the machines that make the experiment, observation and analysis possible, are all viewed as part of a corporate team. Each must input their labour and expertise, usually for a minimum period of six months (though this will vary with the status of the participant). Like employee-shareholders, or employees who pay into a pension fund, when the project yields profits in the form of journal publications, all participants are duly recognised. Such recognition is granted for publications even after the contributor quits the project, at least for some limited period. This is a far cry from copyright's conception of authorship as requiring actual skill or labour, understood in terms of penmanship or expression.

Conceptual art

Our second example of discontinuity between copyright law and social practice is that of conceptual art, in particular that in the United States in the 1960s and 1970s. The conceptual art movement, if it can be called a movement, in many ways sought to relocate the art object away from individual instantiations (paintings, sculpture and so on), and to re-focus attention on immaterial ideas, on thought, on language, on philosophy, rather than on physical objects. As Le Witt explained:

When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art (Le Witt, 1967, p. 79).

In emphasising the 'idea', conceptual art also challenged the disciplinary categories, which depend largely on form, and related ways of perception and evaluation. In some ways itself an elaboration of the breakthrough ideas of Marcel Duchamp, conceptual art both challenges the role of the visual, and interrogates the notion of art itself (Joseph Kosuth, quoted in Green, 2001, p. 7).

The range of conceptual art in this period was vast. The works of Joseph Kosuth (1945–), often regarded as the pioneer of the movement, for example, include many that comprise only text – such as the lists published in various newspapers, for example: III, – *Communication of Ideas* (1969) or VI *Time (Art as Idea as Idea)* (1969) from *The Second Investigation* (Green, 2001, pp. 2, 13, 16). Other works by Kosuth include a collection of books, *Fifteen People Present Their Favourite Book* (1968), and a neon installation of the words 'neon electrical light English glass letters white eight', *One and Eight: A Description* (1968) (Green, 2001, pp. 4, 11). Other conceptualists used more conventional forms: Alighiero Boetti/Alighiero e Boetti (1940–1994), usually associated with the movement *Arte Povera*, often used embroidery: *Ordine e Disordine* (1973), for example, comprises one hundred embroidered squares, each 7 x 7 inches squared, with each square divided into four, with each quarter containing four letters. The embroidered squares were made by Afghan women, each of whom chose at least some of the colours. Although apparently simple, such works are frequently interrogating important questions as to the relationship between art and language (where meaning is generated in ideas or form), the place and the role of the 'artist' (and the artist's 'personal touch'), the significance of materiality and the place of the object in processes of commodification.

In many cases, conceptual artists have operated by providing ideas in written form, as sets of instructions, leaving their execution or instantiation to others (Green, 2001, p. 10). Charles Green argues that this:

represented the elimination of a certain type of overinflated subjectivity signified by the artist's personal touch or signature. This was a type of long-distance artistic collaboration – or delegation – in which the assistant's work was essential to the project's very success and integrity (Green, 2001, p. 10).

Green explains that the process of delegation was different for conceptual artists than it had been in the past, under the atelier system, when artists such as Paul Rubens and Jacques-Louis David had employed assistants, because conceptualists such as Kosuth and Boetti 'sought the co-operation

of others to enable their authorship to be camouflaged so that the immateriality of the work would be stressed'. Importantly, the role of the executants was not 'itself revalued upward in order to create another artist' (Green, 2001, p. 11).

Many examples of such conceptual art involved very general notions (e.g. 'a cube without a cube', 'straight lines in differing colors'). Some of the best-known examples of such practices are the 'wall drawings' associated with the American artist, Sol LeWitt (1928–2007). LeWitt's wall drawings consist of general guidelines or simple diagrams by LeWitt, which are drawn or painted by assistants directly onto a gallery wall, then usually removed after the exhibition has finished. For example, for Wall Drawing No 146, there is a simple description: 'All two-part combinations of blue arcs from corners and sides, and blue straight, not straight and broken lines'. This is accompanied by two diagrams, one which divides the wall into squares, each containing two numbers, and the other indicating by numbers the types of marking to be included in the square. The wall painting was first installed in the Kunsthalle in Berne Switzerland in 1972 and LeWitt signed a certificate identifying the first drawers as B. Blasi, E. Martin, B. Schlup, P. Siegenthaler, S. Widmer and Sol LeWitt. A later version appears to have been executed at Varese in Italy (Buskirk, 2003, pp. 50–51).

Readers who are unfamiliar with LeWitt's work can view examples on the website of the Massachusetts Museum of Contemporary Art, which in 2008 opened a twenty-five year Wall Drawing Retrospective. One example, Wall Drawing 797, was derived from the following instructions:

The first drafter has a black marker and makes an irregular horizontal line near the top of the wall. Then the second drafter tries to copy it (without touching it) using a red marker. The third drafter does the same, using a yellow marker. The fourth drafter does the same using a blue marker. Then the second drafter followed by the third and fourth copies the last line drawn until the bottom of the wall is reached'.

Evidently, a lot of discretion is left to the first drafter. When the work was first executed at Amherst College, the drafter chose to base the line on the nearby landscape (see <http://www.massmoca.org/lewitt/walldrawing.php?id=797>).

Although Kimmelman reports that 'characteristically, [LeWitt] would then credit assistants or others with the results', (cf. Kosuth, as reported in Green, 2001, p. 22) and the MassMOCA exhibit does list the 'initial drawers', the wall drawings are, of course, primarily known as the works of

LeWitt. As David Carrier has observed ‘presenting the idea for an artwork suffices to get credit for making the work’ (Carrier, 1980, p. 192). Indeed, the use of certificates, which had already been pioneered by the likes of Carl Andre and Flavin, as guarantors of authorship, and thus authenticity of their works (and can be traced back to Duchamp’s L.H.O.O.Q. (1919)), reinforced the unique place of the conceiver as artist (Alberro, 2003, p. 23). In contrast, in many cases the actual executants are not identified (for example, the drawers of the Varese version are not attributed in Buskirk, 2003, pp. 50–51). According to the authorship conventions of conceptual art, then, it seems LeWitt’s assistants would not be regarded as co-authors of the wall drawings.

From the standpoint of copyright, however, the reverse would appear to be the case. The executants of the wall drawings would likely be treated as making significant, original contributions to expression, something certainly ‘akin to penmanship’ – and thus very likely to count as co-authors. This is particularly the case where choices that determine the final expressive form have been left to the executants. According to Michael Kimmelman:

With his wall drawing, mural-sized works that sometimes took teams of people weeks to execute ... he always gave his team wiggle room, believing that the input of others – their joy, boredom, frustration or whatever – remained part of the art (Kimmelman, 2007).

Another commentator confirms:

With these notes, LeWitt provided methods and techniques for the team to follow – such as, for #613, “Rectangles formed by 3 in. (8cm) wide India ink bands meeting at right angles” – while still allowing room for a certain amount of self expression (Anon, 2010, p. 127).

More surprisingly still, LeWitt himself might be described as a legal non-author, at least in those cases where all he contributed was a very general plan or idea for the execution of the work. As the Court of Appeal explained in *Nottage v. Jackson* (1883), (when considering authorship of a photograph):

Certainly [the author] is not the man who simply gives the idea of a picture, because the proprietor may say, “Go and draw that lady with a dog at her feet, and in one hand holding a flower”. He may have the idea, but still he is not there [...] (Nottage, 1883, p. 632).

Indeed, it is notable that many of the 105 wall drawings executed for MASSMoCA were completed after LeWitt's death by students, guided by LeWitt's assistants: (Anon, 2010, p. 128). In these cases it is almost unthinkable that copyright law would treat LeWitt as an author of the wall drawings, as there could be no relevant 'collaboration' between the living and the dead.

Of course, there are some that were made in his lifetime in which he was one of the 'first drawers', and might claim legal co-authorship on that account. There are also some where the details in the instructions were sufficient to control the detailed expression. One account explains:

LeWitt's wall drawings were the products of the artist's carefully conceived systems of lines and colours, which could then be executed by others. A team of assistants that worked with the artist produced the drawings according to **detailed** diagrams and written instructions [...] (Anon, 2010, p. 127).

Moreover, there are certain examples where LeWitt had exercised supervisory control over how the other drawers executed the work. Kimmelman reported that 'like many more traditional artists, he became more concerned in later years that his works look just the way he wished' and thus 'he might decide whether a line for which he had given the instruction "not straight" was sufficiently irregular without becoming wavy'. In these cases, a claim to co-authorship (or even sole authorship) is not out of the question. As Laddie J. explained in the case of *Cala Homes v. Alfred McAlpine Homes* (1995, p. 835), holding that an architect was a co-author of plans which had been executed by his assistants:

In my view, to have regard merely to who pushed the pen is too narrow a view of authorship [...] It is both the words or lines and the skill and effort involved in creating, selecting or gathering together the detailed concepts, data or emotions which those words or lines have fixed in some tangible form which is protected [...] It is wrong to think that only the person who carries out the mechanical act of fixation is the author.

This might allow us to describe some conceptual artists as authors-in-law, but only where they oversaw the work of the executants, correcting it where appropriate, and controlling the decision over when the work as expressed was complete. As Laddie J. emphasises, what matters for copyright is who authors the expression.

Of course, works of conceptual art pose a range of problems for copyright law, including the identification of anything that can be described as a 'work' in the first place – a problem particularly for copyright regimes that identify a closed enumeration of subject-matter, as is the case in the UK (Barron, 2002). Perhaps because revenue streams deriving from reproduction of such works (and from high art more generally) remain of relatively minor importance, compared with revenues deriving from the sale of unique, material artefacts, the processes of certification developed by the conceptualists have been sufficient to make a market for, and in some ways effectively sustain, these practices. As a consequence, the difficult questions that conceptual art raises for the existence of copyright seem rarely to have been tested in litigation. However, when conceptual art pieces are realised or materialised, as with LeWitt's wall drawings, the question of 'authorship' comes into play. Viewed from the perspective of copyright law, a 'conceptual artist' such as LeWitt would not usually be regarded as the author of the resulting artistic work (and certainly not the sole author). In contrast, copyright law would likely regard the assistants as co-authors, when conventionally they would not be viewed as such. The perspectives are not merely 'out of sync', but outright contradictions.

Literary editors

It might be objected that the discontinuities between copyright law's notion of authorship and social practices that we have discussed so far come from the 'margins' of what copyright law was ever intended to protect (and, in the case of conceptual art, inevitably follows from the practices of an art movement that sought to reject conventional understanding, and thus inevitably developed in a manner that was inconsistent with the ways of thinking necessarily incorporated within copyright law's concepts). While it might, in turn, be disputed that scientific writing was not at the heart of copyright law's thinking, at least in its early days, when the purpose was described in terms of the 'encouragement of learning' (and, in the United States Constitution 'promoting science'), we want to suggest that the same types of discontinuities can also be found right in the centre of copyright law's heartland, literary authorship. For our third example concerns literary works, particularly works of fiction and the contributions of editors to what are usually considered single-authored works.

Literary editors, of course, are not generally regarded as 'authors', nor do they think of themselves as such. As Holman explains, an editor is 'an indispensable recruiter, guide, friend, confessor and co-worker with

writers of genius and a shaper of great literary careers' – but not an author or co-author (Holman, 1978, p. 572). Editors are facilitators, midwives assisting at the literary birth of each novel, but leaving no doubt as to whom the parent is. One of the great American editors of the mid-20th century, Maxwell Perkins, the literary editor at Scribners, who edited the works of F. Scott Fitzgerald, Thomas Wolfe and Ernest Hemingway, was clear about the non-authorial role of an editor:

An editor does not add to a book. At best he serves as a handmaiden to an author. Don't ever get to feeling important about yourself, because an editor at most releases energy. He creates nothing (Perkins, in Berg, p. 6; quoted by Inge, 2001, p. 626).

This belief has been acknowledged judicially. In the US case of *Childress v. Taylor*, Judge Newman reasoned about the distinction between writer and editor, and their respective intentions regarding authorship, as follows:

[...] a writer frequently works with an editor, who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet *very few editors and even fewer writers would expect* the editor to be accorded the status of joint author [...] (*Childress* para. 38).

However, when examined more closely, literary editors have often done much more than merely facilitate the creation of a particular work: they have often contributed significantly to the structure, narrative, characterisation and text, through suggested deletions and amendments. In his important overview, *The Myth of Solitary Genius*, University of Illinois Professor of English, Jack Stillinger, has drawn attention to the joint and collaborative nature of many literary works that are often seen as works of single authorship. Even the most seemingly 'romantic' poets like John Keats (1795–1821) relied greatly on suggestions and alterations from editors including Richard Woodhouse (1788–1834) and John Taylor (1781–1864) (Stillinger, 1991, pp. 26–30). Another well-known example concerns the contribution of the poet, Ezra Pound (1885–1972), to the writing of T. S. Eliot's poem *The Waste Land* (1922). Pound, through multiple suggestions, led Eliot to cut the poem from over one thousand lines to 434 (Stillinger, 1991, Ch. 6, esp. pp. 127–8). Other well-documented examples include the assistance given by Hiram Haydn (1907–1973), literary editor at Bob-Merrill from 1950–54, to American

novelist (and former student of Haydn's) William Styron (1925–2006), which include multiple suggested amendments to the structure, characterisation and text of Styron's first work, *Lie Down in Darkness* (Casciato, 1980).

Although Max Perkins' relationship with authors has been described as a 'departure from the traditional relationship of author, editor and publisher' (Litz, 1968, p. 97), a closer look at his practices is revealing. For while Perkins publicly denied his contribution to the authorship of the works produced by Scribners under his supervision, surviving documents suggest he frequently had a very significant involvement with the texts sent to him by his authors. Sometimes Perkins initiated the ideas for works, such as his suggestion to Marjorie Kinnan Rawlings (who had just finished *South Moon Under*) that she write a book about 'a child in the scrub' (Berg, 1978, p. 212, p. 297–300) or to Douglas Southall Freeman that, having completed a biography of Robert E Lee, he write a biography of Washington (Berg, 1978, p. 181–2). More frequently, he received a manuscript, immersed himself in it and offered suggestions as to improvements. Some of these suggestions are clear from the various collections of letters that survive between Perkins and his authors, and they vary in type and extent. In some circumstances, as with Fitzgerald's famous novel *The Great Gatsby* (1925), various manuscripts survive from different stages of the process leading to publication, including the original handwritten manuscript at Princeton University Library. In the case of Wolfe's relationship with the process, significant insights are also provided from his *The Story of a Novel*.

In the case of Fitzgerald's *The Great Gatsby*, Fitzgerald submitted the manuscript and Perkins suggested changes including most importantly the elaboration of the James Gatz/Jay Gatsby character (Nov. 24, 1924 in Kuehl & Bryer, 1971, p. 82; Buccoli & Baughman, 2004, p. 27; Berg, 1978, p. 65). Fitzgerald reacted favourably to the suggestions and incorporated the ideas including one that the character use the phrase 'old sport', which Fitzgerald used a dozen times (Berg, 1978, p. 69). Moreover, Perkins rejected many of Fitzgerald's suggestions as to a title, such as 'Among the Ash-Heaps and Millionaires', 'Gold-Hatted Gatsby', 'The High-Bouncing Loner', 'On the Road to West Egg', 'Trimalchio in West Egg', 'Trimalchio', 'Gatsby' and Fitzgerald's ultimate choice, 'Under the Red, White and Blue' (Berg, 1978, pp. 62, 64, 67; Brucoli, 1974, p. 6 n. 4, pp. 31–32).

Perkins' involvement in the finalisation of Tom Wolfe's manuscripts for *Look Homeward, Angel* (1929) and *Of Time and the River* (1935) is reputed to have been much more substantial. According to Roger Shugg, 'it is well known that Perkins alone made Tom Wolfe publishable by helping him to select from boxes and bales of manuscript the pages and sections that

would have coherence as a book' (Shugg, 1968, p. 11). Scott Berg describes Perkins' reaction to the 1114-page manuscript (some 330,000 words) of what was provisionally called '*O Lost*' when he first received it in 1928, and his correspondence with Wolfe. Perkins thought it needed reorganisation and substantial cutting, and Wolfe acknowledged this, admitting his inability to criticise his own writing and his desire to get advice on the 'huge monster' of a manuscript (ibid., pp. 128 ff). In this account, Perkins not only advised on what needed to go, but what needed to be retained (in the face of Wolfe's erratic inclinations). According to one account, the pair worked day-after-day until over a quarter of the book (90,000 words) was cut, including the first 1377 lines, and the work reframed as seen through the memories of the boy, Eugene (cutting sections where Wolfe spoke directly to the reader) (Berg, 1978, pp. 134–5). Ultimately, Perkins asked Wolfe to alter the title, approving instead the alternative, *Look Homeward, Angel* (a phrase from John Milton's *Lycidas*) (ibid., p. 136). Subsequent scholars have gone over the same ground and although Perkins' contribution is diminished, it nevertheless remains impressive. For example, Dr Park Bucker, from the University of South Carolina Sumter, who has conducted a scrupulous analysis argues that some of the claims as to Perkins' contribution are exaggerated. He suggests that in the case of *Look Homeward, Angel*, Perkins: '... moved one major episode, Grant's Homecoming, from Book II to Book I; recommended the cutting of 60,000 words (22% of the work); and advised Wolfe to write connecting passages bridging the cuts' (Bucker, 2000, p. xvii).

In the case of *Time and the River*, Perkins was involved from the start. Following the publication of *Look Homeward, Angel*, Perkins suggested to Wolfe that he write about 'a man's quest for his father' (Berg, 1978, pp. 137–8, 163, 167). Wolfe took the suggestion seriously and spent the next four years writing. In 1933, Perkins called time on Wolfe, who delivered a manuscript of over a million words twice the length of Tolstoy's gargantuan *War and Peace* (ibid., pp. 235–6). Importantly, Perkins identified that the manuscript contained two distinct stories, each of which needed separate treatment, so that one was carved off and published later (ibid., p. 236). Thereafter, Perkins and Wolfe worked on the novel, in Perkins' office in New York, every evening, six days a week, for much of 1934 (ibid., 1978, p. 237). Perkins' directions were often detailed (ibid., p. 237).

Perkins was thus an editor who was very close to the manuscripts of the authors he worked with. In some situations, Perkins' close involvement in finalising manuscripts even led to suggestions that he was in fact a co-author. This was most notoriously the case with Tom Wolfe's *Of Time and the River*, with one critic arguing that '[s]uch organizing faculty and critical

intelligence as have been applied to the book have come not from inside the artist, not from the artist's feeling for form and esthetic integrity, but from the office of Charles Scribner's Sons' (De Voto, 1936, p. 3ff). Indeed, some were led to suggest that Wolfe left Scribners (for Edward Aswell at Harper's) because of the rumours that Perkins was, in effect, not his editorial mentor, but a co-author (Shugg, 1968, p. 11). While Perkins asserted that 'The book belongs to the author' (Maxwell Perkins to Tom Wolfe, 16 Jan 1937, in Bruccoli and Bucker, 2000, pp. 235, xvii), the question that interests us is whether the contributions by Perkins to the various manuscripts would – or could – have been such as to render him a joint author in the eyes of copyright law?

First, we might ask whether an editor and a writer are collaborators for the purposes of copyright? The British case law indicates that collaborators pursue a 'common design'. In relation to *The Great Gatsby*, for example, Arthur Walton Litz notes: 'Perkins and Fitzgerald obviously shared the same vision of the finished novel, and as the title fluctuated among a half-dozen alternatives they worked together to sharpen the narrative focus' (Litz, 1968, pp. 104–5). Bruccoli observed that Fitzgerald 'trusted Perkins and counted on him to attend to the mechanics of his prose' (Bruccoli, 1974, p. 21).

There is some suggestion that collaboration goes further, and also requires joint control: it is not enough that two persons contribute towards a shared goal if one of them has control over which contributions are accepted and which rejected. Thus in *Hadley v. Kemp*, one member of a band was regarded as the songwriter because he controlled whether the contributions of the others accorded with his 'vision' (in which case they were incorporated) or did not (and thus were rejected). Perkins might well have sought to deny that an editorial relationship involved an appropriate sort of 'collaboration', arguing instead that the author was the ultimate decision-maker, and that this element of control meant that an editor's involvement could not be described as collaboration.

Thus, for example, Perkins wrote to Fitzgerald: 'Do not ever defer to my judgment' (Wheelock, 1950, p. 30; Bucker, 2000, p. xvii) and, to Marjorie-Kinnan Rawlings, that 'a book must be done according to the writer's conception of it as nearly as possible' (Berg, 1978, p. 298). Nevertheless, even if one accepts that collaboration does require joint control, it is difficult to regard an editor such as Perkins as lacking such control. Indeed, not only did authors typically accept his suggestions, but the publication of a work depended on his approval of the manuscript. The advice from Perkins that the author should guard his or her expressive autonomy was made in the face of the reality that the publisher called the shots. Elsewhere, Perkins recognised that authors were pliable:

Editors aren't much, and can't be ... They can only help a writer realise himself, and they can ruin him if he's pliable. ... That is why the editors I know shrink from tampering with a manuscript and do it only when it is required of them by the author (Bucker, 2000, p. xvii).

Yet, Perkins was not like those editors he describes – he did involve himself intimately with the manuscript. And, individually, he was soon so highly respected – ‘the sole and only excuse ... for Fitzgerald having been as successful as he is’ (Madeleine Boyd, quoted in Berg, 1978, pp. 133–134) – that it is difficult to see that any author could regard his ‘suggestions’ as really optional. In the case of Wolfe, Perkins observed ‘Tom demanded help. He had to have it’ (Shugg, 1968, p. 11), while Wolfe explained ‘I have great confidence in him and I usually yield to his judgment’ (Berg, 1978, p. 134).

Second, we must consider the type and extent of the contributions. As we have already noted, the provision of ideas is not enough. Thus Perkins clearly has no claim on that account to be a co-author of Freeman's seven-volume life of Washington, nor Rawlings' Pulitzer Prize winning *The Yearling*. And even though he urged Janet Taylor Caldwell that she write a historical novel (Berg, p. 400), Perkins is not a co-author of her successful works on Saint Paul, Cicero or Pericles. Nor would merely helping to choose the title, as Perkins often did, be likely to render a literary editor a joint author. The titles – *The Great Gatsby* (which Perkins chose from a bunch of suggestions from the indecisive Fitzgerald) (Brucoli, 1991, vii), or *The Yearling* (which Perkins selected from Rawlings' other suggestions of *The Fawn*, *The Flutter Mill* and *Juniper Island* (Berg, pp. 297–299) et cetera – contain too few creative choices to justify a co-authorship claim (cf. *Newspaper Licensing Agency v. Meltwater*, CA, holding that some newspaper headlines might be works of authorship).

For co-authorship in British copyright law, there must be significant and original contributions to expression. While it does not appear that Perkins provided any text to Fitzgerald or Wolfe (Bucker, 2000, xvii), it is clear in many cases that he contributed to the deletion of large passages of text, and in the case of Wolfe, the selection and arrangement of the manuscript. In the case of Fitzgerald's works, these changes were probably not substantial enough to justify a claim to co-authorship under copyright's rules. In the case of *Time and the River*, the matter is less clear. It was Perkins who identified that the manuscript contained two distinct stories, each of which needed separate treatment. This process of ‘selection’ and ‘arrangement’ of texts has been frequently recognised as relevant to the assessment of whether a work is original for the purposes of deciding whether copyright subsists, though has

been seldom discussed in the context of co-authorship disputes. Nevertheless, given its recognition as 'the right kind' of skill labour and judgment (or, in European terminology 'creative choice'), there can be little doubt that these types of contributions (which Brucker, 2000, p. xvii, calls 'structural skills') could warrant a finding of joint authorship under British law.

Were these contributions 'significant'? Scholars of Fitzgerald, such as Robert Emmet Long and Matthew Brucoli, have sought to minimise the importance of Perkins' contribution. Long calls the changes prompted by Perkins minor especially when viewed as part of Fitzgerald's own 'relentless process of polishing' (Long, 1979, pp. 188, 199–200). One way to assess significance is to pay attention to what the authors said. Fitzgerald acknowledged the value of Perkins's assistance to *The Great Gatsby*: 'With the aid you have given me', he declared, 'I can make *Gatsby* perfect' (Fitzgerald to Perkins, Dec 20, 1924, in Kuehl & Bryer, p. 89 and Buccoli and Baughman, p. 32; Turnbull, 1963, p. 172). Another way to assess significance is to consider the reaction of readers, and critics, regarded as valuable components of the works. In the case of *The Great Gatsby*, which received praise for 'its structure' Fitzgerald wrote to Perkins:

Max, it amuses me when praise comes in on the 'structure' of the book – because it was you who fixed up the structure, not me. (Fitzgerald to Perkins, July 10, 1925 in Kuehl & Bryer, pp. 117–118; Buccoli & Baughman, p. 27; Inge, 2001, p. 626).

Brucoli, who has closely analysed the various surviving manuscript and proof versions says that, in so stating, Fitzgerald gave too much credit to Perkins whose participation in re-writing the novel was 'not intimate' (Brucoli, 1991, pp. x, xi). Nevertheless, it seems strange that he should have been so effusive, and Brucoli admits that one possible explanation is that there may be a lost set of galleys on which Perkins made 'detailed recommendations' (ibid, xii).

There is no suggestion that Perkins contributed substantial text to either Fitzgerald or Wolfe. Other editors, however, have not been so restrained. One example is Saxe Commins (1892–1958), a literary editor for American publishing firm Random House from 1933 to his death, who famously acted as editor to Eugene O'Neill, William Forster and W.H. Auden. His experiences were represented in his letters and journal entries, and were collected and published after his death (Commins, 1978, pp. 153–169). One of his less glamorous assignments was to assist novelist Parker Morell (1906–1943) to put the finishing touches on his biography of the American actress and

singer Lillian Russell (1860–1922), entitled *Lillian Russell: The Era of Plush*. The book was being pushed out by the publisher to coincide with a film about Russell. The publisher had provided Morell with a researcher who had worked for eight weeks collecting materials on the actress in the New York Public Library. As the deadline approached, Commins was sent to assist Morell to whip it into shape or, as Commins wittily put it, to ‘gild the lily’. Unfortunately for Commins, Morell was suffering from bouts of dizziness, and had not even made a start on the biography. Commins set about agreeing a table of contents with Morell, and for a week sought to assist him to meet the deadline. Commins generously produced text, but found that the author made no further progress, or that whatever he did do was largely plagiarised (Commins, 1978, p.157). In his journal, Commins described Morell as ‘psychotic, unstable, imbecilic. He simply cannot do the job’ (ibid., p.155). By the first weekend, when Commins returned to New York, determined to tell his employers what was going on, six chapters out of 22 were complete. Apparently, Random House was uninterested in the details and merely wanted the novel finished on time. Commins ended up returning to help Morell complete the book. In effect, Commins had written 300 pages in two weeks. He was disgusted with himself and what he had to do (ibid., pp. 155, 166), and became even more worried as Morell started to recognise that Commins had written more of the book than he had. Commins wanted nothing to do with suggestions that he be co-author or receive half the royalties (ibid., pp. 163, 167). This was ‘a penalty, a sentence, an expiation, a penance – anything but my book, it must be understood’. Doubtless the author for copyright purpose, Commins wanted nothing to do with being recognised as such.

Summation

We have now highlighted a number of examples in which the norms of social and legal authorship point us in quite different directions. In each case there is a disparity between social conventions of authorship and the question of who counts as an author in law. Copyright law is supposed to be committed to the proposition that authorship is a matter of fact, and it assumes that authorship conventions are, generally speaking, fixed and stable across a variety of social practices. With the above examples discussed and analysed, we can now see some important ways in which this assumption might be called into question. What has gone wrong? How might we explain this conflict? Where might we look for solutions? The remainder of the paper is devoted to these questions.

Thinking about these discontinuities

Facilitating discontinuity

In thinking about the apparent differences between legal conceptions of authorship, and how social and cultural practices identify authorship, the first point to note is that the dichotomy between the 'legal' sphere and the 'social' sphere is itself artificial and problematic in a number of respects. Perhaps most importantly, the social sphere does not exist 'outside law', so the differences in legal and social conceptions are themselves, in some respects, a product of law. In other words, while the legal system identifies authorship according to specific criteria, it does not prohibit social practices that attribute authorship in a different manner. On the other hand, in applying its criteria, the legal system frequently invokes social practices as important considerations in reaching legal conclusions about authorship. Both points deserve elaboration.

At first glance, it may seem odd to claim that the existence of a dichotomy between legal conclusions on authorship and social practices of attribution are themselves, in part, the result of law. On reflection, the claim is not strange at all. This is because the legal system requires the identification of authorship as a mechanism for achieving certain functions, most obviously as regards the initial allocation of copyright, as well as determination of the term of protection. However, traditionally the British and US legal systems have not treated the legal definition of authorship as determining of attribution practices. The latter have rather been treated as questions of contractual agreement: a legal author (and first owner of copyright) can transact with a publisher to be named, or not to be named, on the work as published. Through these principles of freedom of contract, the legal system allows for the emergence of the discontinuities between authorship in law, and particular or more generalised practices of attribution. Although UK law has recognised a right of attribution, vested in the legal author, since 1989, it requires that this right be operationalised by an act of 'assertion', typically in a contract, and provides that this right can be waived, for example, in a contract. The effect of this is that the legal system specifically facilitates not merely practices of non-attribution (as for example, of article writers in *The Economist*), but even permits agreement that others – non-legal authors – are attributed as authors. Social attribution of authorship to persons who would not be regarded as authors-in-law is itself legally facilitated.⁵

Perhaps the most obvious example of such legal collaboration in the generation of these discontinuities is provided by the case of ghost authorship,

that is the knowing, conscious writing by one person of a work that will be attributed to another. Often, ghost-writing is used to overcome some of the problems celebrities face in composing their own, 'auto-biographies', but the practice extends well beyond that field (Erdal, 2004), as the Saxe Commins-Parker Merrell example indicates. Another instance of such 'ghosting' is of the first *Star Wars* novel which was in fact written by Alan Dean Foster, but was attributed to George Lucas. Lucas would likely have had neither the time nor the energy to write the novel (which was published before the film was complete and released), but the writer was happy to receive \$5000 for the job and apparently content to have his identity concealed. Indeed, when asked as to whether he resented the attribution of the novel to Lucas, Foster is reported to have said: 'Not at all. It was George's story idea. I was merely expanding upon it. Not having my name on the cover didn't bother me in the least. It would be akin to a contractor demanding to have his name on a Frank Lloyd Wright house' (Pollock, 1999, p. 195).

'Ghost writing', however, is a good example of the way that copyright law is complicit in the social practice of misrepresenting authorship. This is not because copyright law would not recognise a ghost writer as the author of the work – it would. Rather, it is because it would permit the parties to attribute authorship to someone else. This might be possible, in some legal systems, by agreement as to who constitutes the author, or in the United States if the writer was an employee under the so-called 'work-for-hire' doctrine (Lastowka, 2005, pp. 1221–1228). However, even in the United Kingdom, which has since 1989 recognised an author's moral right of attribution, the law allows the author to agree by contract to waive that right. Matters are more complex in other European countries which do not permit waiver of the 'droit moral'. For example, while French law permits authors to consent to such misattribution, should the author change their mind, they will then be permitted to assert their right of attribution (but may have to indemnify the co-contractant).

Accommodating social practice

While copyright law thus might be said to be complicit in, or at least facilitative of, these discontinuities, in other respects the law does attempt to take social practices seriously, and its search for factual marks of authorship is inevitably influenced by authorship practices outside of the legal sphere. Most legal systems reduce room for dispute in relation to determinations of authorship by operating presumptions that a person designated as the author on a published version of the work is in fact the author. Indeed,

Article 5 of the EU's Directive on the Enforcement of Intellectual Property⁶ requires Member States to recognise a presumption that where 'his/her name ... appear[s] on the work in the usual manner', then the author of a literary or artistic work is to 'be regarded as such, and consequently to be entitled to institute infringement proceedings', in the absence of proof to the contrary. Implementing this, the French IP Code, Article L. 113–1 provides: 'Absent proof to the contrary, the status of author belongs to the person or persons under whose names the work has been divulged'; while the UK CDPA, s. 104(2) states that 'where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved ... (a) to be the author of the work'. Although no such presumption is included in the US Copyright Act, US law looks explicitly for 'factual indicia' of joint authorship in terms of attribution, such as billing and crediting (*Thomson v. Larson*, 1998, at para. 32).

However, it remains the case that, when social facts about authorship explicitly conflict with the legal test, copyright law will likely disregard the social conventions. In the English case of *Bamgboye v. Reed*, for example, the High Court rejected evidence that the claimant was not co-author of the musical work *Bouncing Flow* on the basis that 'he would not have been thought of as a "collaborator", in the way that the word might normally be used in the industry' – this was considered irrelevant to the legal question of whether he had 'creative input into the music ...' (*Bamgboye*, 2002, para. 61). When it comes to factual questions about authorship, then, copyright law is selective in its appeal to social facts, at least regarding linguistic expectations about the use of the term 'author', and also the extent to which these expectations reflect how the parties might agree to define their roles.

Would it be desirable to align legal and social understandings of authorship?

Would it be (and, to the extent that it already occurs, is it) desirable for copyright law to ascertain legal facts about authorship from social conventions? First, we might note that copyright law needs to put forward a conception of authorship that is relatively stable and fixed. This is, first, because copyright is a property right and its very existence often depends on the identification of the author of a work. As Farwell L.J. put it in the case of *Tate v. Fullbrook*: 'The Act creates a monopoly, and in such a case there must be certainty in the subject-matter of such monopoly in order to avoid injustice to the rest of the world' (p. 832).

In contrast, social authorship conventions are far from stable, even within specific cultural fields. For example, looking at the case of editors, an interesting literature has developed about editorial principles, and the extent to which editors do view themselves as taking on an authorial role when they prepare works for publication. In our exposition of the role of editors above, we took it for granted that editors would be considered social non-authors. However, according to an approach Peter Schillingsburg calls the 'aesthetic orientation', editing is described as producing a 'best' text of a work, rather than the more traditional 'authorial orientation', which sees the editor's role as one of constructing 'a purified authorial text', capturing most fully the author's intentions prior to the intervention of editors or publishers. The aesthetic orientation challenges certain views of editorial authorship we took for granted, according to which 'there is assumed to be an absolute distinction between author and editor – the editor is supposed to be the servant of the author's intentions, not a co-writer' (Eggert, 1990, p. 24). If the editor is seen as a person who produces the 'best' text out of a number of inferior versions attributed to the author, he becomes a 'collaborator with the author, doing better what the originating production crew did poorly' (Schillingsburg, 1996 p. 42).

Similar points might be made about the changing social conventions of authorship practices in the artistic, commercial and scientific spheres.⁷ Indeed, the question of the proliferation of attribution of authorship for scientific publications became a matter of such concern that attempts were made to codify social norms. The most widely adopted of these is the action of the International Committee of Medical Journal Editors (Dreyfuss, 2000; Fisk, 2006, p. 84). These rules state that:

Authorship should be based only on a substantial contribution to:

- i) Conception and design or analysis and interpretation of data; and
- ii) Drafting the article or revising it critically for important intellectual content; and
- iii) Final approval of the version to be published.

Although widely adopted, for example, by all PLOS journals, as well as the Royal Society, the requirements have not gone without criticism (Kwok, 2005, p. 554; Smith and Williams-Jones, 2012, p. 202), in part because they are a rather strict set of rules. Indeed, they might even deny attribution to some who would be regarded as authors by copyright law (for example, someone who wrote the article but did not conceive the project). Indeed, there are suggestions that the rules have had no significant impact upon the

rates of attribution (Baerlocher, 2009; Haeussler, 2013, p. 690). Regardless of their effectiveness, we draw attention to the ICMJE rules here to highlight the capacity for social norms to transform over time.

Second, we observe that copyright law needs a conception of authorship that can be applied across a great diversity of cultural fields, which means that its legal framework needs to be broad enough to accommodate the vast differences between the various creative practices it proposes to protect. Although there are discontinuities between copyright law's conception of authorship and the conceptions recognised in relation to conceptual art, scientific authorship or literary editing, it should be clear that these three 'social' conceptions are themselves very different. When one factors in all sorts of other spheres which copyright law seeks to regulate – music production, screenwriting, theatre (Gripsrud, 2014), film-making (Bently and Biron, 2014; Lastowka, 2005, p. 1230), – one can see that discontinuities are inevitable. When reflecting on the possibility of the introduction of a moral right of attribution, these complexities led Rebecca Tushnet to observe that '[l]egitimate claims for credit are simply too varied and contextual, and copyright law already too complex and reticulated, for an attribution right to be a valuable addition to copyright's arsenal' (Tushnet, 2007a, p. 789).

Third, it might be argued that, even though it may produce discontinuities, copyright's conception of authorship usefully limits the possibilities of highly fragmented ownership. In limiting the types of contributions, and requiring collaboration, copyright ensures the concentration of rights in few hands (what, elsewhere, has been referred to as 'agglomeration'). In some jurisdictions, such as the United Kingdom, no joint author (or co-owner) can exploit the work without the consent of other joint authors, so multiple ownership raises issues of potential 'hold ups' (as economists might say). Take the example of the article in *Nature* with 151 attributed authors: if each of these were really a legal joint author, all would have to grant permission to publish (and if 150 had agreed, the 151st would have enormous power to refuse to publish or exact modifications).

Although the ownership rules vary from jurisdiction to jurisdiction (see, e.g., Dreyfuss, 2000, p. 1207), and some copyright laws include provisions to resolve disagreements between joint owners, courts appear to act on a desire to simplify ownership by agglomerating ownership rights in as few persons as possible. Such a tendency leads to a high threshold for joint authorship. Writing about the United States, Rebecca Tushnet (Tushnet, 2007a, p. 807) explains that 'an important reason that courts have adopted restrictive definitions of joint authorship' lies in the implications for the exploitation of the copyright, namely, the potential licensing problems associated with

the requirement than an exclusive license be agreed by all co-authors (see also La France, 2001, p. 194; Lastowka, 2005, p. 1217).

Fourth, it might be said that any attempt at alignment may also be regarded as futile because there will always be a section of the cultural world that takes its function to be to interrogate the categories of contemporary life, including law (its concepts and practices), by actions and interventions that self-consciously excavate, expose and deliberately destabilise the ideas, assumptions and ways of thinking with which law operates. However hard law reformers work to locate a conception of authorship that is broad and flexible enough to accommodate a wide range of social practices, there will be some artists who nevertheless want to expose and challenge those conceptions. Indeed, our example of conceptual art might be regarded as precisely such a case. While perhaps not focused on challenging copyright law's conception of authorship, its explicit goal of eliminating the 'overinflated subjectivity signified by the artist's personal touch or signature' that was valued in previous art movements (Green, 2001, p. 10) was inevitably going to produce discontinuities with a copyright law whose conception of 'authorship' had emerged in historical environments where such subjectivity and personal touch was regarded as the hallmark of 'authorship'. Even if copyright law could encompass many artistic practices, then, it seems implausible to think it could align itself with every section of the artworld.

Fifth, it might be said that these divergences are unproblematic, possibly even desirable. The discontinuities might be said to be unproblematic because copyright law provides other mechanisms to adjust the initial allocation of rights. The most obvious of these is contract law, as a result of which initial allocations of rights can be varied (as we have seen above). If copyright law designates one person as an author there is – in most laws at least – nothing to stop an arrangement whereby that copyright can be assigned to another (and, in the few cases where copyright law prohibits assignments, an arrangement with an equivalent effect can usually be achieved). Perhaps the best illustration of the importance of contractual remedies to problems of authorship can be seen in film practice: despite longstanding uncertainty and confusion over who should count as a film author, the film industry has nevertheless been able to flourish through contractual provisions that ensure that all the necessary rights end up in a particular film production company. Complicated questions of who is a film author as a matter of law typically only arise in situations of amateur production (see, for example, *Wimmer v. Slater*).

Moreover, it might be suggested that the non-alignment of law's conception of authorship with social practice is a by-product of the relative autonomy of law, an autonomy that is desirable because it creates spaces

that are free from prior social relations of power, especially economic power. Legal non-authors cannot use economic or social power to transform themselves into legal authors, whereas the use of social power to gain attribution in science has received widespread, and almost universally critical, comment (Kwok; Smith and Williams-Jones, 2012, p. 205; and, more generally, Fisk, 2006, p. 102). Most recently, Carolin Haeussler and Henry Sauermann have studied attribution in relation to scientific works and concluded that: 'contributions in the form of carrying out technical steps or laboratory work are more likely to be rewarded with authorship when made by scientists with higher hierarchical status or prior scientific accomplishment' (Haeussler and Sauermann, 2013, p. 689). In fact, what they show is that attribution practices reflect power relations. For copyright law, authorship remains a matter of law, and such contributions would not be relevant for copyright law's assessment of authorship.

Equally, with authorship being a matter of law, the socially less powerful should remain 'authors' if their contributions are in fact contributions to authorship: an actor can become a co-author of a play (whatever the director or playwright may think), a family member who contributes could become a joint author of the resulting work. Consider, for example, the situation in the United States during the 1950s when screen credit was determined not by formal, public legal rules but by the rules and practices of the Screen Writers Guild. While much that the Guild did might be thought of as beneficial to writers, as is well known, a series of writers – Paul Jarrico, Dalton Trumbo, Michael Wilson – who were blacklisted as a result of their 'associations' with Communism were not granted credit on the films (*The Las Vegas Story* (1952), *Roman Holiday* (1954), *The Friendly Persuasion* (1956) to which they had contributed (Fisk, 2006, p. 231–245). The Screen Writers Guild was ineffective to resist the political pressure of the producers. In contrast, it seems fair to assume that judicial designation of authorship would have been less vulnerable to these politically-motivated exercises of economic power.

Of course, we should not overstate the social justice arguments in defence of the legal control of the determination of authorship. For a start, as already noted, these legal determinations do not stand outside power-relations, but are, of course, deeply immersed in complex webs of power. This means that when a court determines whether a contribution is original or substantial, its conclusions will rarely be uncontaminated by social valorisations that in turn reflect relations of power (Bently, 2009). Moreover, in so far as the intention of the parties is relevant to determining questions of joint authorship, as in the United States, questions of self-perception and capacity to act inevitably inform the actors' capacities to form relevant intentions, however

substantial their contributions in fact are. Does an editor, for example, ever intend to become a joint author? Prevalent views of the role of the editor may preclude the formation of the intention to co-author.

Despite all these good reasons to be skeptical about the desirability of any attempt to align copyright's conception of authorship with the varied ideas deployed in specific fields of social practice, something important is at stake in this failure to align copyright's concept of authorship with the understandings of authorship evinced in many – perhaps most – social practices. What is at stake is the credibility and legitimacy of copyright law itself. Copyright law relies heavily for its operation on widespread acceptance of its legitimacy (rather than the sporadic enforcement of its sometimes hefty sanctions). That legitimacy lies in the idea that copyright law promotes cultural flourishing, by giving the weight of law to ideas that artistic and cultural activities warrant recognition, respect and reward. In turn, it is important that different social operators feel a reasonable correspondence between the social norms that underpin their practices and legal norms embodied in copyright law.⁸ For this reason, we think it is at the very least worth considering carefully whether the conception of authorship can be made more consistent with social norms.

Three proposals

We are not alone in thinking that some exploration of whether copyright law can be made more consistent with social norms. For example, Professor Rochelle Cooper Dreyfuss from New York University, one of the most prominent intellectual property scholars in the United States, has proposed the introduction of a whole new category of 'collaborative authorship', while Professor Gregory Lastowka from Rutgers has suggested that US law regulate authorial attribution to give effect to social interests in 'truthful' attribution. Dreyfuss's proposal can be seen as an attempt to make legal constructions more consistent with changed social practices, while Lastowka seeks to cabin 'deviant' (i.e., particularly misleading) social practices to make them more consonant with legal ideas of authorship. We review these in turn, before tentatively making our own suggestion.

Dreyfuss's proposal for a concept of 'collaborative work'

Dreyfuss suggests that copyright laws should recognise a new kind of copyright work: a 'collaborative work' (distinct from 'collective works' or

‘works of joint authorship’), which would arise where the parties indicated an intention that the work should be so treated (either in writing or through other actions) (Dreyfuss, 2000, p. 1222). In so proposing, Dreyfuss consciously builds on some of the more open conceptions of co-authorship that we have referred to above, such as that operative in France and the Netherlands where contributions do not need to be integrated into a work so as to become non-distinct. But Dreyfuss’s proposal goes further than existing copyright regimes, conferring authorship status on ‘every participant who has contributed to such work’, including those who created (non-copyrightable) ideas and facts, those who instigate, find funding, or provide resources (*ibid.*, pp. 1220, 1222–3). Many contributions that are not usually counted as authorial in law would, on this proposal, count, and the definition of contribution would be more expansive and accommodating than on current joint authorship doctrine. Her proposal would ‘give each author pecuniary interests in the work proportional to that party’s input’ (*ibid.*, p. 1220) Building on the US rule on exploitation of jointly authored works (as well as some provisions found in civil law regimes), each author would be allowed to utilise and develop their own contribution, with an implied licence to use that of the other contributors (with proportionate obligations to remunerate those others), but their rights would be unenforceable unless and until all contributors were properly attributed (*ibid.*, p. 1221).

This proposal has a number of attractive features. It would potentially encourage more collaboration between parties, as individuals not usually accorded authorial status would be attracted by the prospect of greater recognition. It would also encourage would-be single authors to think carefully about the influences on their work, and to be clearer about the demarcation of creative roles, and the need to give credit and recognition to other contributing parties. It would work well for cases of legal non-authorship such as scientific publishing, when authors contribute in ways not usually recognised by copyright as contributions ‘of the right kind’. The case of conceptual art is more difficult, however. On the one hand, Dreyfuss’s proposal allows a contribution of an artist like Sol LeWitt to count as authorial, but this is only on the proviso that his work be considered a collaborative one, alongside the contributions of his assistants. Thus, it does nothing to harmonise legal and social conceptions of authorship in the artistic sphere, even if it gets around the difficulty of conceptual artists being viewed as legal non-authors.

More generally, Dreyfuss’s proposal might be seen as problematic to the extent that it actually highlights the disparity between legal authors and social non-authors, providing a way not only for editors, friends and ghosts

to count as legal co-authors when they might conventionally not be so considered (it is arguable that current joint authorship standards already offer this prospect), but also for broader contributions – of publishers, funders or even the public at large, to count as authorial. But why should we inflate (legal) authorship to this extent? One concern is that enabling contributions of ‘ideas’ to count as authorial could threaten to extend copyright protection precisely at a time when scholars are worrying about its ‘over-expansion’. Indeed, copyright law’s idea/expression dichotomy is often justified as a technique which enables courts to balance the interests of copyright owners against those of users, creators and the public at large, preventing the monopolisation of ideas and facilitating a robust public domain. When ‘non-copyrightable ideas’ are viewed as contributions of authorship, as per Dreyfuss’s proposal, this balancing act becomes harder to achieve, because the scope of copyright infringement potentially increases. While a proposal which enables ‘ideas’ to count as authorial has the potential to align legal and social conceptions of authorship, then, we might wonder whether this is too high a price to pay for such alignment.

Moreover, recognition of this problem could lead us to question one of the potential strengths of Dreyfuss’s proposal in encouraging more collaborative ventures: although the proposal might encourage collaborative authorship in one sense, it has the potential to stifle authorship in the more traditional sense of building on the raw materials which copyright law is supposed to safeguard. In our view, this tension could be avoided if copyright law treated attribution rights separately from ownership rights (see below).

Lastowka’s proposal to strengthen attribution

Gregory Lastowka’s starting point is the US Supreme Court in *Dastar Corporation v. Twentieth Century Fox Film Corp* in 2003 which, at its broadest reading may preclude authors relying on trade mark law to prevent misattribution of their work as others’, and possibly others’ work as theirs. Lastowka is concerned that *Dastar* has unjustifiably removed a valuable legal remedy, and proposes the reversal of the decision. In contrast to Dreyfuss, his proposal thus concerns purely questions of authorial attribution, and the vehicle for giving effect to these duties to attribute is trade mark law. Lastowka’s justification for so advocating is not the familiar moral rights theory according to which ‘authors’ have a natural or moral right to attribution in relation to their works (for the mere reason that the works are the products of the author’s personality). Rather, Lastowka argues that ‘accurate

authorial attribution benefits society because it is a type of information that has special social value' (Lastowka, 2005, pp. 1176, 1180–85). Consequently, Lastowka proposes that trade mark law – a form of intellectual property which protects particular signs or marks that are used by traders to identify their goods/services, to indicate the origin of their goods/services, and distinguish them from goods/services produced by other traders – plays a role in ensuring that there is appropriate authorial attribution.

Lastowka's preference for trade mark over copyright is explained not just by his public interest orientation, but also because he also sees US copyright law's conception of authorship as out of step with that in popular understanding (*ibid.*, pp. 1215–1216). As he observes:

If one believes there is a societal interest in accurate attribution, copyright's scheme of authorship ordering is obviously problematic because the legal author controlling attribution is not the person society views as the author (*ibid.*, p. 1216).

Nor would Lastowka want to make the matter one for individual authors. Because he is concerned with promoting 'truth' (*ibid.*, pp. 1193, 1233), leaving policing of attribution to authors 'has a glaring structural defect', namely that authors might agree to misattribution (either because of unfair bargaining, or because they willingly do so for alternative benefits) (*ibid.*, p. 1218). For Lastowka, 'attribution must be bounded to some factual and socially valuable truth about the identity of the true author'.

Thus, Lastowka wants to ensure that legal regulation prevents social practices that misattribute the 'true author'. In his view, for example, ghostwriting should be actionable as a form of reverse passing off (i.e., misrepresentation of one person's work as another's) irrespective of the consent of the author (*ibid.*, pp. 1218, 1233). Such actions should be able to be brought not just by the misattributed or unattributed author or contributor, but also by the public (which, as Lastowka reports, had occurred in the US in the 1990s when the pop duo Milli Vanilli purported to be singing on the album (and single) *Girl You Know Its True* but in fact were lip-synched the recording). Although Lastowka acknowledges that such regulation would often prove ineffective (*ibid.*, p. 1230), his aim is that socially deceptive practices should be brought into line with legal norms, and those legal norms are to reflect 'socially important legal truth'.

But what is less obvious is quite what are the relevant 'truths' in the sorts of situations that we have been discussing. Is the socially important empirical truth that a work was 'conceived by' Sol LeWitt, or 'executed by'

various assistants? Is not the 'truth' more a product of attribution practices than an 'empirical reality'? Is the extent of Perkins' role in editing Fitzgerald and Wolfe such as to make it deceptive to describe the latter alone as the authors? Unfortunately, Lastowka's proposal offers too little guidance here to be of value. Moreover, the case of scientific authorship would be left entirely outside the field of legal regulation. This is because Lastowka takes the view that social interests diminish 'in cases involving more than two or three authors who contribute to a single work' (*ibid.*, p. 1230), and contributor attribution no longer provides factually meaningful information about a product. As he explains, in 'the case of collaborative authorship, it seems the justification for the doctrine of reverse passing off falls away' (*ibid.*, p. 1232). Yet the volume of literature concerning 'scientific authorship' suggests there are important individual and social interests at stake here (Fisk, 2006, p. 50).

A more reflexive concept of authorship for attribution

Like Dreyfuss and Lastowka, we see problems with the discontinuities between copyright law's narrow conception of authorship and social practices. However, in contrast to Dreyfuss, but in common with Lastowka, we think there may be reasons to focus attention on attribution, with a view to considering whether some greater level of consistency between law and social practice can be achieved at least in relation to this question. Thus we suggest greater attention should be given to an idea raised by Rebecca Tushnet – 'a special type of "attribution authorship"' (Tushnet, 2007a, p. 807) – an idea we think she dismissed too quickly.

We suggest that a right of attribution – a right already recognised under most copyright regimes (and indeed in a number of international obligations) – could be extended to all relevant contributors to the making of a work (or perhaps to any intellectual endeavour). The notion of 'contributor' need not be synonymous with the notion of 'authors' as deployed for other purposes within copyright law (in particular, ascribing first ownership). This could be achieved either by recognising that 'authorship' has a different meaning when considering rights or duties of attribution, or perhaps less problematically by identifying the beneficiary of a right of attribution by a distinct term such as 'contributor'. Indeed, it might be that rights of attribution could be removed from the copyright system altogether, and instead be treated as free-standing rights. Attribution itself is a feature not just of copyright law, but of other fields of intellectual endeavour (Tushnet, 2007a, p. 794). 'Inventors' and 'designers' already receive limited attribution rights (Fisk, 2006, p. 70), and this proposal could also extend to them. Indeed such

a right of contributors to attribution could easily be developed out of notions of rights of personality, commonly recognised in civil law countries, but more embryonically being developed in the jurisprudence of the European Court of Human Rights in its interpretation of Article 8 of the Convention as requiring recognition of a right in one's own name or image.

Re-thinking attribution in terms of 'relevant contributions' would have a number of potential benefits. First, it would free the attribution right from the proprietary logic of copyright, and thereby permit a greater number of potentially qualifying contributions. Catherine Fisk has observed that 'over the last generation there has been a tendency to expand the number of people and the types of contributions that are attributed' (Fisk, 2006, p. 101). These contributions could (but would not necessarily) include contributions to ideas, generating data, even building machines that help generate data as well as contributions to text or expression. Because recognition of such contributions as entitling a person to attribution would not, in turn, implicate questions of ownership, marketability or exploitation of a work, there are no policy reasons for a court or tribunal arbitrarily to exclude them from recognition. More positively, by allowing the broad array of contributions to be taken into account, copyright law can incorporate within its logic what matters, and what is valued, within specific fields of endeavour. The contribution of the conceptual artist would at least be recognised as entitling them to attribution.

Secondly, a 'relevant contribution' test would allow rights of attribution to become more reflective of social norms. Indeed, 'relevant' could be expressly defined so as to take account of social norms in the particular sector. Rebecca Tushnet has observed that there are 'powerful attribution *norms* throughout modern society, rather than a single norm that covers most situations' (Tushnet, 2007a, p. 795). Thus, where such norms are codified textually, for example by industry agreement (as in the case, for example, of the Screen Writers Guild of America) (Fisk, 2006, pp. 77–81; Fisk, 2011), those norms would be determinative (and the resolutions of the relevant dispute-machinery could be given presumptive force). A similar position could be taken where such norms are socially developed, as for example with various scientific societies' statements on attribution, or indeed with editorial practices. If individual literary editors do not wish to be attributed, or editorial contributions – even to structure, sequence, organisation and text – are not treated as relevant contributions under the relevant social norms at the pertinent time, then they would not be entitled to attribution. Of course, care would need to be taken to ensure that individual agreements and social norms do not become opportunities for unfair bargaining

practices, but there are many circumstances in which one can imagine parties giving their full and informed consent to a particular billing. This might be because the billing has been collectively bargained, or because the parties agree that it represents the best way to market the cultural work.

Thirdly, deferring to social norms also raises the possibility of differentiating between categories of relevant contributor. One could easily imagine a legal system differentiating between categories of contributor, such as between 'principal authors' and 'ancillary authors', or 'authors' and 'contributors'. Indeed, this is precisely the solution to the problem of attribution in 'scientific authorship' that has been proposed by the deputy editor of the *Journal of the American Medical Association*, Dr. Drummond Rennie (Rennie, 1997; Rennie, 2000; Dreyfuss, 2000, p. 1190). He has suggested that contributors receive credit for what they did, just as with film credits. It also raises the possibility that contributors could be recognised 'collectively'. As Catherine Fisk has ably demonstrated, such norm-based regimes can be appraised in terms of transparency, participation, equality, due process, efficiency, and substantive fairness (Fisk, 2006, pp. 73–76).

A fourth aspect of the proposed 'contributor's right' would be that it could be formulated to take advantage of the changes to the technological environment within which works are now published. As Catherine Fisk has observed, 'context is everything in determining when credit is due' (Fisk, 2006, p. 76). In contrast with copyright law's concept of 'authorship', which needs to be a stable grounding for exclusive rights that could last over 150 years (life of an author plus 70 years), contribution rights could be made to reflect current social norms. Thus the assessment of whether there is a 'relevant contribution' could fall to be determined at the present time, so that an online publisher could be required to modify attribution of works for the future. Given that the costs of altering attribution information are relatively low, a right of attribution that can respond in this way seems much more feasible than it might ever have been hitherto.

Two commentators, Professors Catherine Fisk and Rebecca Tushnet, have anticipated and critiqued a proposal of this sort. Fisk argues that 'a comprehensive and legally enforceable right of attribution ... is neither feasible nor probably desirable' (Fisk, 2006, p. 109). One of her concerns is that such a system would lack the flexibility of 'norm-based systems' (*ibid.*). Therefore, she proposes a very limited intervention, restricted to the field of employment contracts. However, we are less pessimistic. Although the United States has not, as yet, enacted attribution rights, most copyright systems already include such rights as part of the system of 'droits moraux'. Indeed, Article 6 Bis of the Berne Convention, Article 5 of the WIPO

Performers and Phonograms Treaty and Article 5 of the Beijing Treaty on Audiovisual Performances already require that such rights be conferred on authors of literary and artistic works and performers. We suggest that such rights should be implemented in a way which draws on and is sensitive to existing social norms.

Tushnet criticises the idea of a ‘right of attribution’ as one which would ‘increase the number of line-drawing problems substantially’ (Tushnet, 2007a, p. 807). She is, at least, partly right. If there are a greater number of people with attribution rights, and a greater number of contributions are recognised as entitling the contributor to attribution, the number of instances where decisions need to be made will evidently increase. But that does not mean that ‘problems’ will increase. Indeed, we would suggest that the number of ‘problems’ might well decrease for two reasons. Firstly, because with our suggestion, there would be greater alignment between legal and social norms, and thus we would anticipate that contested claims to attribution would be fewer. Secondly, because the right only relates to attribution, so that questions of ownership are not at issue, we would envisage that the parties would likely be more ready to accommodate one another. By reducing the practical effects of authorship ascription, we would anticipate a corresponding reduction in the intensity of legal fights over authorship.

Of course, many details of this proposal remain to be worked out, and it is beyond the scope of this chapter to offer a detailed defence and analysis. Rather, the purpose of this chapter has been to highlight the underlying discontinuity between legal and social authorship that the proposal is designed to address, to argue that re-aligning legal and social authorship norms is important for the sake of copyright law’s legitimacy, and to suggest that current proposed solutions to this tension are in certain respects problematic. We think the proposal outlined here is a more promising alternative, and submit that it warrants further scholarly attention.

Notes

1. This chapter does not specifically address examples of digital collaboration. However, based on evidence from workshops that took place during the HERA project (in particular, the papers by Eva Northup and Hendrik Spilker at the HERA workshop on ‘Notions of and conditions for authorship and creativity in media production’, 2 November 2012, University of Bergen), our view is that, whilst digital collaboration makes questions about authorship pertinent and pressing, it does not fundamentally change the more general questions

- considered here about authorship norms and roles. For further discussion of the norms of digital artistic collaboration, which relates to the example of conceptual art, please see the chapter in this collection by Elena Cooper.
2. Many jurisdictions give protection to a collective or composite work (such as an anthology) as a distinct category of work. See van Eechoud et al., 2009, esp. ch. 6, for detailed discussion. For reasons of space, this chapter focuses on copyright's definition of joint authorship.
 3. This chapter focuses on questions of joint authorship in terms of the specific contributions and collaborations amongst individuals to a work (a question that courts have been faced with when joint authorship is contested); however, for discussion of how EU and Dutch Courts often disregard these more specific questions about individual contribution when deciding whether a 'work' counts as an 'author's own intellectual creation' for the purposes of copyright protection, please see the chapter in this collection by Stef van Gompel.
 4. Our focus here is largely on the written outcome of scientific research (e.g. journal articles) as opposed to datasets or visualisations formed as part of the publication process. Although we do not discuss the difficult question of the copyright status of these other potential 'works' of authorship, we note here that individuals who collect or manage data are often cited as authors of scientific research articles on the basis of their contributions to the former.
 5. It is worth noting that many collaborative ventures such as Wikipedia rely on open source and open content licensing agreements, and that such collaborative ventures are often facilitated by authorship agreements which bypass questions about authorship attribution. It is beyond the scope of this chapter to discuss such agreements in depth, but we draw the reader's attention to them as other examples of contractual agreements facilitating collaborative authorship, often independently of copyright law.
 6. EU directives are laws which all Member States must implement in their national legal systems: here, we refer to the specific directive which indicates that attribution ought to be recognised as an important presumption in favour of authorship. However, it must be noted that, whilst the process of copyright harmonisation is underway between EU Member States, many differences still exist between different Member States with regards to questions of authorship and moral rights. For an overview of the complexity, see van Eechoud et al., 2009.
 7. For an interesting example of how artistic and scientific authorship norms can combine in certain cases, independently of copyright law, see the examples of digital collaboration discussed in Elena Cooper's contribution to this volume: in particular, the Renaissance Team at the National Centre for Supercomputing Applications (NCSA), University of Illinois at Urbana-Champaign. In this example, all the different contributors to the data

- visualisations are seen as equal players; Cooper argues that they appear uninfluenced by copyright norms in their conceptions of authorship.
8. For discussion of this point with regards to the relationship between copyright law and aesthetic judgments specifically, see the chapter in this volume by Erlend Lavik.

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