

How Conceptual Art Challenges Copyright's Notions of Authorial Control and Creativity

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Thank you very much to the organizers here at the Kernochan Center and at the Copyright Office for putting this together. This is always a terrific event and I'm delighted to be here and really excited to have an opportunity to talk about a set of issues that I think is really important. In some respects, what I'm going to do is push on some of the things that Shyam Balganesesh was just telling you about¹ and continue to give you a bit of my sense of some of the challenges that conceptual art is facing in the Copyright Office and that the Copyright Office is facing with respect to conceptual art. I will use these issues as an opportunity to think about some more fundamental challenges at the heart of copyright doctrine.

I'm interested in the way in which the control or predictability that some putative author has over the content of her creation interacts with our judgments of its creativity.² What I'm going to suggest is that there's a paradox at the heart of copyright law and that these cases involving conceptual art demonstrate that paradox pretty clearly. In fact, though, the paradox actually exists in a variety of other cases.

Here's the basic argument: that to the extent that someone exerts too little control or that there is too much unpredictability about the way in which the work will be produced, then that person is at risk of being declared not an author of the work. Copyright law looks for control and predictability, and if there's not enough of either, then copyright law and the Copyright Office may conclude that the creator is not an "author" of the work. On the other hand, to the extent that there is too much control or too much predictability, then authors run the risk of being told that their work is not creative. In fact, the strategy for an author is to balance these sorts of competing requirements: to exert control over the ultimate product, but not so much control that you risk losing the opportunity for creative expression.

By looking at a variety of cases, we can see how these issues have arisen.

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1. See generally Shyamkrishna Balganesesh, *Do We Need a New Conception of Authorship?*, 43 COLUM. J.L. & ARTS 371 (2020).

2. For a lengthier treatment of copyright law's authorship requirement, see Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229 (2016).

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Copyright law has adopted from aesthetic theory a fairly traditional about the nature of authorship and creativity, and over the course of the last fifty or sixty years, conceptual art in particular has been challenging a lot of those theories, encouraging us to think more deeply about what we understand authorship and creativity to be. According to the contemporary aesthetic philosopher Paisley Livingston, to be an author is to be in control of an “utterance.”³ Livingston and other philosophers have tried to conceptualize who, with respect to some multi-person effort, can plausibly be the author or authors of the work. Does the caterer of a film shoot count as one of its authors? Does the financial backer of a film or a book count? The answer to the rhetorical question is clearly “no!” An author is one who exerts authority over how the work is made, who gets to contribute to it when it gets finished.

Similar disputes show up in copyright law regularly, when the law has to decide who, if anyone, is an author of a given work. It looks for who has control over the work and if one has insufficient control over the work, one risks being declared not its author. Take, for example, *Lindsay v. Titanic*.⁴ Lindsay directed an underwater shoot of the *Titanic* vessel. The photos were the ones he directed people to shoot, even though he himself did not dive down to take the photographs of the *Titanic*. Nonetheless, the court had no problem describing him as the author. Why? Because he exercised such a high degree of control that the film “duplicates his conceptions.”⁵ He had in his mind some set of ideas of how the (literally) underlying ship would be expressed in the ultimate images that got produced, and those images duplicate his conception, so he has control of them.

On the other hand, in the *Andrien* case,⁶ a less well known case, someone hired a producer to print off a bunch of maps, among other things. And then the printer tried to claim a copyright as the author of the the ultimate production. However, according to the court, the printer is effectively an amanuensis of the actual author. The author is dictating what’s happening, is in full control of how the work ultimately gets produced, and thus the mere printer of the work can’t assert any sort of authority because she didn’t do anything, and didn’t have any control over the work.

This shows up in these conceptual art cases as well. In *Kelley v. Chicago Park District*,⁷ the artist Chapman Kelley installed an enormous wildflower garden in Grant Park and brought suit under the Visual Artists Rights Act when the parks department modified the garden without his permission. Part of the problem for Kelley in the Seventh Circuit’s opinion was that, at any given moment, the garden owes most of its form and appearance not to Kelley—Kelley doesn’t control it—but to natural forces.⁸ Though the gardener who plants and tends obviously assists, he but then gives away control—gives up the opportunity to perfectly prune the work

3. Paisley Livingston, *Cinematic Authorship*, in *FILM THEORY AND PHILOSOPHY* 132, 134 (Richard Allen & Murray Smith eds., 1997).

4. *Lindsay v. Wrecked & Abandoned Vessel R.M.S. TITANIC*, No. 97 CIV. 9248 (HB), 1999 WL 816163 (S.D.N.Y. Oct. 13, 1999).

5. *Id.* at *5.

6. *Andrien v. S. Ocean Cty. Chamber of Commerce*, 927 F.2d 132 (3d Cir. 1991).

7. 635 F.3d 290 (7th Cir. 2011).

8. See Christopher Buccafusco, *Authorship and the Boundaries of Copyright: Ideas, Expressions, and Functions in Yoga, Choreography, and Other Works*, 39 *COLUM. J. L. & ARTS* 421 (2016).

and predict precisely how it's going to go. At any moment, he can't know what it might look like. That is beyond his control, and in this respect, he becomes less of an author of the work.

Contesting notions of authorial control is a regular feature of contemporary and conceptual art. For instance, in Vito Acconci's film *Following Piece*,⁹ he would wake up in the morning, grab a camera, and find a random person and follow them on the streets until they went into a private establishment. Each film lasts however long that person was walking publicly. He just kind of creepily walked behind them. This becomes, in some respects—and this is the point—the total depersonalization of the work. It is mechanical and irrational; it doesn't require the author to make choices. And that's the goal for Acconci, but also part of the problem that it produces when it potentially bumps up against copyright law.

Or consider Yayoi Kusama's *Obliteration Room*.¹⁰ The room starts off white, and then people are encouraged to put stickers on the walls, floor, and ceiling. By the end of the day the room is covered in stickers. Here the artist, Kusama, doesn't have control of the ultimate end product and, in that respect, runs into problems for understanding her commitment to authorship and her ability to be described as the ultimate author of the work.

Although copyright law requires authorial control, the other side of this problem is that in order to be a *copyright-protected* author, you have to exhibit some kind of creativity. And what I'm going to suggest again is that what creativity is doing in copyright law is mimicking what creativity means in a certain kind of traditional aesthetic theory that does not line up well with contemporary artistic practice. Berys Gaut, another aesthetic philosopher, says that a creative work is one that is original, valuable, and demonstrates "flair."¹¹ I love that word. *Feist*'s requirement that a copyrightable work not only be independently created by the author, but also exhibit "some minimal degree of creativity,"¹² is hard to interpret, and I think flair is a pretty good word for what that second step is. We're looking for flair; it can't be made purely by chance (that is to say, without control), and it also can't be made purely mechanically or through rote procedure. There has to be an opportunity for imagination.

So in copyright law too, it must be original and creative. This means that there must be opportunities for freedom to choose, that the work reflects subjective judgment and that there be some sort of unpredictable "spark" to the work. These are the terms that *Feist* uses. These are the terms the Copyright Office uses. I interpret these demands as a requirement of unpredictability: something that we didn't see coming, some flair, something unusual, something more than garden variety, and the like.

9. See Vito Acconci, *Following Piece*, MOMA, <https://perma.cc/ZP7C-VPLJ> (last visited Feb. 7, 2020).

10. See Yayoi Kusama, *The Obliteration Room*, QUEENSLAND ART GALLERY & GALLERY OF MOD. ART, <https://perma.cc/5SKS-44J8> (last visited Feb. 7, 2020).

11. See Berys Gaut, *Creativity and Imagination*, in *THE CREATION OF ART: NEW ESSAYS IN PHILOSOPHICAL AESTHETICS* 148 (Berys Gaut & Paisley Livingston eds., 2003).

12. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

One of the ways this gets cashed out in copyright law, in a way that I think is interestingly problematic, is that at least some courts, and lots of copyright scholars and thinkers, analyze creativity in a purely additive dimension—that creativity is what you add to stuff. Take, for example, the *Meshwerks* case,¹³ in which then-Judge Gorsuch declared a digital wireframe model to be insufficiently creative, a mere slavish copy of a Toyota Camry. Gorsuch says that the model purely depicts the vehicle. It is “untouched by a digital paintbrush” because the image doesn’t, for example, depict the car surrounded by palm trees or climbing a mountain road.¹⁴ Gorsuch seems to be requiring some sort of additive creativity; if Meshwerks had added some palm trees in there, they would have a copyright. But I think what Gorsuch fails to note is that the image doesn’t look at all like a Camry. If you went to the Toyota dealership and you said, “I would like to test drive the Camry,” and they showed you a wireframe model of a Camry that you could see through, you’d be pretty freaked out. You would not get in the car. I think what Gorsuch is failing to recognize is the way in which an important part of the aesthetic and creative process is not purely additive, but in fact abstractive or subtractive as well.

On the other hand, take the *Schrock* case, in which the author made photographs of a set of “Thomas the Tank Engine and Friends” toys.¹⁵ This case succeeds for the author. Why? Because he’s able to tell a story about the way in which there’s something special about *these* photographs of them that doesn’t exist in the toys as such—he made them look super happy, happier than they already were. If you can tell a story about additive creativity, then you can succeed, but if your story is merely abstractive creativity, I think authors’ claims to copyright have a harder time.

Consider two more examples. First, a work of art called *Glazed Maple*, which is actually a linoleum floor tile.¹⁶ This looks like a floor tile to me—a piece of wood. But that was not what the plaintiffs in the case claimed when they asserted copyright in *Glazed Maple*. They claimed that they looked at a lot of wood and got a bunch of ideas about wood—but that the work was not any particular piece of wood that has ever existed, but rather an expression of their ideas of “glazed maple.” So here what they were doing was thinking hard about what maple should look like and then demonstrating it with this piece of wood that looks like what maple should like. And there the court says, effectively, “Yeah, you guys did a lot of stuff; that’s really creative.”

By contrast, a work like *Log Cabin*,¹⁷ when the author, Cady Noland, is engaging in subtractive, abstractive creativity, I think it becomes harder to see the nature of the creativity involved in the production. Here, the author doesn’t seem to want to tell a story about “I thought about log cabins and all of these dreams about log cabins came to me and this is what I produced.” When the author doesn’t want to tell that story—sometimes for aesthetic reasons, sometimes for market-based reasons—then the

13. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

14. *Id.* at 1265.

15. *See Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513 (7th Cir. 2009).

16. *See Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404 (11th Cir. 2015).

17. *See generally* Megan E. Noh, *U.S. Law’s Artificial Cabining of Moral Rights: The Copyrightability Prerequisite and Cady Noland’s Log Cabin*, 43 COLUM. J.L. & ARTS 353 (2020).

ultimate copyright comes into doubt.

One of the great writers on conceptual art, Sol LeWitt, wrote that “[w]hen an artist uses a conceptual form of art . . . the execution is a perfunctory affair.”¹⁸ The whole point is that the concept or the idea eliminates the arbitrary, capricious, and subjective as much as possible. When it comes to something like Deborah Kass’s *OY/O* sculpture,¹⁹ that’s exactly the point in many respects. It’s to limit the subjectivity and creativity of the artist, but that itself is a creative contribution.

Going back to Shyam’s suggestion with respect to *Sarony*,²⁰ Sarony gets a lot of credit for asserting control over his photograph of Oscar Wilde. And who gets little credit? Certainly, Sarony’s mechanic. (In the 1870s and 1880s, he was called a mechanic, not a photographer.) But also, Wilde, and more importantly, Wilde’s barber. Wilde took his barber to the Metropolitan Museum of Art (this was taken in New York) to look at the classical sculptures in the museum and to make sure his hair looked exactly like that. As we think about who has control over that work, I think Wilde and his barber miss out on those claims, although I think they may matter in important ways.

I hope that understanding this challenge between control and creativity will give us some purchase on analyzing the questions associated with *Slater* and monkey selfies,²¹ and will give us some purchase on analyzing the questions associated with AI and computer code and the sorts of creativity that come about in those sorts of ways as well.

18. Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, <https://perma.cc/57DT-U5VT>.

19. See Deborah Kass, *OY/O* (2015), images available at <https://perma.cc/B8FF-PHAT>.

20. See Balganes, *supra* note 1, at 372 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

21. See *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).