

ABSTRACT

Title of dissertation: THE METAPHYSICS AND ETHICS OF COPYRIGHT

Darren Hudson Hick, Doctor of Philosophy, 2008

Dissertation directed by: Distinguished University Professor Jerrold Levinson
Department of Philosophy

Copyright, broadly defined, is a legal form of proprietary ownership of authored works, including literary, pictorial, musical, and selected other intellectual kinds. Ideally, one who is familiar with the law should know whether something they have created is protected by copyright (and to what extent), and whether some action they take will infringe a copyright. Unfortunately, this is often not the case. Rather, established copyright law gives rise to a host of problems, including legal decisions and established doctrines that are alternatively arbitrary, counterintuitive, and contradictory.

My central argument is that these problems arise from a failure in copyright law to recognize the nature of its objects, *authored works*, and that a coherent and stable approach to copyright must be built upon such an understanding. To this end, I outline an ontology of authored works suitable for grounding both the legal and ethical domains of copyright.

Centrally, I contend, a reasonable understanding of copyright depends on grasping four composite dimensions of authored works: their *atomic* dimension—the parts of which they are composed, and the selection and arrangement of these parts; their *causal*

dimension—their *contexts of creation and instantiation*, and the *weak and strong historical links* that connect a given work to others; their *abstract* dimension—that all such works are best understood as type/token entities capable of multiple instantiation; and their *categorial* dimension—that multiple works belonging to mutually-exclusive categories can be embodied in the same physical object. On an understanding of these factors, I establish conditions for the copyrightability of authored works, for the infringement of these copyrights, and for the creation of “derivative works.”

Finally, I consider the *right* of copyright. First showing how the strongest contenders for grounding this right—the Lockean and Constitutional approaches—fail to align with our understanding of authored works, I sketch an alternative approach—one based on the author’s creativity as realized in the authored work—building on the ontological account outlined above, and for establishing the extent of this right, including its duration and when it might be infringed without amounting to a *violation* of the right.

THE METAPHYSICS AND ETHICS OF COPYRIGHT

Darren Hudson Hick

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Advisory Committee:

Distinguished University Professor Jerrold Levinson, Chair

Professor Samuel Kerstein

Professor Judith Lichtenberg

Professor Steven Mansbach

Professor Christopher Morris

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FOREWORD

In 2003, a photograph by Richard Prince, “Untitled (Cowboy),” sold at Christie’s Auction House for \$332,300. Some might be surprised that a photograph could garner such a princely sum, but—in this case at least—none more so than Jim Krantz. Krantz might be allowed a certain unique incredulity, for Prince’s photograph was a photograph of *another* photograph, this one taken by Krantz himself while on commercial assignment for Marlboro. Indeed, Prince has based entire gallery shows on photographs of Krantz’s commercial work.

* * *

In 2007, the Fraser Gallery in Bethesda, Maryland, displayed a series of photographs taken by local artist Doug Sanford. The photographs depicted e-mailed letters sent to him throughout the previous year by an ex-girlfriend, stating variously: “I don’t love you anymore,” “I hope you suffer horribly,” and the like. Sanford had not received permission from the letter writer, and she entreated both Sanford and the gallery to remove the works from display. Sanford argued that his work had *transformed* the e-mails into something new: “The words are the subject. I’ve never said the words are mine. ... If I were selling her words and calling them mine, there would be a copyright issue.”¹

* * *

¹ Quoted in Jessica Gould, “Mad About You: An artist’s photos of an ex’s angry e-mails prompt even more anger.” *Washington City Paper* (Washington, DC), 2 February 2007.

In 2008, J.K. Rowling, author of the popular Harry Potter novel series, filed suit against Steven Vander Ark for his role in contributing to a proposed unauthorized publication, *Harry Potter Lexicon*. Ark edits a website containing a database of original essays and encyclopedic material based on the Potter series. Rowling claims she intends to publish her own Harry Potter encyclopedia, and that the *Harry Potter Lexicon* illegally infringes her part in the copyright to materials in the Harry Potter series.

Ideally, one who is familiar with the details of the law should know whether something they have created is protected by copyright (and to what extent), and whether some action they take will infringe a copyright. Unfortunately, however, this is often not the case. Although intellectual property in general, and copyright in particular, has in recent years become a popular topic in the media, and is regularly debated in legal literature, discussion of the matter in the domain of philosophy remains surprisingly minimal. However, addressing both the ethical and legal issues arising in cases such as those above, as well as determining if any wrongdoing has occurred, depends on the sorts of rights that creators can claim over their works—and, as I argue in the chapters that follow, these rights in turn ultimately depend on the nature of the works themselves. Providing an understanding of this nature, and showing how it impacts one's rights and the rights of others, will be the central project of this dissertation.

In Chapter One, I provide a brief historical account of American copyright law, and an outline of the central concepts employed in the law to determine when a work may be copyrighted, and when that copyright has been infringed. However, as an examination

of these concepts and their application in real-world cases will show, the conceptual framework of copyright law leads to results that are alternatively arbitrary, counter-intuitive, and, taken as a whole, often self-contradictory. The root cause of these collective problems, I argue, is metaphysical in nature. In particular, I contend that while American copyright law assumes *some* metaphysical basis to its objects, it fails to provide a suitable ontological basis necessary for its administration. Partly, this seems the result of judges being left to their own devices to determine the nature of the objects of copyright, and partly it seems the result of concepts ingrained in the law that are themselves metaphysically confused.

As such, the central project of my dissertation is to provide a comprehensive, coherent, and consistent ontological groundwork for determining the copyrightability of authored works—the objects of copyright—and the infringement of these copyrights. However, doing so first requires setting out in some detail the factors that serve to gird this account.

In Chapters Two through Four, I build the foundations to my ontological account, outlining the atomic, causal, abstract, and categorial dimensions of authored works. Beginning with the atomic dimension, in Chapter Two, I provide an outline of the various properties and entities of which authored works are composed, and a guide to thinking about “atomic similarity” between distinct works. As well, I establish the author’s act of creation as the selection and arrangement of these properties and entities to constitute the new work.

In Chapter Three, I turn my attention to the causal dimension of authored works, and in particular to their unique contexts of creation, and to the causal chains by which

they are linked. Building on the work of Jerrold Levinson, I argue that a work's context of creation (determined by when, where, and by whom it was created) can be distinguished from any particular instance's context of instantiation (determined by when, where, and by whom it was instantiated), such that works are uniquely identifiable by the former and particular instances of those works by the latter. Having thus provided a means for distinguishing works, I outline two causal means by which works are connected: weak historical links—weak asymmetric dependency relations such that the properties of some given work depend counterfactually upon properties held in common by a *body* of pre-existing works; and strong historical links—strong asymmetric dependency relations such that the properties of some given work depend counterfactually upon properties of some *particular* pre-existing work.

In Chapter Four, I discuss the abstract dimension of authored works, in particular the view that authored works are best understood as type/token entities—that is, as created abstract objects capable of multiple instantiation and to be distinguished from the physical objects in which they are instantiated. I defend this view against proposals that works are best understood as universals and particulars (both Platonic and Aristotelian), as kinds and instances (*vide* Nicholas Wolterstorff), and as *action* types and *action* tokens (alternatively proposed by Gregory Currie and David Davies). Further, I consider in this chapter a line of argumentation begun by Nelson Goodman and further advanced by Jerrold Levinson that some categories of works are not capable of multiple instantiation—are essentially singular in nature—and thus fail to qualify as entities of a type/token sort. Finally, I investigate the complex ontological issues raised by notations

and templates, and translations and adaptations, each best understood as drawing on the type/token ontology.

In Chapter Five, I discuss the categorial dimension of authored works. In particular, following Kendall Walton, I contend that many of the properties a work possesses depend on that work's being viewed in the correct category, although the field of authored works contains a variety of "utilitarian" kinds that outstretch the categories of art works, and so complicate matters. In particular, I argue, a given object can embody multiple authored works belonging to mutually-exclusive categories of works. Finally, I return to the argument that some categories of works are essentially singular in nature, and consider a variation on this argument proposed by Mark Sagoff.

In Chapter Six, I set out my central argument, building on the ontological factors outlined in the foregoing chapters. In particular, I argue that the copyrightability of authored works depends on such a work being of a new type—and that this in turn requires that either the new work possess atomic properties that differ from those of any pre-existing work, or that the work fail to possess strong historical links to any pre-existing work. I further argue that infringing the copyright of some pre-existing work requires that the new work be atomically similar to some pre-existing work, and that the properties held in common between the two works be connected by strong historical links.

On this account, I seek in Chapter Seven to ground the claims of copyright-holders to own their works. Thus concerned with the *right* of copyright, I first seek to show how the strongest contenders for grounding such a right—the Lockean and Constitutional approaches—fail to align with our understanding of authored works, and

second to sketch an alternative approach to grounding this right—a right based on the author’s creativity as realized in the authored work. It is on an understanding of authored works and how they come about, I argue, that the copyright-holder gains his right to determine under what conditions a work may be instantiated, whether in whole or in part. Finally in this chapter, I investigate the extent of copyright, including the limits and duration of this right, and claims that users of copyrighted works—that is, members of the public at large—have rights of *use* that parallel the rights of copyright owners to *control*.

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CHAPTER ONE

The Objects and Concepts of Copyright Law

What you are reading right now is protected by copyright. At least, most of it is. That is to say, the *words* aren't protected, nor are the *ideas* they express, but somehow *it* is. And because it is protected by copyright, you are legally forbidden to copy it (though you're perfectly free to write the same words in the same order on your own). Moreover, you are forbidden to make an audio recording of it, or to adapt it into a play or a movie (however unlikely that may be). Had I only spoken the words, however, and not written them down, you would be free to copy them at will. Such is the domain of copyright law.

A Brief Introduction to Copyright

Although once merely the purview of novelists and mapmakers, today copyright affects nearly everyone. If, in the last 30 years, you have written, drawn, or constructed anything with even a modicum of creativity, chances are, that thing is protected by copyright. What exactly that "thing" is, however, and what your protection over it amounts to, are complex, non-trivial, and deeply philosophical issues. Problematically, copyright law has focused primarily on issues of the *rights* of copyright, and not the nature of its objects, or else has estimated the latter in its attempts to explicate the former, and it is from here that the problems of copyright arise.

Copyright, broadly defined, is a legal form of proprietary ownership of authored works, including literary, pictorial, musical, dramatic, and selected other intellectual kinds. Copyright ownership is essentially a cluster of rights centered around such

authored works, allowing the owner to reproduce, distribute, display, and create derivative works based upon the original.

Modern copyright law, generally, stems from Great Britain's Statute of Anne (1709), a law that repealed a 150-year-old general monopoly enjoyed by Britain's printing guild, the Stationer's Company. Members of the Company purchased manuscripts from authors and thereafter held a perpetual monopoly on printing the work. The new Statute removed the monopoly from the printers, and placed it instead in the hands of the authors themselves (though for a limited duration). So enacted, the Statute would serve not only as the basis for future copyright law in Britain, but also as the inspiration for copyright law elsewhere in the world.

Copyright in the United States is formally based on Article 1, Section 8, Clause 8 of the U.S. Constitution, which gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹ Using language largely adapted from the Statute of Anne, Congress originally enacted this power in the Copyright Act of 1790. Brief in its detail,² and initially protecting only maps, charts, and books (paintings, drawings, and music would be added later), the complexity of cases would quickly outstrip the brevity of the Act. The law was revised in the Copyright Act of 1909, and again in the Copyright Act of 1976, with the latter Act serving as the primary grounding for current copyright law in the U.S. (entered into the U.S. Code as

¹ This sentence in the Constitution (known as the "Intellectual Property Clause") also forms the basis for patent law, with copyright factoring over "Science" (employing an archaic definition of the term), "Authors", and "Writings", and patent dealing with "the useful Arts", "Inventors", and "Discoveries".

² See *Columbian Central* (Boston), 17 July 1790.

Title 17). The law has continued to develop, both with revisions that bring the Act in line with international treaties, and with court decisions that interpret the Act.³

Untangling the Concepts of Copyright

In general, copyright law is meant to establish, first, when a work may obtain a valid copyright, and, second, when another work infringes upon that copyright. My central argument in this dissertation will be that, although interpretation and application of copyright law is an active and lively enterprise, its legal and ethical implications rest ultimately on questions of a metaphysical nature. That is, what rights one has or does not have with regard to the objects of copyright will depend largely on the nature of those objects. Although the Constitution specifically mentions “authors” and their “writings”, the evolution of the Copyright Act has expanded the objects of copyright law to include not only additional categories of art and artist, but also such items as computer programs, boat hulls, and other articles of industrial design. As well, the nature of copyright law excludes a variety of traditional artworks, as will be discussed later in this chapter. Given this unusual domain of copyright, I shall use the term “authored works” to refer to its objects, generally.

Distinguished from plagiarism (an act of presenting another’s ideas as one’s own), copyright infringement involves the unauthorized appropriation of the *expression* of

³ Although most countries have their own copyright laws, this dissertation will focus specifically on U.S. copyright law. Primarily, this is for obvious practical reasons: analyzing the copyright law of countless nations is a gargantuan task. As well, a variety of international treaties over copyright and intellectually property, generally, have worked to establish at least some international standards. As such, while U.S. copyright law is by no means universal, many of its central elements are mirrored in the laws of other countries. Some essential points of difference, however, will be discussed in relevant chapters to come.

another's ideas.⁴ This expression may take the form of a literary, musical, pictorial, audio-visual, or other work, and it is the work itself that is protected, not the idea that it embodies. This distinction between the idea and its expression is just one of the central concepts employed by the law to establish when a work may be copyrighted, and when that copyright has been infringed. In the following sections, I will outline these central concepts, some derived directly from the Constitution, some set in the Copyright Act and its legislative history, and others stemming from an assortment of court decisions. As these decisions illustrate, however, enactment of copyright law has led to problematic conclusions that are variously counterintuitive, arbitrary, and contradictory. This is, I argue, the result of ambiguity with regard to the objects of copyright. While legal and philosophical discussion on copyright tends to revolve around its ethical and constitutional entailments, such debate regularly fails to investigate the root of the problem: the nature of the kinds of things being protected.

In untangling the central concepts of copyright in this chapter, I will show that not only are the problems that arise from them essentially metaphysical in nature, so too are the concepts themselves. Overall, the essential metaphysical nature of these concepts points to a foundational problem: while copyright law assumes *some* metaphysical basis of its objects, it provides no actual such basis upon which its concepts are built. As such, the problems that arise in copyright law are not only endemic, but also foundational and systemic in nature.

⁴ Certainly, plagiarism may take the form of copying another's words verbatim, but this is simply a specialized case of plagiarism, one which ventures also into the domain of copyright infringement. Plagiarism is an ethical, but not a legal, issue in the United States. While laws are perhaps designed to reflect and enforce our ethical intuitions, not all of our ethical intuitions are reflected in the law.

i. Originality

The objects of copyright are sketched out in §102 of the 1976 Copyright Act:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.⁵

This passage contains two central concepts in copyright theory: that of an ‘original work of authorship’, and that of being ‘fixed in a tangible medium of expression’. The first of these concepts will be the subject of this section; the second will be taken up in the following section.

“Originality” is not defined in §101 of the 1976 Act (which sets out other critical definitions for terms in use throughout the Act), though legislative history and court findings set the bar for what constitutes originality quite low. The 1976 Senate House Report that forms the legislative history of the Act notes, “The phrase ‘original works of authorship,’ which is purposely left undefined, was intended to incorporate without change the standard of originality established by the courts under the [1909 Copyright Act]. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.”⁶

This is to say, under the 1976 Act, a work need not be *novel*: it need not (a) express

⁵ Copyright Act of 1976, §102, reproduced in Cohen et al. (2006b) *Copyright in a Global Information Economy 2006 Statutory Supplement*, 10.

⁶ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5665-66.

unique ideas, nor (b) express ideas in a unique manner. Moreover, it need not possess any discernible aesthetic merit.⁷ Even so, novelty and aesthetic merit aside, court cases have continued to test the bar for what constitutes originality under these broad conditions.

In the case of *Alva Studios, Inc. v. Winninger* (1959), known as the “Hand of God case,” the plaintiff laboriously reproduced the Carnegie Institute’s bronze casting of Auguste Rodin’s *Hand of God* on a smaller scale. The defendant marketed similar reproductions, and the plaintiff filed suit. The defendant claimed to have copied the casting possessed by the Metropolitan Museum of Art, and argued that the plaintiff’s reproduction was not original, and therefore not protected by copyright. Based on this case, the court introduced a new test for originality, under which a work is “original” if it is created by the reproducer’s “own skill, labor, and judgment without directly copying or evasively imitating the work of another.” It contended that the plaintiff’s reproduction satisfied this condition.⁸

In *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), Rural, a publisher of local residential telephone directories, filed suit against Feist, a publisher of area-wide telephone directories, on the basis that Feist had incorporated a large number of listings from Rural’s directory into Feist’s more encompassing directory. Feist did not contest that it had copied Rural’s listings, but rather that the listings were not protected by copyright. The court agreed: “[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a

⁷ The exclusion of artistic merit as a basis for copyrightability was established in the finding of *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903), in which Justice Holmes states, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”

⁸ *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265 (SDNY 1959). Certainly, given this interpretation, it seems reasonable to say that the defendant had not copied the plaintiff’s work. It is unclear in the decision, however, why either the defendant’s or the plaintiff’s works should qualify as “original”, given that each copied from Rodin’s work.

particular fact has not created the fact; he or she has merely discovered its existence.”⁹ As such, the basis for originality is set in the *creative* act of the author—merely that “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁰ Rural had not *created* the facts that it published, certainly, so the question was whether it had created anything else in the publication. Perhaps, it was thought, what Rural *had* created was a unique *organization* of the facts (which would qualify the directory as a compilation, and therefore copyrightable in the same way that an anthology is copyrightable separately from its component articles¹¹). If this were the case, while Feist would be free to copy the facts themselves, it would not be free to copy their particular organization and selection, as had been done. However, the court found that Rural’s laborious contribution of selecting certain facts to publish, and of organizing the listings alphabetically, failed to meet the low bar of originality:

Rural’s selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to

⁹ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The conceptual issue of “facts” will be further explored in §iv, below.

¹⁰ *Ibid.*

¹¹ Particular rules govern the copyrightability of compilations under §103 of the 1976 Act.

make the white pages directory useful, but insufficient creativity to make it original.¹²

We are left asking, what *would be* sufficiently creative to constitute originality? What *is* this modicum of necessary creativity? Unfortunately, even when dealing with virtually identical cases, the courts have come to contradictory conclusions regarding originality, as shown in the following two examples.

In *Boosey v. Empire Music Co.* (1915), plaintiffs argued that a musical composition, “I Hear You Calling Me,” was infringed by the defendant’s composition, “Tennessee, I Hear You Calling Me.” In particular, it was argued the refrain, “I hear you calling me”—both the words, and the accompanying six notes—were identical in each song, and that this musical phrase was the prominent aspect of the plaintiff’s piece. The court found that “the use of this similar phraseology and the similar bars of music” was sufficient to warrant the charge of copyright infringement.¹³

Similarly, in 1983, Les Baxter sued composer John T. Williams, arguing that Williams’ theme to the film *E.T.: The Extra-Terrestrial* lifted a series of six notes from Baxter’s song “Joy”. After a series of appeals, however, a jury found that, though Williams was so familiar with “Joy” that he had performed it in concert, and though the same series of notes appeared in each work, a series of six notes is not original material protected by copyright.

Although the Boosey and Baxter cases involved more than the copying of two series of six notes, what is at issue here is the findings by the courts *about* the series of

¹² *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)

¹³ *Boosey v. Empire Music Co.*, 224 F. 646 (SDNY 1915)

notes in each case.¹⁴ One case presumes that a short musical passage has been created by the artist, and the other argues that such a passage *cannot* be. Surely, both results cannot be true.¹⁵ What, we must ask, is thus the minimum of creativity—in music, in literature, in the visual arts?

ii. “Fixed” Tangible Form

Prior to the effective date of the 1976 Copyright Act, works were protected by a dual system of copyright protection. At the federal level, works were protected by the 1909 Copyright Act, but this Act required that a work be published in order to secure federal copyright protection. Unpublished authored works, meanwhile, were protected under state common law copyright (laws set by the courts, rather than by statute, and differing by state as precedents differed). The act of publication eliminated protection for that work under common law, and opened the door for federal protection. Securing federal protection, however, required submitting to a host of formalities, most centrally including affixing proper copyright notice to the work. Failure to affix copyright notice meant the work failed to qualify for federal protection, and since the publication of the work eliminated common law protection, the work fell into the public domain.¹⁶

¹⁴ In *Boosey v. Empire Music Co.*, the case involves the copying of both the music and the accompanying words. The final outcome of the Baxter and Williams case depended further on whether the jury found “Theme to E.T.” to be “strikingly similar” to “Joy”. This matter is essentially an issue of the weight of evidence of infringement. The concept of “substantial similarity” is discussed later in this chapter.

¹⁵ The Boosey and Baxter cases are not isolated incidents. See *Marks v. Leo Feist, Inc.*, 290 F. 959, 960 (2d Cir. 1923) (implication that copying six bars of music is not actionable); *Northern Music Corp. v. King Record Distributing Co.*, 105 F. Supp. 393 (SDNY 1952) (similarity of four bars actionable); *Gingg v. Twentieth Century-Fox Film Corp.*, 56 F. Supp. 701 (SD Cal. 1944) (similarity in two to four bars not actionable); *Robertson v. Batten, Bardon, Durstine & Obcorn, Inc.*, 146 F. Supp. 795 (SD Cal. 1956) (similarity in two to four bars actionable).

¹⁶ The original term of copyright protection under the 1909 Act lasted 28 years from the date of publication. Copyright holders had to submit to further formalities upon the expiration of this term to gain a further 28-year term. Again, failure to properly submit to these formalities resulted in the work’s falling into the public domain.

Perhaps more problematic than the practical issues involved in securing federal copyright protection under the 1909 Act was the conceptual issue of exactly what qualified as “publication” of a work. The 1909 Act did not expressly define “publication”, though §26 notes that “‘the date of publication’ shall [...] be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.”¹⁷ Although this stipulation seemed to easily encompass such cases as books, periodicals, maps, and motion pictures, other categories of works proved more problematic. Notoriously, the public performance of a spoken drama did not constitute publication.¹⁸ And precisely what would qualify as the “publication” of a statue, painting, or other singular work remained an open question. Finally, in the decades following the institution of the 1909 Act, the advent of new media, in particular radio and television, continued to test the boundaries of what qualified as publication. Would the broadcasting of a speech, dramatization, or musical performance (whether live or previously recorded) over television or radio constitute “publication”? Further, if a Broadway play ran for years, with the script of the play eventually being published in book form, would the play itself be protected under federal or state protection?

The creation of the 1976 Act was implemented, in part, to resolve these issues, as well as to eliminate the dual system of copyright protection. Under the new Act, federal copyright protection began not with the publication of the work, but with its fixation in a tangible form. This requirement is laid out in §101 of the 1976 Act:

¹⁷ Copyright Act of 1909, §26, available at http://www.kasunic.com/1909_act.htm

¹⁸ See *Ferris v. Frohman*, 223 U.S. 424 (1912)

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.¹⁹

On its face, this new requirement seemed to solve many of the questions left open by the 1909 Act²⁰: public performance of a dramatic work still did not qualify for copyright protection, though the script from which the director and actors worked did, even without publication, so the dramatic work was indeed protected; statues, paintings, and other singular works (“published” or not) qualified for copyright protection from the moment they were created; and while the broadcast of a live performance by television or radio did not itself qualify the performance for copyright protection, a simultaneous recording of the performance did.

These effective improvements notwithstanding, the new requirement of “fixation” breeds its own sorts of conceptual problems. What qualifies as “sufficiently” permanent or stable? What are the bounds of “transitory” duration? Is this a reasonable basis on which to ground protection? Certainly, a work’s being “fixed” has practical repercussions: if it is *not* fixed, establishing that infringement has occurred will be

¹⁹ Copyright Act of 1976, §101, reproduced in Cohen et al. (2006b), 6.

²⁰ Note, however, that the institution of the 1976 Act could not entirely solve the problems left behind by the 1909 Act, as works created before the effective date of the 1976 Act continue to be governed by the former rules.

difficult at best, for it will not be possible to compare the original work and the infringing one. However, consider the following scenario:

Murphy, a horn player, performs an improvised composition in a jazz club. Taffy is in the audience, and makes an audio recording of the performance, unbeknownst to Murphy. Because the jazz composition is improvised, Murphy did not “fix” the work, either as a score or as a recording (what copyright law calls a “phonorecord”). However, because Taffy *did* record the performance, on the principle of fixation, *Taffy* owns the copyright on the recording. And, as such, any later performance of the composition (even by Murphy) may arguably constitute infringement of Taffy’s copyright.

Certainly, this is a less-than-satisfying conclusion. Intuitively, Murphy created the work, and without a contract or some other basis to the contrary, it seems unreasonable that Taffy should manage to secure the copyright on the composition.²¹ Similar problems promise to arise for improvised speeches, stand-up comedy routines, and other such “unfixed” works.

In this case, Murphy might consider two possible routes to circumventing this conclusion. First, Murphy might argue that, as the artist, he had not authorized Taffy to make the recording and, as such, given the specification in §101 that a fixation must be made “under the authority of the author,” the recording would not qualify for copyright

²¹ Similarly, we might consider a gifted audience member who, instead of recording the composition by audio-visual means, simply made a written score of the composition as Murphy improvised it on stage. Virtually identical issues will arise.

protection. However, while Murphy is intuitively the author of the composition, legislative history would seem to establish Taffy as the author of the recording. In the 1976 Senate House Report, discussing the broadcast of football games, it is argued that “there is little doubt that what the cameramen and the director are doing constitutes ‘authorship.’”²² Certainly, Taffy is performing a similar action to that of the cameramen and director of the football game broadcast. And, like the actions of the football players captured by the cameramen, Murphy’s improvised composition (in and of itself) fails to qualify for copyright protection.

Second, Murphy might appeal to a 1994 amendment to the 1976 Act enacted by Congress to implement the World Trade Organization’s TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement, intended to establish minimum intellectual property standards to WTO member-nations. Added as §1101 to the 1976 Act, the amendment is meant to protect live musical performances, specifying that anyone who (without consent of the performers) fixes the sounds and/or images of the live performance shall be subject to the same remedies and “to the same extent as an infringer of copyright.”²³ However, while this rule appears as a part of the Copyright Act, it neither (a) establishes any copyright ownership on the part of Murphy, nor (b) blocks any copyright ownership on the part of Taffy. It simply specifies that Taffy shall be punished for his bootlegging activity to the same *extent* as an infringer of copyright. Further note that §1101 specifically applies to *musical* performances, and not to improvised speeches, stand-up comedy acts, or other such performances.

²² H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665-66.

²³ Copyright Act of 1976, §1101, reproduced in Cohen et al. (2006b), 182.

If a musician's own recording of his work is copyrightable by the musician, it seems deeply counterintuitive to withhold copyright protection on the basis that he improvised the work. Likewise, while a comedian can copyright a book of jokes, it seems counterintuitive that he should not be able to copyright precisely the same jokes if they are delivered in a live performance without being written down. Under the rules of the 1976 Act, Martin Luther King Jr.'s famous "I Have a Dream" speech would only be copyrightable because he had first written it down. If the same words had come to King only as he spoke them, under the Act, he would not hold a copyright (though the various news organizations who filmed the speech might).²⁴ In effect, King would have no legal claim to own the speech, nor the jazz musician his music, nor the comedian his jokes.

Here, we must ask, is there some *essential* difference between the instantiation of a work in "fixed" and "unfixed" forms? And, if so, should this difference be taken to indicate that these are, indeed, instantiations of different *works*? If not, on what reasonable basis do we offer copyright protection to one, and not to the other?

iii. Substantial Similarity and Derivative Works

As discussed earlier in this chapter, copyright is essentially a *cluster* of exclusive rights held by the copyright owner. Copyright ownership allows the owner to reproduce, distribute, display, and create derivative works based upon the original.²⁵ The vast majority of cases of purported copyright infringement fall into two categories: (1) the unauthorized reproduction of whole copyrighted works (or parts thereof), and (2) the

²⁴ In fact, King's estate successfully defended the copyright of his speech against claims by CBS that the speech was not copyrightable. As the speech was delivered prior to the effective date of the 1976 Act, however, the argument by CBS was made on the basis that the speech was not *published*. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.* 194 F.3d 1211 (11th Cir. 1999)

²⁵ These rights are more fully detailed in §106 of the 1976 Act, reproduced in Cohen et al. (2006b), 17-18.

unauthorized appropriation of elements of a copyrighted work into a new work.²⁶ Cases of the first type tend to include the copying of musical recordings (whether a single song or an entire album), movies, books (or chapters therein), articles, and the like. Such cases tend to be relatively straightforward.²⁷ Conversely, cases of the second type tend to be much more problematic, as they tend to turn on less obvious issues of appropriation. This second type can be further broken down into (i) cases of “derivative works”, and (ii) cases of what I will call “elemental” appropriation. To better clarify this distinction, consider the definition of a “derivative work” as outlined in §101 of the 1976 Act:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work or authorship, is a “derivative work”.²⁸

This category of work encompasses a wide berth of cases, including the adaptation of works from one medium to another (what I will call “transmediations”), and new works based on previously-existing works of the same medium (including translations, revised editions, “cover songs”, and the like). This said, it should be obvious that an artist can

²⁶ At times, determining whether a purported case of infringement falls into (1) or (2) is less than simple, particularly in cases dealing with copying across media.

²⁷ Though many such cases turn on the issue of “Fair Use”. This doctrine of copyright law will be further discussed in Chapter Seven.

²⁸ Copyright Act of 1976, §101, reproduced in Cohen et al. (2006b), 5.

appropriate elements of a previously-existing work without going so far as to “adapt” or “revise” that work. The artist might take a phrase of music, a character from a novel or film, a visual element of a painting, and so on. Unlike the appropriation of book chapters or songs from albums (which might arguably be considered *parts* of a larger work), however, “elemental” appropriation involves inserting those elements appropriated into a new work. This was the sort of appropriation being considered in the Feist, Boosey, and Baxter cases outlined above.

Historically, establishing infringement in cases of purported derivative works and cases of elemental appropriation tends to turn on the issue of “substantial similarity” between one work and another. However, as Justice Torruela notes in the decision on *Concrete Machinery Co., Ltd v. Classic Lawn Ornaments, Inc.* (1988), “Substantial similarity is an elusive concept, not subject to precise definition.”²⁹ Courts have employed a variety of tests for substantial similarity. Two of the most common are the “extrinsic test” or “pattern test” and the “intrinsic test” or “ordinary observer test”. The “extrinsic test” or “pattern test” is generally employed to compare narrative works, and focuses on individual features of each work to find specific similarities in plot, theme, dialogue, mood, setting, pace, characters and sequence of events.³⁰ The “intrinsic test” or “ordinary observer test” asks whether an “ordinary, reasonable observer would find a substantial similarity of expression” of the ideas shared between the two works. It asks if there is substantial similarity in “the total concept and feel of the works.”³¹

²⁹ *Concrete Machinery Co., Ltd v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988)

³⁰ See *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475 (9th Cir.); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Smith v. Little, Brown & Co.*, 245 F. Supp. 451 (SDNY 1965).

³¹ See *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984); *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991); *MicroStar v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

A simple case should illustrate the problems inherent in deciding a case of copyright infringement on tests for substantial similarity. Both Piet Mondrian and Theo van Doesburg were non-representational Dutch painters, each contributing to the neo-plasticist and De Stijl art movements in the early part of the 20th Century. They knew each other well, belonging at one point to the same artists' colony. Certainly, their works heavily influenced each other. Indeed, each artist's paintings tend to depict complex interlocking patterns of squares and rectangles, sometimes in color and sometimes in black and white. Given the standard tests for substantial similarity, and given nearly any two paintings, either Mondrian or van Doesburg could be found guilty of copyright infringement, depending on which work was painted first. Certainly the works of Mondrian and van Doesburg are "substantially similar" but it seems deeply problematic to argue that either artist was doing anything *wrong* in being influenced—even *heavily* influenced—by the other.

The case of *Gross v. Seligman* (1914) centers on the purported copyright infringement of a nude photograph taken by the defendant. After taking the original photograph, the defendant sold its copyright to the plaintiff. Two years later, however, the defendant reproduced the photograph, and the plaintiff subsequently filed suit. However, rather than reproducing the original from its negative (which, as the photographer of the original, one presumes he could easily have done), photographing the photograph, or using another means to directly copy the original, the defendant laboriously recreated and re-photographed the scene depicted in the original, including using the same model. Although differences between the original and the recreation are clear—the model had visibly aged, struck a different facial expression, and now held a

rose—the court found that “the identities are much greater than the differences” and that the recreation therefore infringed on the original’s copyright.³²

Although the justification for the decision in *Gross v. Seligman* seems clear, the matter is more complicated. Justice Lacombe writes in the *Gross* decision:

If, by chance, the pose, background, light, and shade, etc., of this new picture were strikingly similar, and if, by reason of the circumstance that the same young woman was the prominent feature in both compositions, it might be very difficult to distinguish the new picture from the old one, the new would still not be an infringement of the old because it is in no true sense a *copy* of the old.³³

That is, had the new photograph simply, coincidentally, represented a strikingly similar scene (or even the *same* scene) from the same angle, it would not thus constitute infringement of the original. Infringement does not occur if a new work represents the same scene as another; it occurs only if the new work *copies* the previously-existing work in its representation. This principle is affirmed in the following case.

In *Alfred Bell & Co. v. Catalda Fine Arts* (1951), the defendant intentionally attempted to paint reproductions of mezzotint prints produced by the plaintiff. The plaintiff’s prints are, themselves, reproductions of the images of “Old Masters” paintings, produced using engraved copper plates. On the basis that the plaintiff’s prints merely reproduced works already in the public domain, the defendant contended that the plaintiff

³² *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914)

³³ *Ibid.* Emphasis added.

could therefore not hold any copyright in their prints for the defendant to infringe. The court concluded that, due to the creativity involved in recreating the Old Masters paintings in the mezzotint process, the mezzotints were original enough to qualify for copyright protection. That said, had the defendant copied the public domain work directly, rather than copying the mezzotint prints, it would not have infringed the plaintiff's copyright. The court argued:

The "author" is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his.³⁴

On this argument, similarity alone is not enough of a basis on which to establish copyright infringement. Copyright infringement is generally further established on the basis of another connection between works.

In the much-cited decision in *Litchfield v. Spielberg* (1984), Justice Wright argues, "To prove copyright infringement, the plaintiff must show (1) ownership of the copyright; (2) access to the copyrighted work; and (3) substantial similarity between the copyrighted work and the defendant's work."³⁵ Certainly, it seems difficult to argue that one artist has infringed another if the first artist has never seen (or heard, or read) the work that he is charged with infringing. However, even where "substantial similarity" is admitted, is familiarity with the copyrighted work enough to ground a conclusion of

³⁴ *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99 (2d Cir. 1951)

³⁵ *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984)

copyright infringement? Consider again the case of Mondrian and van Doesburg, outlined above. Similar cases can be found throughout the history of art: artists are influenced by both their predecessors and their contemporaries. Where clusters of these influences occur, we get artistic *movements*. Works do not exist each in a vacuum—each is connected to others through historic webs of influence. So on what grounds does one draw the line between infringement and mere influence? Is there some reasonable difference to be found between *copying* a work and being *influenced* by it?

iv. Facts

Just as ideas are not protected by copyright, nor are facts. However, the basis for the non-copyrightability of facts is not due to any similarity between facts and ideas—quite the opposite. The non-copyrightability of facts seems to follow directly from the originality requirement, outlined above. Ideas are created, and are thus original to their creators. Conversely, facts are discovered, and so are not original to their discoverers. Justice O’Scannlain makes this point in the decision on *CDN Inc. v. Kapes* (1999): “Subject matter created by and original to the author merits copyright protection. Items not original to the author, i.e., not the product of his creativity, are facts and not copyrightable.”³⁶ Certainly, a distinction in kind can be drawn between facts and ideas—one is created, the other discovered – but the bottom line is the same: neither may receive copyright protection. However, it must be asked, given that *neither* facts nor ideas are protected by copyright, what difference does this distinction between the two make, so far as copyright protection is concerned?

³⁶ *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999). O’Scannlain is being notably imprecise (and potentially misleading) in this assessment, of course: “subject matter” only merits copyright protection if “subject matter” is taken to refer to the expression of the idea, and not the idea itself.

One might reasonably ask, if neither facts nor ideas are protected by copyright, but the expression of ideas is so protected, what can be said of the expression of facts? This issue was at the heart of the decision in *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), outlined above. As was decided in this case, if the expression of facts itself contains no originality, then just as the facts are not copyrightable, neither is the expression. Consider, however, another case. In 1962, author A.A. Hoehling published *Who Destroyed the Hindenburg?*, an exhaustively researched account of the colossal dirigible constructed in Germany under Hitler's rule. Based on investigative reports, previously-published books and articles, and interviews with survivors of the Hindenburg disaster and others, Hoehling developed the theory that the explosion of the zeppelin over the Lakehurst, New Jersey Naval Air Station in 1936 was the result of sabotage at the hands of Eric Spehl, a rigger on the Hindenburg. Hoehling presented this theory in his novelized account as fact.

In 1972, Michael MacDonald Mooney published another book, *The Hindenburg*, a more "literary" approach to the Hindenburg affair, including the sabotage theory. Mooney's book developed symbolic themes around the tragedy, contrasting the beauty of the month of May with the cold technology of the Hindenburg. Mooney acknowledged consulting Hoehling's book, but states he first discovered the theory of "Spehl-as-saboteur" in another book, Dale Titler's *Wings of Mystery* (also published in 1962). After Mooney had finished an outline of his book, his publisher negotiated an agreement with Universal City Studios, who commissioned a screenplay by Nelson Gidding, a fictionalized account of the Hindenburg disaster, turning on sabotage by a rigger named "Boerth." The story in Gidding's screenplay, and the resulting film, *The Hindenburg*

(1975), largely match the theory laid out by Mooney and Hoehling, though Gidding infused his screenplay with a variety of additional subplots, and the fictional character Boerth differs substantially from accounts of the real rigger, Spehl. Hoehling, however, filed suit against Universal and Mooney for copyright infringement.

The court found that, though verbatim reproduction of even a nonfiction work (which Hoehling purported to be writing) is actionable as copyright infringement, “Hoehling’s allegations of copying [...] encompass material that is non-copyrightable as a matter of law.”³⁷ That is, Hoehling had employed sufficient creativity in expressing his account for the expression to qualify for copyright protection, and had Gidding appropriated Hoehling’s word-for-word *account*, he would have committed copyright infringement. However, employing the purported facts alone that Hoehling laid out in *Who Destroyed the Hindenburg?* is not actionable.

It is generally agreed among historians that the Hindenburg disaster was not the result of sabotage, but rather was an accident. Much of the result in the Hoehling case rests on his account *as fact*, and not as fiction. Had Hoehling written *Who Destroyed the Hindenburg?* as fiction, a very different court case might have resulted. One might ask, then, if Hoehling *had* presented his account as fiction, as Gidding did in his screenplay, would he have had a better case in arguing for copyright infringement? This issue will be further explored below in connection with the idea/expression dichotomy.

v. The Public Domain

The term “public domain” refers to the arena of works, types of works, and elements of works that do not qualify for copyright protection. Some works were once protected by

³⁷ A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), cert. denied, 449 U.S. 841 (1980)

copyright, but the duration of their protection has run out, and so the works have fallen into the public domain.³⁸ Similarly, works published prior to the effective date of the 1976 Copyright Act, but without proper notice, likewise fell into the public domain as a matter of law. The more interesting set of unprotected entities, however, are those that by their very *nature* fail to qualify for protection, and it is these entities that shall be the focus of this section.

The Code of Federal Regulations (C.F.R.) is published by the Federal Register, and lists the codification of the general and permanent rules of the executive departments and agencies of the Federal Government. Included in the C.F.R. is a list of materials not subject to copyright and for which registration will not be given. The majority of types included in this list are intuitively excluded based on the rules set forth in the 1976 Act and the various cases discussed throughout this chapter. The exclusion of other types, however, is not so obviously derivable from the Copyright Act. Among these are:

Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.³⁹

Each of these types of entities is, as such, in the “public domain” and receives no protection under copyright law. In the cases of words, short phrases, typographic variations, and the like, the basis for exclusion from copyright protection seems to be

³⁸ The duration of copyright on a work created after the effective date of the 1976 Act is the life of its author plus 70 years. However, the duration of copyright on a work created prior to this date and/or as a work-for-hire is a much more complex matter.

³⁹ 37 C.F.R. §202.1

that, like facts, these entities are not so much created as discovered. A similar argument is made regarding short “phrases” of musical notes in the Boosey and Baxter cases discussed earlier in this chapter. Certainly, the vast majority of literary works are composed entirely of pre-existing words, and in many cases common phrases. Similarly, musical works are composed of pre-existing notes, chords, and harmonies, and rare is the musician today who would lay claim to *creating* any of these composite elements. The scale of notes is, after all, mathematically derived, with individual notes representing standardized frequencies of vibration. As such, the intuitive argument behind excluding individual words and musical notes (and short phrases of either) from protection is that they are so commonplace that no one today can lay claim to having created them. They are part of the “public domain”, and all are free to use them as they see fit.

The argument for the familiarity of words and short phrases has been further expanded to include “*scenes à faire*” or commonplace scenes in literary and dramatic works, and here the inherent problem with the argument may be made more clear. In the Hoehling case, discussed in detail above, the plaintiff argued that the defendants had reproduced particular scenes, and doing so constituted copyright infringement. The court, however, dismissed this argument:

[A]ll three works [Hoehling’s, Mooney’s, and Gidding’s] contain a scene in a German beer hall, in which the airship’s crew engages in revelry prior to the voyage. [...] These elements, however, are merely *scenes à faire*, that is, “incidents, characters or setting which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.” [...]

Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain “stock” or standard literary devices, we have held that *scenes à faire* are not copyrightable as a matter of law.⁴⁰

There are two possible arguments here by which such *scenes à faire* may be excluded from copyright protection. First, like words and musical notes, such scenes are common because they have been used so often in storytelling that none today may lay claim to having created them: they are “standard” scenes or “stock” devices. That is, stories including scenes of German beer-hall revelry have been around at least as long as German beer halls, and no one today can reasonably argue that they created that type of scene. Second, as with words and musical notes, *scenes à faire* are common because they are “indispensable” elements of storytelling, and certain kinds of stories simply cannot be made without them. That is, one cannot tell a story that takes place in 1930s Germany without a scene of revelry in a beer hall.

This second argument is clearly flawed. Certainly, all manner of stories take place in 1930s Germany and yet fail to include a scene of beer-hall revelry. The first argument, however, seems more viable. Scenes of beer-hall revelry are, indeed, much older than any of Hoehling’s, Mooney’s, and Gidding’s stories. None of them are going to lay claim to having created that particular *kind* of scene. Rather, each is likely drawing on scenes developed throughout literary history. Indeed, even *Beowulf*, which is at least 1000 years

⁴⁰ *A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). A different take on *scenes à faire* is made in the case of *Ets-Hokin v. Skyy Spirits* (2003), that “[C]ourts will not protect a copyrighted work from infringement if the expression embodied in the work necessarily flows from a commonplace idea.” As all ideas are essentially in the “public domain”, however, this basis for withholding protection from *scenes à faire* appears flawed on its face.

old, contains a scene of German beer-hall revelry. As such, even if Gidding and Mooney did rely on Hoehling's story to create their scenes of beer-hall revelry, Hoehling himself relied on a long history of such scenes—stretching back to *Beowulf* and probably beyond—to create his own, and one cannot claim copyright on what did not originate with oneself. The same would seem to be true of words, musical notes, and (at least) short phrases of each.

Two further problems, however, threaten this argument. First, however long the histories of particular scenes, words, and musical notes, each such history has a beginning: someone *did* create these entities. And just as a new type of scene, it seems, cannot constitute a *scene à faire*, and so should qualify for copyright protection, the same should hold true for new *words* and *phrases* (and perhaps new musical notes). Certainly, new words and musical notes are not plucked from the Platonic Forms (though one might argue that the ideas that they express are). As such, while one might argue that a given author “discovered” such an entity in the work of another, such entities certainly owe their *origin* not to discovery, but to creation. Second, given that such entities as words, notes, and scenes are created and not discovered, it seems at least possible that one might create a given scene without reference to other scenes, however similar in kind. In cases of such commonplace literary scenes as those of beer-hall revelry, this might require a particularly insulated author, utterly unfamiliar with much of literature. However, had one done so, it seems patently wrong to say the scene did not originate with him, and if another were to reproduce the scene of *this* author, it seems, this second individual has infringed upon the work of the first. After all, as established above, that a work is indistinguishable from a previously-existing work does not qualify, alone, as grounds for

copyright infringement. Rather, some further connection needs to be established between the new work and the old one.

vi. *Utility and Conceptual Separability*

Copyright is only one of several domains of intellectual property law, including trademark, trade secret, and (as particularly relevant to this discussion) patent law. The domain of patent law is that of useful articles, and is based on the same “Intellectual Property Clause” in the U.S. Constitution as copyright law. Despite their common origin, however, patent and copyright law have developed along different lines and, as a result, patent law has not only more stringent requirements for protection, but also a more limited duration of protection for the patent holder.⁴¹ As copyright protection is easier to obtain and lasts substantially longer than patent protection, designers of industrial products have sought not only patents for their creations, but also copyrights. To effectively distinguish these respective arenas of protection, copyright, while protecting the creator’s expression, specifically does not protect useful articles *qua* useful articles.

Under the 1976 Act, “useful articles” are defined as follows:

A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.⁴²

⁴¹ Patents require not only originality, but also novelty. The duration of patent protection is 20 years from date of filing, versus copyright’s 70 years from the death of the author.

⁴² Copyright Act of 1976, §101, reproduced in Cohen et al. (2006b), 8.

In the same section of the 1976 Act, under the definition of “pictorial, graphic, and sculptural works”, the extent of copyright protection for the expression embodied in useful articles is further explored:

Such [pictorial, graphic, and sculptural] works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspect of the article.⁴³

Following the language of this section, if one cannot conceive of the artistic or aesthetic elements of a useful article as being “capable of existing independently of [...] the utilitarian aspect of the article” (that is, being removed from the article and standing on their own), then the aesthetic and utilitarian aspects of article are not conceptually separable. This language presents difficulties for such intuitively copyrightable designs as those of clock faces and book covers, however. As such, the courts have relied as much (if not more) on testing “conceptual separability” outlined in the 1976 Senate House Report:

⁴³ *Ibid*, 7.

Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.⁴⁴

Although the House Report is meant to better clarify the test for separability, borderline cases have led to problematic and questionable results. Consider the following two cases, each dealing the copyrightability of lamp designs.

In the case of *Mazer v. Stein* (1954), the respondents, Stein et al., manufactured a series of statuettes from original molds depicting both male and female dancers, intended to serve as the bases for electric lamps. The statuettes, without any lamp components added, were submitted and registered as copyrighted works with the Copyright Office. Thereafter, the respondents sold the statuettes around the United States, both as lamp bases and as individual statuettes (though primarily the former). Petitioners, Mazer et al, copied the statuettes and likewise sold them as lamps, contending that the statuettes, as intended to serve as lamp bases, were not the proper subject matter of copyright. As Justice Reed notes, "The case requires an answer, not as to a manufacturer's right to register a lamp base but as to an artist's right to copyright a work of art intended to be reproduced for lamp bases."⁴⁵ The court ultimately sided with the respondents, and upheld the copyright of the bases, arguing that "[t]he successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show that 'works

⁴⁴ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5667-68.

⁴⁵ *Mazer v. Stein*, 347 U.S. 201 (1954)

of art’ and ‘reproductions of works of art’ are terms that were intended by Congress to include the authority to copyright these statuettes.”⁴⁶ Although *Mazer v. Stein* was decided on the basis of the 1909 Act, it has been argued that the decision rests on principles that are in line with the 1976 Act.

The case of *Esquire Inc. v. Ringer* (1978) likewise dealt with the copyrightability of lamp designs, but here the lamp designs were of a different sort. First, Esquire designed and manufactured streetlamps, not interior ones. And second, the lamps were of a contemporary and decorative design, employing smooth, stylistic lines and rounded housings for the lights themselves. Unlike those in the Mazer case, there was nothing representational to the Esquire designs, and no clearly physically separable bases. After a series of failed attempts, Esquire eventually secured copyright for its designs, with the registration compelled by *Mazer v. Stein*. Ringer, however, sought to appeal Esquire’s copyright, and, ultimately, the court found that, because Esquire had sought copyright protection on each lamp’s *entire* design, and not on some physically separable element thereof (as was the case with Mazer), the designs did not qualify for copyright protection.⁴⁷

In the case of *Mazer v. Stein*, it is, perhaps, relatively easy to see how one of the lamp bases, on its own, might be considered a sculptured work of art. Though kitschy, the depiction of the figures is realistic, and almost classical in configuration. Absent the external wiring, fittings, bulb, and shade, it is rather easy to imagine placing one of the figures on a mantle. (Similar reasons would later be used to affirm the copyrightability of

⁴⁶ *Ibid.*

⁴⁷ *Esquire Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978)

belt-buckle designs,⁴⁸ and to deny the copyrightability of sculptured human torsos intended for displaying clothing in retail stores.⁴⁹) Unlike the Mazer statuettes, the Esquire designs are clearly and obviously lamp designs. In a later, similar decision, a stylistic bicycle rack design (the “RIBBON Rack”) by Brandir International, Inc. was denied copyright on the basis that, though aesthetically appealing, it was essentially the product of industrial design. Here, the court employed a test for conceptual separability developed by Robert Denicola (the “Denicola Test”):

If design elements reflect a merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements.⁵⁰

The court argued that the aesthetic and functional aspects of the RIBBON Rack had indeed merged, and as such the design was not protected by copyright. Another test for conceptual separability suggested by Justice Newman, in his dissent of *Carol Barnhart Inc. v. Economy Cover Corp.* (1985) may have yielded similar results:

For the design features to be “conceptually separate” from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function.⁵¹

⁴⁸ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980)

⁴⁹ *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985)

⁵⁰ *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987)

⁵¹ *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985), J. Newman, dissenting.

Although both the Denicola Test and Newman's "eye of the beholder" test attempt to interpret the notion of "conceptual separability" introduced in the 1976 Act and House Report, neither truly captures the notion.

To begin, a positive result in a test for physical separability (as is essentially employed in the Mazer case) is surely *sufficient* for conceptual separability. That is, if one can physically separate an item's aesthetic elements from its utilitarian ones, then one can certainly conceptually do so. However, surely physical separability is not necessary for conceptual separability. The problem that has arisen for conceptual separability in both the Denicola Test and the "eye of the beholder" test results from attempting to conceive of the aesthetic elements of an article without likewise conceiving of the utilitarian elements. To imagine, say, a bicycle's particular structural *design* without at the same time imagining a bicycle is perhaps an impossible task. However, the reverse does not seem to be true. Certainly, one can imagine all variety of industrial designs that equally fulfill the utilitarian requirements of a bicycle (that is, at an approximation, being a seated, single-operator, human-propelled vehicle of personal conveyance) without imagining the *particular* bicycle design under consideration. That is, the utilitarian aspects of being-a-bicycle might be *embodied* in all variety of industrial designs, and need not be embodied in any one particular design. As such, it seems, if one can imagine those utilitarian aspects embodied in a design other than the one under consideration, then one has sufficiently conceptually separated the aesthetic aspects from the utilitarian ones. Rather than conceiving of the aesthetic elements of an article without likewise conceiving

of the utilitarian elements, one has instead conceived of the utilitarian elements without likewise conceiving of the particular aesthetic ones.

With this conclusion in mind, the test for conceptual separability runs into one immediate problem: absolutely everything will pass it. That is, with any set of functional considerations, there seems to be an *infinite* number of ways in which those utilitarian needs might be embodied. Any functional artifact requires *some* choice in construction, aesthetic or otherwise. Whether building a car, or a house, or a sprinkler system, there is *always* some choice as to how the artifact should be designed. And this being the case, it is always possible to conceive of the utility embodied in another form.

Were this not enough, further problems arise for the distinction between “useful” articles and aesthetic ones. First, the 1976 Act, by elimination, defines “non-useful” articles as those whose function is “merely to portray the appearance of the article or to convey information”. But does this adequately capture the function of authored works? The types of art works in the category of “authored works” variously inspire, amuse, entertain, and sometimes provoke. Alternatively, several theorists have argued that the function of art is to bring about the “aesthetic experience”,⁵² to produce “aesthetic contemplation”,⁵³ or to yield “aesthetic satisfaction”.⁵⁴ It seems at least unobvious that these various functions fall within the bounds of “[portraying] the appearance of the article or [conveying] information.” If these are “useful” functions, then copyright seems to cover only those aspects of the work that do *not* serve these functions (which would

⁵² See Beardsley, Monroe C. (1958). “The Relation of Design to Subject” and “The Instrumentalist Theory” in *Aesthetics: Problems in the Philosophy of Criticism*. New York: Harcourt, Brace & World, Inc.; Schlesinger, George (1979). “Aesthetic Experience and the Definition of Art” in *The British Journal of Aesthetics* (19:2).

⁵³ See Tolhurst, William (1984). “Toward An Aesthetic Account of the Nature of Art” in *The Journal of Aesthetics and Art Criticism* (42:3); Wolterstorff, Nicholas (1980). *Works and Worlds of Art*.

⁵⁴ See Hanfling, Oswald (1995). “Art, Artifact and Function” in *Philosophical Investigations* (18:1).

leave very little to copyright). Alternatively, if these are *not* “useful” functions, it remains to be explained why this should be the case.

The next problem arising from the distinction between “useful” articles and aesthetic ones is that the function of articles can change. Reasonably speaking, for instance, the function of a urinal is to be a receptacle for liquid human waste. Surely, however, this is *not* the function of Marcel Duchamp’s *Fountain* (nor is it, presumably, even a secondary function of the work). Do we want to say that *as* a urinal, the object is uncopyrightable, but inverted and entitled by Duchamp, it is? If copyright law wants to maintain the distinction for “useful” articles, it will need to tell a story here.

vii. *Idea, Expression, and Merger*

The inclusion of copyright law under the category heading of “intellectual property” is something of a misnomer. As touched on earlier in this chapter, copyright protection may be afforded to the expression embodied in a work of art, but not to the ideas expressed therein. According to §102(b) of the 1976 Act:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.⁵⁵

⁵⁵ Copyright Act of 1976, §102, reproduced in Cohen et al. (2006b), 10. This article in the Act further distinguishes the realm of copyright from that of patent law, and cements the non-copyrightability of facts (encompassed under the category of “discovery”).

By no means an idiosyncrasy of U.S. Copyright Law, the idea/expression dichotomy is likewise maintained in the international TRIPs Agreement and World Intellectual Property Organization (WIPO) Copyright Treaty, each of which extends copyright protection “to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”⁵⁶

Cases illustrating the distinction between idea and expression are not hard to imagine. The simple idea that love conquers all, for example, is variously expressed in the film *Sleepless in Seattle*, Sarah McLachlan’s song “Sweet Surrender”, and countless other works in various media. Although each work expresses the same idea, each does so in original and entirely dissimilar ways. Despite the effectively countless number of such examples, however, legal history has served to erode the conceptual line between ideas and expressions.

In *Morrissey v. Procter & Gamble Company* (1967), plaintiff Morrissey sought to defend its copyright in a set of rules for a promotional contest. Procter & Gamble had, in the rules for a similar promotional contest, allegedly reproduced nearly word-for-word Morrissey’s materials, with only minor variations. Like facts, discussed earlier, the procedure that makes up the promotional contest is likely not protected by copyright, being essentially ideational. Its expression, however, at least potentially is. In the case of *Morrissey v. Procter & Gamble Company*, however, the court established a class of exceptions. The procedural rules of Morrissey’s and Procter & Gamble’s contests were, for all intents and purposes, the same, and, as Justice Aldrich argues in the court decision, there are only very few ways in which this idea might be expressed. As such, affording

⁵⁶ TRIPs Agreement, Article 9, reproduced in Cohen et al. (2006b), 265; WIPO Copyright Treaty, Article 2, reproduced in Cohen et al. (2006b), 282.

copyright protection to Morrissey's rules would essentially result in protection for the idea that they expressed. Because Procter & Gamble (or anyone else) could not express the same idea without utilizing essentially the same expression, protection for the expression would give Morrissey an effective monopoly over the idea itself, a result that copyright law has been specifically designed to avoid. As Aldrich states, "We cannot recognize copyright as a game of chess in which the public can be checkmated."⁵⁷ The finding of this case formalized the basis for a foundational principle in copyright law:

The merger principle [...] is a variation of the idea/expression dichotomy[. When the idea and the expression of the idea coincide, then the expression will not be protected in order to prevent creation of a monopoly on the underlying 'art.' [A]n expression will be found to be merged into the idea when 'there are no or few other ways of expressing a particular idea.'⁵⁸

However, while the merger principle exposes (and patches over) a conceptual hole in the dichotomy of idea and expression, the merger principle is not without conceptual holes of its own.

First, consider a case that predates not only the 1976 Act, but also its 1909 precursor.⁵⁹ In 1859, Charles Selden registered the copyright on his book, *Selden's Condensed Ledger, or Book-keeping Simplified*, in which he explains a new and unique

⁵⁷ *Morrissey v. Procter & Gamble Company*, United State Court of Appeals, First Circuit, 1967. 379 F.2d 675.

⁵⁸ *Educational Testing Services v. Katzman*, 793 F.2d 533 (ed Cir. 1986)

⁵⁹ Prior to the 1909 Act, the Copyright Act of 1790 held sway. Full text available at <http://www.copyright.gov/history/1790act.pdf>

accounting system that he has developed, and includes a series of blank ledgers developed to implement this system. In 1860 and 1861, Selden filed copyrights on several other books that improved upon his system. Selden filed suit against the defendant, Baker, for infringement. Baker had created slightly altered ledgers, including a different arrangement of columns and different headings, and used them in his business. The court found for Baker in the case, arguing:

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public [...] ⁶⁰

Selden could not copyright the system itself, and, the court argued, because the system required the use of the particular ledgers that Selden had published, he could not copyright the ledgers either. That is, because the ledgers represented the only way to implement the system (or within very few variations), the idea and its expression had merged.

However, as mentioned, Baker's versions of the ledgers employ a different arrangement of columns and different headings. The design of Baker's ledgers differed

⁶⁰ *Baker v. Selden*, 101 U.S. 99 (1879)

slightly, and it used different fonts. They could certainly have used different colors and orientation as well. With this array of differences open to Baker, one must ask, how many variations need to be possible for an idea and its expression to fail to merge? Copyright cases provide no answer, and only further problems for idea/expression dichotomy.

In May of 1922, Anne Nichols' play, *Abie's Irish Rose*, opened on the stage of New York's Fulton Theater, having previously played in San Francisco and Los Angeles. In its new home, the play garnered critical acclaim, going on to become the longest-running production in Broadway history. One year before Nichols' play arrived in New York, Aaron Hoffman's play, *Two Blocks Away* (1921), saw a short run in George M. Cohan's Theatre, also on Broadway. Although its Broadway run lasted less than a month, Hoffman's play was adapted into the Universal Pictures film, *The Cohens and Kellys* (1929). Arguing substantial similarity between the film and her play, Nichols filed suit against Universal Pictures.

Nichols' play presents the story of two young lovers in New York: the daughter of an Irish Catholic widower, and the son of a Jewish widower. The boy and girl have been secretly wed, but the son introduces his secret wife to his father as a Jewish girl in whom he is merely interested. The boy's father becomes infatuated with the girl, decides they must marry, and prepares a Jewish wedding for them. The girl's father, meanwhile, thinking she is to wed an Irish Catholic, travels with a Priest from California. He arrives too late for the wedding celebration, however, and the two fathers become enraged, each seeking a means to dissolve the union of their children. About a year later, the young couple, estranged from their respective fathers, have had twins. The fathers, receiving

word of the birth, travel to the couples' home and, after some slapstick comedy, eventually exchange amenities.

The Cohens and Kellys, meanwhile, presents the story of two poor New York families, one Irish and one Jewish. The daughter of the Jewish family and the son of the Irish one have fallen in love and secretly married, but remain living with their respective families. The Jewish father learns from a lawyer that he has inherited a substantial fortune, and moves his family into a luxurious home. The Irish boy seeks out his wife in the new home but is chased away by her father. The Jewish father and Irish boy become adversarial, and the girl's father becomes so sick from the fight that he must leave the city just before the daughter reveals the marriage to her mother. Upon his return, the girl's father finds his daughter has borne a child, and learns of her alliance to the Irish son. He subsequently disowns her. Having done so, however, he also learns that, by a twist of fate, the inheritance half-belongs to his new son-in-law. Despite attempted machinations by the lawyer (who himself seeks to marry the Jewish daughter), he seeks out his daughter and son-in-law, and a reconciliation ensues.

Despite a few passing elements of similarity, the court found there was not enough similarity between the play and the movie to warrant the complaint of infringement. Justice Learned Hand notes:

The stories are quite different. [...] The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.⁶¹

⁶¹ *Nichols v. Universal Pictures Corp.* 45 F.2d 119 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931)

The characters themselves, however, are substantially different, as are the string of events that make up each play. Hand argues:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended. [...] Nobody has ever been able to fix that boundary, and nobody ever can.⁶²

This is to say, the more general or abstract a plot, the less likely that it may be protected by copyright because it will qualify only as an idea. Conversely, the more detailed it is, the more likely it will be found to be an original expression of the idea. As the general idea cannot be copyrighted, it cannot be infringed. The particular detailed expression, however, can be both copyrighted and therefore infringed. The issue, Hand admits, is that the point where the “number of patterns” becomes detailed enough to qualify as a plot may well be impossible to fix.

Surely, however, this famous assessment is in error. To see the problem, consider some description of the plot of a literary work, *x*. This level of description is too general or abstract to qualify as an expression, and so is merely an idea, according to Hand. Now

⁶² *Ibid.*

add some more detail to the description, y , so that we have the description, $(x + y)$. Suppose this will not yet include enough detail to qualify as an expression, so we can add more description, z , and consider $(x + y + z)$. What Hand argues is that, at some point in this building of detail in the description, $(x + y + z + \dots n)$, we will have added enough detail to our description for our description to qualify as an expression. The problem with this approach is that it seems the description will not have changed from the description of an idea to that of an expression, but that the idea described will have become detailed enough to qualify *as* an expression. And, if this is the case, it seems, the idea has somehow *become* an expression. And, if an idea has *become* an expression, surely we must say that the idea and the expression have *merged*, for what else is it that the expression expresses but itself? The unfortunate consequence is this: a plot that has less than the necessary level of detail to qualify as an expression will be merely an idea, and therefore non-copyrightable. Adding more and more detail, the plot will eventually have enough detail to qualify as an expression, but then the idea and its expression will have merged, and since works that represent a merger of idea and expression cannot be copyrighted, nor can this plot. Indeed, it seems, whether rich or impoverished in its description, a plot can *never* be copyrighted.

Hand has two options open to him: either he can accept the result that plots, by their nature, cannot be protected by copyright (which, I suspect, is counterintuitive both to Hand and to the layman), or he can reassess this method of distinguishing idea from expression (which, unfortunately, has become ingrained in the history of copyright law, and has set the basis for many cases that would follow it). Distinguishing ideas from

expressions, in kind, as well as determining into which category entities like plots fit, is, again, an essentially metaphysical issue, and one for which the law provides no basis.

Building an Ontology

Attempting to assess the nature of the objects of copyright subsequent to, or as a consequence of, assessing the *rights* of copyright is like trying to build the supporting frame and foundation of a house only after one has built the house itself. If it can be done at all, it will surely require major structural revisions, but will most likely result in an ongoing series of stopgap measures intended to keep the whole thing from collapsing. And this is precisely what has happened throughout the history of copyright law.

It is my goal in the following chapters, to develop a comprehensive, coherent, and consistent account of the ontology of authored works that can reasonably be used as a basis on which to administer copyright law. As such, it should be designed to meet both the practical and theoretical concerns of copyright law, while accommodating our intuitions regarding the nature of its objects. Given the original purpose and current applications of copyright law, this ontological account should apply to the various forms of intellectual property embraced by it, as well as those foreseeable in the future. It should be subtle enough to illuminate the differences between kinds of authored works, yet powerful enough to encompass these works, generally. As such, so far as copyright is concerned, the account needs to be able to differentiate the nature of literature from that of film, or music, or sculpture, while at the same time being able to apply to authored works generally, and across the lines that differentiate these kinds of works.⁶³

⁶³ I am not, it should be made clear, attempting to give a *full-blown* ontology of art, but only one pertinent to the assumptions and decisions made in copyright law.

Predictably, this account will require some major alterations to copyright law, while nevertheless leaving it in at least a largely recognizable form.

CHAPTER TWO

The Atomic Dimension of Authored Works

Introduction

In the preceding chapter, I provided a tour of the conceptual problems that plague the domain of copyright law. Establishing that the central concepts employed in the law are essentially of a metaphysical sort, I further argued that the wealth of problems arising from these concepts points to a foundational issue that is likewise metaphysical in nature. I argue that the law (embodied in the Copyright Act, its underlying legislative history, and the court decisions based on them) assumes *some* metaphysical basis to the objects of copyright, but does little to indicate what this nature *is*. And it is from this ambiguity that the problems arise.

In the following chapters, I will outline the basis of an ontological foundation that I believe will serve to ground the program of copyright law. Specifically, I argue that the copyrightability of an authored work depends upon four factors: the work's *atomic* dimension, its *causal* dimension, its *abstract* dimension, and its *categorical* dimension. In the following four chapters I will investigate each of these ontological factors, with the ultimate goal of showing how the relationship of these factors can provide the perfect rules for determining (i) when a work may be protected by copyright, and (ii) when another work infringes upon that copyright.

In this chapter, I will focus on the atomic dimension of an authored work, meaning the *parts* that make up the work, the particular *arrangement* of these parts, and the *relationship* between these parts and the whole. It should be made clear, however, that I am not seeking in this chapter to provide an “atomic definition” of authored works,

nor am I proposing that the identity of an authored work is reducible to its atomic constituents. Indeed, I argue that the nature of a work is multifaceted, with the atomic dimension of a work being but one of four aspects of a work that pertain to its position within copyright.

I approach the atomic aspect of a work first for two reasons. First, I expect the claims I make in this chapter to be the least contentious, which is not to say I expect they are uninteresting or obvious. Second, a claim of atomic similarity is the primary basis for most copyright infringement suits: an author sees a film that is strikingly similar in plot to a play she has written (as in *Nichols v. Universal Pictures Corp*); a composer hears a song that uses the same musical phrase as one of his own works (as in *Boosey v. Empire Music Co.*); and so on.

Determining whether copying of a work in part or in whole has, in fact, taken place requires determining whether two works can be differentiated. If they cannot, they are the same work. The first, and most obvious, means of attempting to differentiate two works is by comparing their respective parts and properties—in other words, their respective atomic dimensions.

What Constitutes a Work?

On a simple view, a work of literature is a series of words, a musical work is a string of notes, and a film is a sequence of images and sounds. Similarly, it might be said, a sculpture is composed of particular materials formed into particular shapes, and a painting is composed of colors, lines, and shapes. The multifarious kinds that fall under the heading of “authored works” allow for an array of such composite parts. Moreover, a

given authored work may be extremely complex, or it may be very simple. Beethoven's *Piano Concerto No. 4 in G major, Op. 58* is performed in three movements using piano, flute, two oboes, two clarinets, two bassoons, two horns, two trumpets, timpani, and strings. The concerto consists of hundreds of measures, with a given performance lasting roughly 30 minutes. Contrast this with John Cage's *4'33"*, consisting of three very short movements without a single note being played on a single instrument (in Cage's words, "the work may be performed by any instrumentalist(s), and the movements may last any lengths of time."¹). Analogous extremes might conceivably be found in all media.

Regardless of whether one is working with words, notes, or stone, and whether one's final work is rich or impoverished in detail, the act of composing any authored work involves both *selection* and *arrangement*. As such, a composer *creates* a musical phrase by *selecting* notes and *arranging* them in a particular sequence. A writer does precisely the same with words. It might be said that a painter *creates* a certain line or field of color, but he *selects* the colors he uses to create these lines and fields. An authored work might even be composed of a single *selected* item, be it the color red or a single musical note. But even here, the artist must decide the dimensions for the field of color, or the duration of the musical note, and imposing such limits on the selected item constitutes *creation*.

As soon as an artist has created an item from selected elements, or has created the bounds for a single selected element, the artist has done what is necessary to create an authored work. Granted, most works involve innumerable such elements, but as little as a single brushstroke or the selection of a single musical note may constitute the creation of an authored work.

¹ Introductory note in the "sheet music" for John Cage: *4'33"*. For more on this work, see footnote 3, below.

A Note on Unfinished Works

There are countless examples of unfinished works, either abandoned by their creators or left unfinished on their creators' deaths. Edmund Spenser had published six books of *The Faerie Queene* by the time of his death in 1599, making it the longest epic poem in all of English Literature. But Spenser had planned the poem to encompass twelve books. In 1822, Franz Schubert began work on his *Symphony No 8 in B minor*, but seemingly abandoned it. He died six years later, leaving what has become known as the *Unfinished Symphony* with only two movements and some fragments of others. Cartoonist Georges "Hergé" Remi died in 1983 before finishing his twenty-fourth book in the celebrated Tintin series, *Tintin and Alph-Art*. The book was published posthumously in 1986, despite its unfinished status.

History is littered with unfinished works, some published or hanging in galleries, others tucked away in attics, vaults, and other hiding places. In some cases, we know these works are unfinished because their creators have left behind sketches, notes, or other indicators of how they were to be completed. In other cases, the works simply *look* unfinished: patches of bare canvas, stories cut off in mid-stream, sculpted figures only partially emerging from chunks of unhewn stone.

However, a work's "finished" or "unfinished" status is not always a clear matter. A painter may continue to touch up her work for years until she is finally satisfied, or has sent the work to a gallery. An author may continue to revise his work until the final moment of sending it off to his publisher. Of course, even then, his editor may request changes. Certain events may *signal* the completion of a work, or, more properly, indicate

that a work *is* finished: the publication of a work of literature, the installation of a painting or sculpture in a gallery, or the screening of a film. But if a work has not been put on public display in one of these manners, it should not be thereby assumed that the work is unfinished. Certainly, a manuscript may sit for years in a drawer, or a painting for years in a studio, and receive no alterations prior to being put on public display. Conversely, even absent any apparent indications that it is unfinished, one should not assume that a work is complete. Rather, the decision that a work is complete seems entirely at the discretion of its creator. And even where a creator has decided that his painting, symphony, or sculpture is “complete,” he seems always to be free to make alterations after this event.² Similarly, a creator’s *lack* of declaration or decision that a work is complete does not seem to indicate that it is unfinished: the manuscript may be sitting in the drawer because the author is not satisfied with it, but decide years later that it is without making any modifications to it. If the painter chooses to leave patches of bare canvas in his work, or the sculptor chooses to leave a figure half-emerged from a block of marble (as Donatello did with his *non finito* pieces), this seems entirely up to the artist. At any point in the creation of a work, the artist is free to declare the work “complete.” Despite claims by some sculptors that they are chiseling away to reveal the form within the stone, it seems entirely at the artist’s discretion to determine when that form has in fact been revealed: there is nothing about the work itself that might indicate this to the audience.

² I believe there is an interesting argument to be made here, that putting a work on public display so indicates that a work is finished that any alterations to the work after this event, even by the original artist, will result in a *different* work, not a mere modification to the original. See my Hick, Darren Hudson (2008) “When Is a Work of Art Finished?” in *Journal of Aesthetics and Art Criticism* (66:1).

Given that the artist is free to declare his work complete at any time, at each stage during the process of its creation, I argue that we should consider a work as we have it as provisionally complete. As such, we should be free to discuss that work's atomic dimension (or, equally, its causal, abstract, or categorial dimension), aware that that may change.

Higher and Lower-Level Properties

As touched on above, the diverse kinds of authored works allows for equally diverse perceptual properties. At bottom, for example, a painting is composed of particular colors in particular shapes of particular sizes and particular orientation. A musical work, meanwhile, is composed of particular notes or particular tones of particular duration. A work of choreographed dance is composed of particular body parts making particular poses or particular movements at particular speeds, and for some particular duration. In each kind of authored work, I shall call such individual properties aesthetic "simples". And while an exhaustive list of the simples that make up the numerous kinds of authored works seems possible, I expect the examples I have provided will suffice. More formally, however, I shall define a "simple" as:

Simple (df): any one of the formally-definable, bottom-level perceptible properties of an authored work, only instantiable in a given work in combination with other simples.

The second part of this definition requires some further explanation. A painter cannot simply instantiate a color. Rather, she instantiates a *field* of color, with particular boundaries, shape, size, and orientation. Likewise, a musician does not simply instantiate a tone; he instantiates a tone with a particular duration.³ Contrasted with simples, then, are aesthetic “complexes”:

Complex (df): one of the perceptual elements of an authored work composed of *simples*, such that the removal of any one of its composite simples would result in the complex not being instantiable.

Simples and complexes are the building blocks of authored works, discernible by *merely perceiving* such works, and requiring no specialized knowledge or sensitivity on the part of the viewer. All that is required to perceive such properties or elements is the standard array of sensory organs, and the standard conditions for viewing or hearing (or, perhaps, touching, tasting, or smelling) such properties.

Some, like Nelson Goodman, have pointed out the potential difficulties involved in distinguishing or privileging properties or elements that are perceptually discernible by “merely looking”. The argument is that such a designation picks out an arbitrary point on the scale of perceptibility.⁴ Certainly, for example, a magnifying glass will help us to pick out elements of a work that we do not *ordinarily* notice, and a microscope will help us to

³ Cage’s *4’33”*, mentioned above, poses something of an issue, here. As this composition includes *no* notes, and seemingly only duration, it might be thought that Cage has managed to instantiate an aesthetic simple on its own. Of course, we can ask, duration of *what*? In my estimation, Cage’s composition consists of three long rests or breaks, totaling four minutes and 33 seconds. The rest is as integral a part of the language of music as is the note or tone, and like the note or tone, is traditionally specific in its length in a given composition. Cage is simply playing on this—rather than as a rest *between* notes, the rest stands on its own. That Cage’s own sheet music for *4’33”* does not reflect this hypothesis should not deter us.

⁴ See Goodman, Nelson (1976). *Languages of Art*, pp. 103-112

pick out elements of a work that we perhaps *could not* perceive without being so aided.⁵ Similarly, an individual with poor eyesight or hearing may not perceive the work as the artist or average audience member will.

However, I think it only appropriate to privilege such properties or elements, given that they are what the creator of an authored work *expects* her audience to be able to pick out, unaided, given the standard array of sensory organs and the standard conditions for viewing such properties. To clarify, consider the authored works created by painters and graphic designers working on computers. Where Georges Seurat expects the standard viewer to perceive the dots of color that make up *Sunday Afternoon on the Island of La Grande Jatte* (because they are easily discernible by an individual with standard sensory organs in standard conditions), a graphic designer generally does *not* expect (nor even *want*) a viewer to specifically perceive the pixels that make up her latest work. While the dots of color in a pointillist work are meant to be noticed by the viewer, the pixels in a computer graphic are not. A pointillist's dots are a part of the work—the aesthetic object—while the graphic designer's pixels are only a part of the “physical” object, not the aesthetic object, *per se*.

Certainly, the “standard conditions” for viewing a work may differ by work. Standardly, for example, a painting is expected to be viewed from some range of distance and some range of angles under some range of lighting conditions. In most cases, the standard conditions need not be specified simply because they *are* standard. Some works, however, may require specific conditions for viewing that do not fall within what is standard for that kind of work. A work may be painted in anamorphic perspective (as in the case of Holbein the Younger's *The Ambassadors*) or created on an enormous scale

⁵ A variety of other instruments will serve the same functions in cases of auditory works.

that requires a “bird’s eye” perspective (as in the case of Robert Smithson’s *Spiral Jetty*). As such, if the creator does not somehow specify the appropriate conditions, determining which properties and elements are the work’s aesthetic simples and complexes may not be obvious. Similarly, we can imagine a gifted physicist or geneticist who composes “works” on an infinitesimal scale out of protein strings or atoms, or a musician who composes works at a frequency above or below that which is normally perceptible to an unaided individual. Viewing such works as their creators expect us to will require what would otherwise be non-standard conditions. However, these will be the standard conditions for viewing such works.

Over and above the aesthetic simples and complexes is another class of formal properties of authored works, supervening on, and emerging from, the simples and complexes. Moreover, they will arise from relations *between* the simples and complexes. For the sake of nomenclature, then, I will refer to these properties as aesthetic “relationals”. These will include such properties as balance, harmony, symmetry, contrast, proportion, and patterning. Such properties are supervenient, or asymmetrically dependent on their bases, in that a change in a work’s balance or patterning will require some change to the work’s aesthetic simples or complexes, but a change to the simples or complexes will not necessarily result in a change to the work’s balance or patterning. As such, altering a work’s balance, for instance, will require altering some aspect of its composite colors, shapes, or other basic formal properties, but altering its colors, shapes, or other such properties need not result in a change to its balance.

Further, such relationals may emerge from a wide array of simples and complexes. A musical work may be as symmetrical, for example, as a painting, but in

each case the works will be symmetrical as a result of different kinds of simples and complexes. As such, two works may have some of the same relationals but entirely different simples and complexes.

Perceiving relationals may require a more advanced level of knowledge or sensitivity than is required for perceiving a work's simples or complexes. Such properties as harmony or patterning, for example, may not be immediately perceptible to an audience, and may require more than "merely looking" at a work.

It is worth noting that similar arguments have been made regarding the non-formal, paradigmatically "aesthetic" properties of works, such as beauty, grace, delicacy, elegance, and the like. Frank Sibley famously argues, for instance, that such properties supervene on the "non-aesthetic" properties of a work, and require some special sensitivity or knowledge on the part of the audience.⁶ This argument has merit, but my theory is agnostic as regards the sorts of properties with which Sibley is primarily interested.

Higher and Lower-Level Entities

I want to turn now from primarily discussing the various levels of *properties* of an authored work to discussing the various levels of *entities* that make up an authored work. To make this distinction more clear, in this discussion a property is something predicated of a work or element thereof, while an entity is that of which the property is predicated.

As with the properties of a work, we can find the elemental entities of a work at various levels. Let us begin, then, with a work's most basic entities. In many cases, a work's base entities will be identifiable with its aesthetic complexes. Such will be the

⁶ Sibley, F. (1959). "Aesthetic Concepts" in *Philosophical Review* (68:4).

case in paintings or musical works. In other cases, however, the base entities will not be identifiable with aesthetic complexes, as in the case of a sculpture's material make-up, the words that make up a work of literature, or such elements as bricks, concrete, and glass in architecture. In the case of a blue square of such-and-such a size and orientation, or a note or tone of such-and-such a duration, the entity is formally definable. In the case of the linguistic elements of a literary work, or the material elements of a sculptured or architectural work, the entities are not, strictly speaking, formally definable.

Unlike the properties of a work, the levels of entities that compose a work are not neatly categorized as high (as with relationals) or low (as with simples). Rather, basic entities may be combined and recombined into higher and higher-level entities. Sculptures may be composed of a single material, or of many materials. Words are combined with punctuation into sentences or phrases, sentences into paragraphs or stanzas, and these into chapters. In a painting, drawing, or other such visual work, fields of color are combined with other fields of color in more and more complex ways. While entities, as such, have a cascading effect, some higher-level entities do hold a privileged status. Among these are such entities as representations in pictures and sculptures, melodies in musical works, plots and characters in narrative works, and such elements as rooms, courtyards, and hallways in works of architecture. Here, again, we find a supervenient relationship, with these higher-level entities supervening on lower-level properties or entities. The representations of a painting, for example, supervene on the painting's lower-level entities (its composite lines and fields of color). Likewise, the plot of a novel will supervene on the scenes or events in the narrative work, which are built on the words, sentences, and paragraphs at the lower levels. In such cases, the higher-level

entities will possess a range of properties that are absent in the entities upon which they supervene. The scenes that make up a plot may each be symmetrical, for instance, without the plot therefore being symmetrical. The lines that are drawn to represent a figure may be black in colour, while the figure that the lines are used to represent is not. Returning to one of the case studies from the last chapter will help to clarify this class of entities.

Case Study: Hand's "Pattern Test" Revisited

Let us return to Hand's "Pattern Test" for determining whether a plot may be protected by copyright. Recall that for Hand, there is a sliding scale: at one end are plots so impoverished in detail that they qualify only as ideas; at the other end are plots detailed enough to qualify as expressions. According to this test, the less developed a plot, the less likely that it may be protected by copyright because it will qualify only as an idea. Conversely, the more detailed it is, the more likely it will be found to be an original expression of the idea, and thus be protected by copyright.

While Hand seems to allow that expressions might be variously rich or impoverished in detail, he is arguing by implicature that ideas are essentially impoverished things. Surely, however, this is in error: that an idea is complex presumably does not preclude it from being an idea.

Unfortunately, neither the Copyright Act nor its legislative history offers definitions for "idea" and "expression", and so we are left to our own devices. As such, let us propose some definitions that, at least provisionally and intuitively, will provide a

foundation for the distinction, and, I think, reflect the motivations of copyright law generally:

Idea (df): the content of a thought, feeling, emotion, desire, and/or other cognitive state or event.

Expression (df): the manifestation or embodiment of an idea or ideas in a perceptible form.

Given these definitions, the term “expression” will always be an ellipsis for “expression-of-an-idea” or “expression-of-ideas”, though an idea need not always be connected with a given expression. These definitions are admittedly broad in their scope, and may require further modification, but this much should be readily apparent: ideas are a class of entities *internal* to the mind, while expressions are a class of entities *external* to the mind.⁷

Given this difference, an immediate implication arises for Hand’s assessment: Ideas and expressions, while related, are different sorts of entities, and when Hand implies that an idea can *become* an expression, or vice versa, he is attempting a sort of ontological alchemy. A description of an idea may be indistinguishable from a description of an expression, but the object of one is not the object of the other, and it is a strange claim indeed to say that a description of an idea can *become* a description of an expression simply by adding more detail to the description.

⁷ Alternatively, we might say that ideas are entities instantiated in the mind, while expressions are entities instantiated outside the mind. There is an interesting distinction to be made between these notions of ‘idea’, but as I believe my theory applies equally as well to either, I shall not pursue the distinction here.

A correlated problem that arises for Hand is that comparing descriptions of ideas and descriptions of expressions is not the same activity as comparing the ideas and expressions themselves. Indeed, a description of an idea is almost certainly an expression of the idea, given the definitions above.

With the foundation of Hand's "Pattern Test" left in a questionable state, let us return to the issue of plots. A reasonable first question to ask is, does a plot qualify as an idea or as an expression—that is, is it the content of a cognitive state,⁸ or is it the embodiment of such content in perceptible form? If plots are expressions, they at least potentially fall within the bounds of copyright protection; if they are ideas, they categorically do not.

First, let us consider the proposition that plots are ideas. Certainly, there is some intuitive evidence that points to this conclusion. We speak of plots as being constructed, and, unlike constructing a house, this certainly *seems* to be a cognitive activity. Indeed, one might certainly state, "I have an idea *of* a plot," or "I have an idea *for* a plot," and I would hazard to guess that in most cases of writing a story, the author begins with an idea of the plot, and works to construct the narrative around it. In this view, the plot, as such, provides the skeleton that holds together the meat of the story, and the same skeleton might be filled out with an array of such meats, resulting in a number of stories, each embodying the same plot. Given this view, we might analogize the relation between plots and narratives to that of theatrical scripts or musical scores and their performances, with the plot, like the script or score, provides the structure, and the narrative, like the performance, embodying the structure in perceptible form. To give it a name, let's call

⁸ That is, something that *can be* thought (but which is not necessarily *being* thought).

this position the “idealist view of plots,” maintaining that a plot is an idea, and that the narrative is the embodiment or expression of that idea.

Although perhaps intuitive, this idealist view of plots ultimately fails to stand up. First, just as an idea of a house is not itself a house, I would argue, the idea of a plot is not itself a plot. Rather, it seems, the plot, like the house, is the *object* of an idea or thought-act. And while a plot or a house may be the *object* of an idea, we shouldn't confuse the idea's object with its *content*. Rather, the content of an idea is a *representation* of its object, and the two possess wildly different properties.⁹ An idealist about plots might point out that in the sorts of cases just discussed, there exist no such objects to *be* represented, and as such the unwritten plot exists only *in the mind*. Ongoing work in the philosophy of mind and elsewhere, however, pulls the force of this punch: just as one can have an idea of the house one wants to retire in, which does not yet exist, so too can one have the idea of a plot one has not yet written. The unwritten plot is something of an *intentional object*—and *merely* an intentional object, the representation of which may be richly detailed, but which is, nevertheless, not the object itself, for the object itself does not exist.

If this is the case, then, what sort of object *is* a plot? Given our original dichotomy, if a plot is not an idea, perhaps it is an expression. Now, if my assessment is correct, one does not, strictly speaking, *express* a plot, for a plot is not an idea. However, it may be the case that a plot is an expression of a different *sort* of idea. Let's leave aside for the moment what sort of idea this might be, and simply consider the possibility that a

⁹ I recognize that representational theories of mental content are not unanimously accepted. Even so, I expect my argument could be easily modified to account for competing theories.

plot is some sort of expression. What seems immediately apparent is that if a plot *is* an expression, it's a strange sort of expression.

Recall again our definition of an expression, being *the embodiment of an idea or ideas in a perceptible form*. We have granted that a plot may express some sort of idea, but what seems to pose a problem is that idea's being expressed in "perceptible form". Certainly, the plot of a narrative work is not *immediately* perceptible to the audience. It is not like the colors or shapes of a painting. To use the terminology introduced earlier in this chapter, a plot is neither an aesthetic *simple* nor an aesthetic *complex*. Rather, the plot of a narrative work becomes *apparent* to the audience upon experiencing that work, or *during* the experience of the work. As the narrative plays out, the audience progressively grasps the overall plot of the work.

As such, the analogy to a script or score and its performance no longer seems to apply. One perceives the elements of a script or score at the very same time one perceives the performance itself. The performance is an *embodiment* or *realization* of the script or score, and while it *adds* perceptible elements, the elements of that which is embodied are also perceptible. They have become perceptually bonded: the audience perceives the elements of the script or score at the very same time it perceives the elements of the performance; to perceive one requires perceiving the other. Not so with the plot of a narrative. At no point does one hear, see, or otherwise *perceive* the plot, however *apparent* that plot might be to the audience. To hear the dialogue of a novel or to view the performance of a scene is not *ipso facto* to perceive the plot.

It might reasonably be argued that a plot is no more than the succession of scenes in a narrative work. And, as such, when one perceives a given scene (itself composed of

dialogue and various descriptive elements), one is, in fact, perceiving a *part* of the plot. And, as such, it is only upon having read or viewed the entire narrative work that one can say one has, in fact, perceived the plot as a whole. Aristotle makes a related point in *The Poetics*, arguing, “[A]s bodies and animals must have a size that can easily be perceived as a whole, so plots must have a length which can easily be remembered.”¹⁰ Just the same, it should not be concluded on this basis that a plot is simply reducible to its composite elements.

Stephen Davies makes a similar point with regard to melodies in *Musical Works & Performances* (Oxford: 2001). He argues that a melody is not to be *identified* with its notes, nor can it be reductively *analyzed* as tonally-structured note strings. Rather, he argues, a melody is a “higher” structure than its notes, and can survive small-scale local changes.¹¹ Similarly, I suggest, small-scale changes to scenes or events in a narrative work will not change the plot that they contribute to. Had Hamlet confronted Gertrude in the garden, rather than her bedroom, it seems reasonable to say that the plot of *Hamlet* as a whole would nevertheless survive this change. Had he confronted her at the beginning of Act 2, rather than the end of Act 3, however, it seems the plot would be very different.

Plots are more complex than simple chronologies. Executing a series of similar scenes back to back in a play might give the plot a certain rhythm, while portraying them simultaneously on separate sides of the stage will give the plot a certain harmony. Opening a play with a death scene and closing it with a birth scene will give it a sense of balance, while both opening and closing it with a death scene, or the same scene repeated, will give it a particular symmetry. Having those scenes occur elsewhere in the execution

¹⁰ Aristotle, *The Poetics*, §1451a

¹¹ Davies, Stephen (2001). *Musical Works & Performances*, pp.54-58

of the narrative, however (even if they occur in the same relative points in the chronology being portrayed), will certainly alter these formal properties. The properties possessed by plots are not necessarily the same properties possessed by the scenes or events of which they are composed: plots may be variously balanced, symmetrical, proportioned, contrasting, or rhythmic, all to varying degrees, regardless of the higher-level properties possessed by the scenes, individually. Chronologies have none of these properties—they are simply strings of scenes or events. So, while a work’s chronology undoubtedly *contributes* to its plot, a plot is not *exhausted* by its chronology. Rather, a plot has formal, higher-level properties that depend on *how* the chronology is executed in the narrative, properties that depend upon the *relations* between scenes and events as portrayed in the narrative, not only as they occur in the chronology.¹²

The relations between scenes and events occurring in the narrative will in most cases be causally related, such that event *A* is depicted as causing event *B*, and such a relation will largely depend upon the story’s chronology. But scenes or events *as composing nodes in the plot* will also be related in ways not dependent upon the chronology, but upon how the chronology is structured within the plot. Some, like George M. Wilson, have contended that the structure of a story’s telling itself provides meaning over and above the meaning contributed by the scenes or events so structured:

Narratives assign meaning or significance to the events they incorporate
by situating them within an explanatory pattern that typically delineates

¹² The work of “narratologists” like Tzvetan Todorov (*The Poetics of Prose*, 1977), Seymour Chatman (*Story and Discourse*, 1978), and Wallace Martin (*Recent Theories of Narrative*, 1986) have established other reasons for distinguishing a work’s plot from its chronology, but these fall outside the scope of this argument.

both their causal roles and their teleological contributions to the needs and goals of the characters.¹³

Although Wilson speaks primarily in terms of “narratives” and not “plots,” and where his focus is on meaning and mine is on properties, we seem to be playing similar games, and making parallel distinctions. That is, a plot is not to be identified with the scenes or events depicted in a story, nor strictly with the chronology of the story. Rather, it possesses an array of properties (and if Wilson is correct, meaning) distinct from these other elements of a work.

Having reached this understanding of plots, I think we can safely hazard a definition:

Plot (df): a formally structured web of relations that hold between scenes or events in a narrative work.

It is this formally structured web of relations that possesses the properties of balance, symmetry, contrast, and the like, not the scenes or events that form its nodes. And, while the plot undoubtedly *depends* on these nodes, it should not be *identified* with them, in the same way that a melody should not be identified with its constitutive notes.

In our hierarchy of entities discussed earlier in this chapter, plots are found at a very high level. A plot is not merely *composed* of lower-level entities, as sentences are composed of words and punctuation, and words are composed of letters. Rather, the plot

¹³ Wilson, George M. (2003). “Narrative,” p. 394. See also Wilson, George M. (1997). “On Film Narrative and Narrative Meaning” (in R. Allen and M. Smith, eds., *Film Theory and Philosophy*).

of a narrative work supervenes on the scenes or events portrayed in the work. Alterations to the scenes of a work will not necessarily result in an alteration to the plot, but alterations to the plot certainly require alterations to the scenes or their arrangement within the work.

A narrative work may be identified at least in part with a particular structure, but this structure will exceed that of a plot. The identity of a work of literature depends in part upon the particular words used by the author. As such, while the original Russian and the English-language translation of *Notes from Underground* undeniably have the same *plot*, they should probably not be identified as the same literary *work*. So, while a narrative work may be identified in part with a particular structure, and its plot may be a *part* of this structure, the plot is not exhaustively constitutive of it. The work, in other words, is not a simple instantiation of the plot, though a change to the plot will undoubtedly result in a change to the work, so the plot is certainly a *part* of the work.

Though a plot is not an idea, it may qualify as an expression. However, as previously noted, if so, it is a strange sort of expression.¹⁴ First, a web of relations is not the sort of entity that is immediately perceptible to the audience, though it may certainly be *apparent* to the audience. Second, as a formally structured web of relations holding between scenes or events in a narrative work, a plot cannot be embodied without some such scenes or events *as told* in a work. So, while one might *outline* a plot, this outline is not the plot itself. Rather, the outline is a *description* of the plot, and this description need not possess the same properties as the plot that it describes. This said, while a plot cannot

¹⁴ It may be asked at this point, if a plot is an expression, what is it an expression *of*? We might as easily ask, what are paintings—or, more properly, the composition of paintings—expressions of? I doubt any single answer will apply to all cases, and even in single cases, will probably require as complex an answer as the plot itself is complex.

stand on its own as an expression, nor is it likely to be immediately perceptible to the audience, it is nevertheless a part of the narrative work as a whole.

Neither is the plot the chronology of the story. At least in cases of non-fiction, a chronology is no more than a fact about the world—a mere sequence of events.¹⁵ As such, at least as it stands, a chronology cannot qualify for copyright protection. Considering fiction as an analog, then, it would seem that a fictional chronology is most likely an idea, the expression of which being the particular and original way that its nodes are arranged within the story, and to what effect. At least as I have described it, this is none other than the story's *plot*. And so, it seems, at a best guess, the idea that the plot expresses is the chronology.

Similar analyses are imaginable for each of the highest-level entities that make up authored works, including but not limited to melodies in musical works, characters in narrative works, and representations in pictorial and narrative works. While such analyses would be exhaustive, it seems reasonable to say that in each of these cases, the higher-level entity supervenes on lower-level entities such as notes, words, and fields of color. And, while apparent to or adduced by the attuned audience, the higher-level entity will not be strictly *perceptible* as such.

Discounted Elements

Having looked at higher and lower-level elements of authored works (both properties and entities), it is worth noting that certain elements of the physical object (or objects)

¹⁵ Recalling the case of *A.A. Hoehling v. Universal City Studios, Inc.* (1980) from last chapter, it should be apparent that the plot of a “factual” narrative work like Hoehling’s is as much an expression as is the plot of a fictional one. That is, while the chronology of Hoehling’s book on the Hindenburg conspiracy likely qualifies merely as a fact, the way that the chronology is portrayed in the book (i.e., its plot) is not.

embodying the authored work seem to fall outside the boundaries of work itself. For example, we might imagine that your copy of *Middlemarch* is a softcover edition, published by Penguin Books in 1987. My copy is the hardcover first American edition, published by Harper & Brothers in 1873. The typefaces are different, and my edition has no copyright page (though it does have four pages of ads), but we would, I imagine, want to say that we both own copies of George Eliot's *Middlemarch*. And if I copy the text of *Middlemarch* word for word onto a file on my laptop computer, without any copyright page or ads, it seems I have nevertheless copied the whole of the work, regardless of the font used in my file.

In this case, we can identify two types of elements of the physical object (the book) that are not elements of the authored work, *Middlemarch*. The first type includes both the copyright page and the ads. While perhaps integral to the object of the *book*, and perhaps aesthetic objects of their own right, they are not integral to the *work* itself. They have, quite simply, been added by the publishers of the book, and not the author of the work (though, in the case of the ads, they were probably added with the *knowledge* of the author). The second type of element is the font. Unlike the copyright page and the ads, the work requires *some* font, typeface, or other means of conveying the words in order to embody the work.¹⁶ However, the work does not require any *particular* such font. As such, included in the boundaries of the work are the words themselves, but not the particular means of conveying them, however aesthetic.

George Dickie, by way of Monroe Beardsley, raises analogous cases elsewhere in the arts. In particular, he provides the case of the "Chinese property man":

¹⁶ Included under "means of conveying the words" would, of course, be the spoken word.

Consider the property man in traditional Chinese theater, who appears onstage among the actors while the play is going on. He arranges properties and scenery and does such things as hold a certain kind of flag in front of the face of a “dead body” as it walks off stage. [...] The onstage movements and actions of the actors are clearly aspects of the aesthetic objects of plays. The movements and actions of Chinese property men, while aspects of the performance of plays in a broad sense, clearly belong to another domain from the movements and actions of actors. [...] The Chinese property man is an aspect of *an* aesthetic object because he is an aspect of a visual design, but he is not an aspect of the aesthetic object of the play.¹⁷

As with the copyright page and ads in editions of *Middlemarch*, the Chinese property man is perhaps a part of *an* aesthetic object, and is certainly a part of the physical objects that embody the work, but is not, thereby, a part of the work itself. And, like the font of *Middlemarch*, such works may *require* property men in order to be performed, but the property man is not, therefore, a part of the work. The property man is more like the stage curtains, footlights, theater seats, and other elements that come with performances, but are outside the boundaries of the works in question.

Perhaps even further outside the boundaries of the work are elements like the backs of paintings, the marks on the stage indicating where actors should stand, and the

¹⁷ Dickie (1974). *Art and the Aesthetic*, pp. 166-7

strings of ones and zeros that make up the object code of a video game.¹⁸ Such elements may be functionally required for the works to be physically sustained, like scaffolding, but are not elements of the works themselves. Had the painting been painted with a white back rather than red, the play performed without stage marks, or the video game created with a different object code, the painting, play performance, and video game would not thereby be altered.

As these elements of the physical objects are not elements of the work, and as copyright pertains only to the works themselves, it seems clear that such elements should be excluded from any claim to copyright on the works. However, determining which elements fall within and which outside the work is not always a simple task.

Many of the first editions of Sir Arthur Conan Doyle's Sherlock Holmes stories were published with illustrations by Sidney Paget. Lewis Carroll's *Alice in Wonderland* and *Through the Looking Glass* were originally published with illustrations by John Tenniel. Should we consider these illustrations *parts* of the respective novels they illustrated? (They certainly seem to have more of a claim than do the ads in the printed edition of *Middlemarch*.) Alternatively, should we consider the illustrations as *separate* works? Or, finally, should we consider the *published* work a compilation of two separate such works, one literature, and one visual, together forming some *new* work? Similar such problems arise for prefaces, forewords, and the like.

Taken even further, consider the *Griffin & Sabine* trilogy, by Nick Bantock. *Griffin & Sabine* is a three-part epistolary work (or, alternatively, three epistolary works), involving the correspondence of the title characters. Unlike other epistolary works,

¹⁸ That said, the backs of paintings, stage marks, and computer object code may qualify as authored works *of their own*, but if so these will be *different* authored works than the *front* of the painting, the play performance, and the video game itself.

however, the correspondence in *Griffin & Sabine* is told in both postcards and letters. Like actual postcards, on the reverse side of the pages on which the correspondence is handwritten, Bantock has illustrated the cards. Where the title characters turn to corresponding by letter, the reader must open envelopes glued onto pages in the books and remove the letters in order to read them. Here, it seems clear that typing up the letters word for word on my computer does not amount to copying the work as a whole. Not only the illustrations, but the handwritten form of the letters (or typewritten, in some cases) seems to be a *deliberate choice* of the author. We find similar cases in comic books and strips in which the dialogue in word balloons is traditionally handwritten. In the series of *Classics Illustrated* comics that adapted great novels for the comic format, the dialogue was typed in a standardized sans-serif font, ostensibly to “establish a tone of stateliness and legitimized power.”¹⁹ In Walt Kelly’s classic comic strip, *Pogo*, the voices of many characters were written in a variety of typefaces, allowing additional elements of tone and character to be visualized for the reader. Clearly, here, as with poster design, Dadaist art, and other media employing text, font choice *can* be critical to a work. The question remains when this and other such elements *should* be discounted, and when they should not. This topic will be taken up in Chapter Five: The Categorical Dimension of Authored Works.

Atomic Similarity

As mentioned at the beginning of this chapter, claims of atomic similarity tend to be the primary bases for most copyright infringement suits. Where an individual does not admit

¹⁹ Witek, Joseph (1989). *Comic Books as History: The Narrative Art of Jack Jackson, Art Spiegelman, and Harvey Pekar*, p. 23.

to copying, US copyright law focuses first on substantial similarity between works as evidence that copying has taken place. However, given the various levels of entities and properties that make up any authored work, analyzing atomic similarity between two works is no simple matter.

First, similarity may occur at both higher and lower levels, and with regard to both properties and entities. Focusing first on properties, let us start with some relatively simple examples. First, certainly, a painting of a blue square will be similar to a painting of a blue rectangle insofar as each includes some field of blue color. As well, a rectangle is certainly similar to a square insofar as each has four right angles and four sides. With this in mind, however, simple examples quickly become quite complex. Intuitively, for example, one square is *more* similar to another square than it is to any rectangle. However, a two-foot wide blue square might be thought to be more similar to a two-foot wide blue rectangle than to a three-inch wide red square. How are we to judge this?

Establishing similarity between any two things is essentially a matter of finding points of correspondence between them, such that the more points of one-to-one correspondence holding between two things, the more *similar* these things will be. When looking to establish atomic similarity between two authored works, one such dimension of similarity will be that which holds between aesthetic complexes and the aesthetic simples of which they are composed. Certainly, this will be the easiest to illustrate. For example, the properties of one painting of a blue square may line up in one-to-one correspondence with the properties of another painting of a blue square given the shade of blue used in each, the lengths of the sides of the squares painted, the orientation of the squares and so on. There will, however, be less similarity between a painting of a blue

square and a painting of a blue rectangle, or between a painting of a blue square and that of a red square, and all the less so as the sizes of the figures and their orientations differ. Generally, however, the more aesthetic simples held in common between two works, the more similar they will be. Further, where one painting of a blue square of a particular shade, size, and orientation will be extremely similar to another painting of a blue square of the same shade, size, and orientation, if the latter painting *also* depicts a red triangle, yellow circle and green rectangle, the two will be *less* similar, as there will be a dearth of simples in the former to which those of the latter can correspond. Paintings, of course, tend to be much more complex in their depictions than are the examples discussed here, and establishing the degree of similarity between any two such paintings will likewise be more complex. However, the same principle of similarity will apply as more and more properties of works are compared.

This arena of similarity thus becomes larger as we consider not only the aesthetic simples of a work, but also their arrangement and relation to the work as a whole. As such, a painting with a blue square in the lower-right corner will, *ceteris paribus*, be more similar to another painting with a blue square in the lower-right corner than it will be to a painting with a blue square in the lower-left corner. The possible points of similarity continue to grow as works become more and more complex.

The painting as a whole will have certain simples that apply to it as well, so it might be thought that a painting with a blue square in the upper-left corner need only be rotated 180 degrees to be made more similar to a painting with a blue square in the lower-right corner, but each painting has a particular orientation, and rotating the first painting will not *actually* make it more similar to the second.

These same points will, of course, apply to different kinds of authored works. Two musical works will be substantially similar if they contain precisely the same tones, for example, but will be less similar if those tones are presented in a different order in each work, or for a different duration in each.

Beyond aesthetic simples, degrees of similarity may hold between two works with regard to their aesthetic *relationals*. As the aesthetic simples and complexes differ between works, so too may such properties of the works as their respective symmetries, patterns, harmonies, and the like. As supervenient properties, however, two works may differ in their aesthetic simples and complexes at various levels of composition, and yet still be substantially similar with regard to their aesthetic relationals. This said, where the aesthetic simples and complexes of two works vary wildly, establishing the similarity between two works with regard to their respective aesthetic relationals will be a matter of degree. That is, one work may be more or less symmetrical than another, or more or less harmonic, but determining precisely *how* similar these works are with regard to their respective symmetry or harmony will be more difficult given *how* these works are symmetrical or harmonic, which is to say, upon *which* aesthetic simples and complexes the aesthetic relationals of each work supervene.

Atomic similarity between works is not restricted only to the dimension of properties, but may also be found in the dimension of entities. Of course, as aesthetic complexes are entities composed of nothing more than aesthetic simples, cases of comparing these entities simply grow out of comparing the simples themselves. As discussed above, however, other entities are not formally defined. For instance, two sculptures will be more or less similar as their relative material composition differs, even

where the shapes of the sculptures are precisely alike. Naturally, the same is true of the linguistic entities that make up literary works, the material entities that make up architectural works, and so on. As such, two works of literature will be more or less similar with regard to the literary entities that make up each, and with regard to their arrangement in the respective works, and the same will be true for other kinds of authored works.

The same principle holds with regard to the higher-level entities that make up works. Two architectural works, for example, may be more or less similar with regard to their kinds and numbers of rooms, courtyards, and the like. Two musical works may be more or less similar with regard to their respective melodies. And, as discussed at length earlier in this chapter, two literary works may be more or less similar with regard to their respective plots. Further, just as works may be more or less similar with regard to their higher-level properties independent of their lower-level properties, so too may works be more or less similar with regard to higher-level entities independent of their lower-level entities. For example, as touched on above, the original Russian and the English translation of *Notes from Underground* will have precisely the same plot (a higher-level entity), and yet will vary wildly, if not entirely, with regard to the words that make up each (lower-level entities).

This distinction between higher and lower-levels becomes particularly relevant when considering similarities between works across media. Similarity between works composed in different media will usually be restricted to similarity in higher-level entities and properties. For example, consider the case of Michael O'Sullivan, the protagonist of Max Allan Collins and Richard Piers Rayner's graphic novel, *Road to Perdition*. Collins

and Rayner’s graphic novel was adapted into a film by 20th Century Fox, starring Tom Hanks as the now-renamed Michael Sullivan. The film, meanwhile, was adapted into a novel, not surprisingly written by Collins himself. The character of O’Sullivan/Sullivan is as such variously depicted in comic form (in the graphic novel), in a painting (used for the cover of the graphic novel), in the film adaptation of the graphic novel, and in the novelization of the film—this, despite the fact that very little similarity may be found in the lower-level entities across these media.

Whether dealing with higher or lower-level properties, or higher or lower-level entities, similarity is a sliding scale, from no similarity between works to total similarity, as between copies of the same novel, movie, or other such work.

With this in mind, let us consider again the tests for substantial similarity discussed last chapter. Recall that where “extrinsic” or “pattern” tests are used to compare the individual features of works, “intrinsic” or “ordinary observer” tests ask whether an “ordinary, reasonable observer would find a substantial similarity of expression” of the ideas shared between the two works, or if there is a substantial similarity in “the total concept and feel of the works.”²⁰ Extrinsic tests tend to be undertaken by experts in a given field. Especially where similarity is argued to hold in higher-level properties or higher-level entities, employing expert witnesses is a reasonable strategy, as comparing such properties and elements often requires some heightened or specialized sensitivity or knowledge. Intrinsic tests, however, pose more of a problem.

²⁰ Again, see *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984); *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991); *MicroStar v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996).

As just mentioned, intrinsic tests depend upon an ordinary observer declaring some similarity in the “total concept and feel” of the works. Each of these conjuncts, however, is problematic. All that seems required for two works to be substantially similar in “total concept” is that the works express the same idea or ideas. However, as ideas are specifically left unprotected by copyright, creators are free to express the same ideas as others have before them. “Total concept” is as such a non-starter. The other half of the conjunct proves equally unpromising. While an ordinary observer’s finding that two works are substantially similar in “feel” *may* be indicative of some atomic similarity (for two works that are atomically identical will almost certainly have a substantially similar “feel”), such a finding is certainly not conclusive. An ordinary observer may, of course, find a similar “feel” in an Edvard Munch painting, an Edward Gorey drawing, and a Richard Wagner composition. Such a finding, however, does not clearly indicate anything substantially similar in the works themselves. Instead, such a finding only allows us to conclude a substantial similarity in the observer’s *reaction* to these works, and this sort of similarity should not be confused with the other.

Perceptual Indistinguishables

Even where two works *are* atomically similar, or even atomically *identical*, what then? Are they the same work? In his seminal work, *Languages of Art*, Nelson Goodman claims, “To verify the spelling or to spell correctly is all that is required to identify an instance of the work or to produce a new instance. [...] Merely by determining that the copy before us is spelled correctly we can determine that it meets all requirements for the

work in question.”²¹ In other words, according to Goodman, for one work of literature to instantiate the same linguistic entities as another such work is sufficient for them to be identical. As such, creating a new literary object that is word-for-word indistinguishable from some previously-existing literary object is simply creating a new instance of that first work.

On its face, this seems a fairly obvious assertion. If I publish a poem that is word-for-word identical with Dylan Thomas’ “Do not go gentle into that good night,” it seems commonsensical to say that all I have published is Thomas’ poem. While initially intuitive, however, Goodman’s claim ultimately runs afoul of how we tend to think about such works. By way of example, let us first consider Jorge Luis Borges’ “Pierre Menard, Author of the *Quixote*.” In this short story, the narrator describes how Pierre Menard, through an unexplained mechanism, manages to laboriously rewrite selections of Cervantes’ masterpiece, *Don Quixote*, without direct reference to the original. However, because Menard is writing in what is for him an archaic style, and because Menard’s intellectual and cultural context is entirely different from Cervantes’, Menard’s *Quixote* possesses wildly different aesthetic properties than does Cervantes’. The narrator’s argument amounts to this: despite being word-for-word indistinguishable from each other, the two versions of *Don Quixote* are not the same work.²²

²¹ Goodman (1976), p. 115. This claim is part of a larger argument on Goodman’s part about the ontology of artworks. I will be discussing Goodman’s more general argument in detail in Chapter Four: The Abstract Nature of Authored Works.

²² Borges’ story has served for contemporary philosophers as an illustration of the difference between “work” and “text”. This distinction is traditionally made on intentional bases (particularly in Jerrold Levinson’s “contextualism” about art), with regard to the audience’s participation (especially in the deconstructionist criticism of Roland Barthes and his followers), or by contrast of the disparate properties of works and texts (see Currie (1991). “Work and Text” in *Mind* (100:3)). While endlessly interesting, and as much as I would like to engage them here, these interpretive approaches go beyond what is required of my theory.

While Borges' story seems perhaps fantastic, as much for the scale of the work(s) at issue as anything else, let us consider a more compact literary form: the haiku. In its English form, the haiku standardly consists of 17 syllables broken into lines of five, seven, and five syllables. Now, while the haiku form effectively allows for countless possible poems, it does not seem unthinkable (or, perhaps, even unlikely) that one poet might independently string together the same 17 or fewer words in the same order as has another poet. Based on their atomic indistinguishability alone, however, it seems problematic to say that the author of the first haiku should have any claim over the second, or the second over the first. For the first author did not write the second haiku, and the second author did not write the first haiku. Rather, they each wrote their *own* haikus, and the most we can say is that the second author wrote a haiku that is composed of the same linguistic entities as that produced by the first author, and perhaps that it possesses the same higher and lower-level properties.²³ While the haiku of the second author is not *novel*, it seems to at least possess its own *originality*, inasmuch as it has a unique origin.²⁴ The improbable circumstances of Borges' story are essentially an extension of this same principle.

Analogous issues arise in other media as well, and may help to clarify the issue at hand. Consider Arizona's Grand Canyon National Park, which plays host to some five million visitors every year. At any given time, a handful of these visitors stand atop the same observation platform taking photographs of the same scenery. As a result, some of

²³ Following the argument embedded in Borges' story, and made explicit in Jerrold Levinson's "contextualism", the two works may have wildly different 'aesthetic' properties, depending on the context in which they were created, but, as previously mentioned, my theory is agnostic regarding such properties.

²⁴ Where by "novelty" I mean something like, *atomically unique*; by "original" I mean, *having a unique origin*. Where the subject of atomic properties, similarity, and uniqueness have been the subject of this chapter, the issue of uniqueness of origin falls under my discussion of the causal dimension of authored works, to be taken up next chapter.

these visitors will walk away with photographs that are atomically identical and perceptually indistinguishable from those of other visitors. As with the haiku poets, each shutterbug has taken his or her own photograph, and it seems flatly incorrect to say each of these photographs is the *same* photograph as the others. Rather, they are atomically indistinguishable in the same way that one identical twin is genetically indistinguishable from the other, but nevertheless a different person. If one photograph were *copied* from another (or the two from the same negative), we would probably more comfortably describe them as the *same* photograph (or as *instances* of the same photograph), but perceptual indistinguishability alone cannot ground this difference. Instead, we must look to another dimension of authored works: their *causal* dimension. For one work to be atomically identical to another does not suffice for its being identical to it *tout court*, for two works might be atomically identical and yet causally differentiated. The causal dimension of authored works is the subject of the next chapter.

CHAPTER THREE

The Causal Dimension of Authored Works

Introduction

In the previous chapter, I discussed the atomic dimension of authored works. Although undoubtedly complex, so far as copyright is concerned, a work's atomic dimension holds a privileged position from the audience's point of view: the atomic dimension of a work is largely perceptual. As such, you can tell a lot about a work's atomic dimension simply by perceiving it, and this is undoubtedly why it serves as the impetus, and forms the initial basis of discussion, for many copyright disputes. The same, however, does not hold true for the remaining factors that I wish to discuss. That is to say, observation of an authored work—be it a novel, a painting, a play, a sonata, or any other—will tend to reveal little about its causal, abstract, or categorical dimension. Such observation may give us hints, and lead to probable conjecture, certainly, but observation alone cannot tell us anything definitive. Indeed, as we have seen, reliance on observation alone risks erroneous findings in the realm of copyright. A claim of infringement by one tourist on the basis that another's photograph of the Grand Canyon is indistinguishable from his own seems groundless. That the two photographs happen to look the same is not nearly sufficient to grant one photographer some claim over the photograph of another. The same is true for the haiku poets who happen to write linguistically indistinguishable poems, and, I would imagine, for similar circumstances arising in any medium. To ground any claim to another's purportedly original work seems to require something further—to borrow from Arthur Danto, it requires something "the eye cannot descry." As

such, we shall have to investigate the non-perceptual dimension of authored works. I shall begin with their causal dimension.

By “causal dimension”, I am referring to what are essentially two factors that contribute to a work’s unique nature: its context of creation, and its place in a historical chain of which that work is a link. My discussion of each of these factors is inspired by the work of Jerrold Levinson, and as such requires some initial discussion of Levinson’s relevant theories. With regard to the context of creation, I look first to Levinson’s “What a Musical Work Is” (1980), one of the most influential of a body of theories challenging purely structural approaches to the ontology of art. With regard to a work’s place in a historical chain, I will begin with a discussion of Levinson’s “Defining Art Historically” (1979), which challenges the non-essentialist definitions of art provided by George Dickie and others. In neither case, it should be noted, am I wholly endorsing or defending these theories, particularly as I am not looking to provide a *definition* of works—be they art works or authored works. Rather, I am simply looking to glean from and expand upon these theories so as to better ground the nature of authored works in the context of copyright.

What a Musical Work Is

In “What a Musical Work Is,” Levinson is in part responding to two extreme approaches to the ontology of art. At one extreme is the view that musical (as well as literary and other) works are in essence purely mental, a position held by Benedetto Croce, R.G. Collingwood, and select others.¹ At the other extreme is the school of thought variously

¹ See Croce (1902). *Aesthetic as Science of Expression and General Linguistic*, and Collingwood (1938). *The Principles of Art*.

embraced by such theorists as Joseph Margolis, Richard Wollheim, and Nicholas Wolterstorff, that musical works are essentially sound structures—that is, structures composed of pitches, rhythms, timbres, dynamics, accents, and other such elements.²

As Levinson points out, the view that works of art are essentially mental suffers from many problems, not the least of which is that on such a view artworks are inaccessible to all but the artist himself. Certainly such a position flies in the face of the common view that in hearing a song or reading a poem we are, indeed, experiencing the work. Further, if we were to embrace the Croce-Collingwood position, it seems, we would thus have to abandon any standard notion of an audience for artworks. As discussed at the end of the last chapter, however, the position that a work of art is essentially nothing but a structure fares no better, for such a position would entail that any two works that are structurally (or, in my terms, atomically) identical are thus the same work. As the examples of the identical haikus and photographs of the Grand Canyon illustrate, such a position quickly leads to counterintuitive results. The same, Levinson argues, holds true for musical works.

It is against this backdrop that Levinson presents his theory, one central to his larger project of “aesthetic contextualism.”³ Looking for a defensible position between these two extremes, Levinson argues that a piece of music *is* a sort of structural type (and, as such, is both non-physical and publicly available)—at its core is a sound structure plus a performance means/structure. But more importantly, Levinson claims that a musical work is not a pure structure, but rather an impure or indicated structure, to wit, a

² Stevenson, Margolis, and Wollheim (as well as many others) thus contend that musical and other works are essentially abstract objects. As I will be discussing the abstract dimension of authored works in Chapter Four, I will withhold discussion of the details of this approach until then.

³ See also discussion of Levinson’s “Historical Definition of Art,” below.

sound/performance means structure-as-indicated-by-X-at-t, with *X* being the composer, and *t* the time of composition.⁴

To begin, Levinson appeals to our intuition that composers do, in fact, *create* their compositions. This is, after all, one reason we revere composers as we do. The view that musical works are simply abstract sound structures, however, serves only to obscure this basis for reverence. Levinson argues, “If musical works were sound structures, then musical works could not, properly speaking, be created by their composers. For sound structures are types of a pure sort which exist at all times.”⁵ This, Levinson argues, is due to the fact that a given sound structure could be instantiated at any time. In this way, a sound structure is like a geometric figure or other mathematical entity. That is, the string of notes that make up Beethoven’s *Symphony No. 5 in C Minor* could have been instantiated prior to 1808, by Beethoven or any other composer, if only it had been thought of earlier. For that matter, it could have been sung by a chorus of birds or accidentally produced by some harmonic clanking and whirring of machinery. This being the case, the sound structure *simpliciter* must have existed prior to Beethoven’s composition. And as such, Levinson argues, “If we conceive of Beethoven’s Fifth Symphony as existing sempiternally, before Beethoven’s compositional act, a small part of the glory that surrounds Beethoven’s composition of the piece seems to be removed.”⁶ If the Fifth Symphony existed prior to Beethoven’s act of composition, it seems, then Beethoven did not *create* the work at all; rather, he merely *discovered* or *selected* it from amongst the countless such works floating about in the ether. This idea that composers

⁴ Levinson also considers a musical work as a *sound/performance means structure-as-indicated-in-musico-historical-context-C*, but feels the version given above more adequately fits our intuitions.

⁵ Levinson, Jerrold (1980a). “What a Musical Work Is” in *Journal of Philosophy* (77:1), 7.

⁶ *Ibid.*, 9.

merely *discover* or *select* entities, rather than *create* them, Levinson argues, flies in the face of deeply-embedded intuitions.

Somewhat in the manner Nicholas Wolterstorff has proposed,⁷ Levinson argues that if we are to claim that a work such as *Symphony No. 5 in C Minor* has been *created* by its composer, the composer must be contributing something further than the sound structure, itself. As Wolterstorff states, “Perhaps the correct view is that though the entity which is a musical work *exists* everlastingly, it is not a *musical work* until some composer does something to it.”⁸ What the composer does, Levinson claims, is twofold: indicating the core structure in a certain “musico-historical context,” and envisaging that structure as involving specific means of performance in mind.

Considering cases similar to the identical haikus and photographs discussed last chapter, Levinson argues that certain attributes of musical works are dependent on factors outside the sound/performance means structures of those works. These factors make up the “musico-historical context” in which the composer is situated when composing the work:

The total musico-historical context of a composer *P* at a time *t* can be said to include at least the following: (a) the whole of cultural, social, and political history prior to *t*, (b) the whole of musical development up to *t*, (c) musical styles prevalent at *t*, (d) dominant musical influences at *t*, (e) musical activities of *P*’s contemporaries at *t*, (f) *P*’s apparent style at *t*, (g)

⁷ See Wolterstorff (1975). “Toward an Ontology of Artworks” in *Nous* (9), 138-139.

⁸ *Ibid*, 139.

P's musical repertoire at *t*, (h) *P*'s *oeuvre* at *t*, (i) musical influences operating on *P* at *t*.⁹

We might, for instance, consider Tchaikovsky's *Symphony No. 4 in F Minor*. Composed in 1877-8, Tchaikovsky's Fourth Symphony is heavily influenced by Beethoven's Fifth Symphony. Had the sound structure been instantiated, say, in 1778 by Mozart, rather than when and by whom it in fact was, calling it Beethoven-influenced would be nonsensical. Composed by Tchaikovsky in the late 19th Century, the work is almost inevitable—it seems to be a natural progression in Tchaikovsky's *oeuvre*. Composed in 1778 by Mozart, the Fourth Symphony would be decidedly bizarre, especially given that the fourth movement of the symphony incorporates a famous Russian folk song as one of its themes. Such properties as these, Levinson argues, arise from the work's being created in a given musico-historical context, and would serve to differentiate it in fact from any other works identical in sound structure.

Further, Tchaikovsky's Fourth Symphony is scored for piccolo, two flutes, two oboes, two clarinets, two bassoons, four horns, two trumpets, three trombones, tuba, timpani, triangle, cymbals, bass drum, and strings. Such instrumental specification, Levinson suggests further, is integral to the work's identity. Since composers specify means of production, and not merely patterns of sound, these means of production are arguably thereby part of what make up the work. That is, were Tchaikovsky to be audience to a presentation of his Fourth Symphony performed by a sophisticated synthesizer or computer, he would certainly be amazed, but might also legitimately question the integrity of the performance *as* a performance of his symphony, even if it

⁹ Levinson (1980a), 10-11.

was sonically identical to what he had composed. According to Levinson, a musical work is as much *about* the instrumentation to be employed as it is about the notes to be played.

Complicated by fusing both sound structure and performance means, Levinson argues, a musical work is not merely a sound/performance means structure *simpliciter*, but a sound/performance means structure indicated (in the act of composition) by a particular individual at a particular time: a *sound/performance means structure-as-indicated-by-X-at-t*. Unlike a sound structure *simpliciter*, which always exists and merely awaits discovery, the contextually-indicated structure that is the musical work only begins to exist when initiated by an intentional human act. As such, Levinson contends, his explanation satisfies what he feels are the critical criteria of any account of musical works:

- I. *The Creativity Requirement*: “(Cre) Musical works must be such that they do *not* exist prior to the composer’s compositional activity, but are *brought into* existence *by* that activity.”¹⁰
- II. *The Fine Individuation Requirement*: “(Ind) Musical works must be such that composers composing in different music-historical contexts who determine identical sound structures compose distinct musical works.”¹¹

¹⁰ *Ibid*, 9.

¹¹ *Ibid*, 14.

III. *The Inclusion of Performance Means*: “(Per) Musical works must be such that specific means of performance or sound production are integral to them.”¹²

Further, Levinson argues, an account of musical works must be able to distinguish: (i) instances of the work; (ii) instances of the sound structure of the work; (iii) instances of the sound/performance means structure of the work; and (iv) performances of the work.

For something, *a*, to qualify as an *instance* of the work, *w*, Levinson argues, *a* must conform completely to the sound/performance means structure of *w*, and exhibit the “required connection” to the indicative activity whereby *w* was originally composed. This required connection, Levinson assumes, is “primarily, if not wholly, intentional.”¹³ For *a* to qualify as an instance of the sound structure of *w*, it seems, *a* merely need line up with *w* note-for-note. For it to qualify as an instance of the sound/performance means structure of *w*, *a* must line up with *w* not only note-for-note, but also instrument-for-instrument. Finally, for *a* to qualify as a *performance* of *w*, Levinson contends, it must be “a sound event which is *intended* to instantiate” *w*, and which “*succeeds to a reasonable degree*.”¹⁴

The Context of Creation

Although Levinson’s account focuses on the specific case of musical works, it is not difficult to see how such an approach might apply to authored works generally. To begin, let us consider the criteria that Levinson argues must be satisfied in any adequate account

¹² *Ibid*, 19.

¹³ *Ibid*, 26 (footnote 31).

¹⁴ *Ibid*, 26. What qualifies as a reasonable degree, Levinson contends, may depend upon the ability of an informed and sensitive listener to discern.

of musical works. First, Levinson contends, “musical works must be such that they do *not* exist prior to the composer’s compositional activity, but are *brought into existence by* that activity” (the Creativity Requirement). The impetus here seems to be to preserve our intuitions that composers, in the act of composition, are doing something more than merely *discovering* or *selecting* their works from the supply of sempiternal sound structures floating about. Rather, we want to say, they are *creating* their works. Certainly, this sentiment applies to other sorts of authored works as much as it does to musical ones. Most closely, we might consider literary works, composed of word-and-punctuation sequences: these sequences might be considered roughly on par with the sound structures that Levinson considers,¹⁵ and so too do we want to say that in the *act* of writing a given literary work, the author has, indeed, *created* that work and not merely discovered it. Further, we consider the painter, the sculptor, the choreographer, and so on, *creators* of their works, respectively, and not simply *selectors* or *discoverers* of them. And, for those of us who are more broad-minded about art, we want to say that while Duchamp *did* select the bottle rack to be used in *Bottle Rack*, the work *Bottle Rack* did not exist prior to Duchamp’s authorial activity, but was brought into existence *by* that activity. Given this, we might reasonably generalize the Creativity Requirement for authored works broadly considered: *authored works* must be such that they do not exist prior to the author’s compositional activity, but are brought into existence by that activity

¹⁵ I say “roughly,” as it might be pointed out that word-and-punctuation sequences are built from human-invented elements, and thus are not truly analogous to the sound structures of music. This contention loses some of its force, however, if we consider musical works as being composed not merely of sound structures, but of *note* structures, which are similarly human-invented. Ultimately, however, we can say that, having *been* created, these words and elements of punctuation can then be combined in all possible arrangements, with those sequences existing, if not sempiternally, then at least from the point at which their composite elements were created.

As discussed at the beginning of last chapter, the act of composing any authored work involves both *selection* and *arrangement*. That is, as soon as an author has created an item from selected elements, or has created the bounds for a single selected element, the author has done what is necessary to create an authored work. Now, where the focus of last chapter was on the elements selected, and how works can be individuated atomically, we now turn to the context of creation as a basis for individuation, and so to Levinson's second criterion, the Fine Individuation Requirement.

Just as the Creativity Requirement seems generalizable for authored works, so too does the Fine Individuation Requirement. Here, Levinson states that musical works must be such that composers composing in different musico-historical contexts who determine identical sound structures compose distinct musical works. Again, the impetus for this requirement seems clear: without this criterion, even where different composers independently create compositions, there is a real risk that these composers will independently create the *same* work, if their works were structurally (or atomically) identical. As discussed with regard to the identical haikus and photographs of the Grand Canyon, it seems deeply counterintuitive to say that these individuals have created the *same* work, or that the author of one should hold any claim over the creation of the other. The same rings true for musical compositions.

It should be noted that in making his case for the Fine Individuation Requirement, Levinson shows how creation in different musico-historical contexts results in works with different aesthetic properties. Recall again the example of Tchaikovsky's *Symphony No. 4 in F Minor*: were the Fourth Symphony composed by Mozart in 1778 rather than by Tchaikovsky a century later, the work could not sensibly be called "Beethoven-

influenced”. Again, where Tchaikovsky’s Fourth Symphony represents a natural progression in the composer’s work, being an understandable sequel to the Third (“Polish”) Symphony, as written by Mozart, it would be decidedly bizarre. As I noted last chapter, however, my theory is agnostic about such properties as grace, delicacy, elegance, and the like. I also wish to include among this list such properties as that of *being bizarre*. I further wish to remain agnostic here towards such properties as *being Beethoven-influenced*, as I believe such properties will be sufficiently covered by my discussion below of weak and strong historical links. That said, Levinson employs divergence in such aesthetic or artistic properties as *evidence* of fine individuation, not as *antecedent* to fine individuation. In other words, were two composers to independently create compositions with identical sound structures *and* identical aesthetic properties (perhaps because they were composing in sufficiently *similar*, if not identical, musico-historical contexts), I suspect Levinson would say, they would nevertheless *not* thereby be creating the same work.¹⁶

Ultimately, Levinson’s preferred account of a musical work as a *sound/performance means structure-as-indicated-by-X-at-t* does *not* make explicit mention of musico-historical contexts, though it does specify the creator and time of creation of the work. Indeed, Levinson’s account of what makes up a musico-historical context focuses on the prominent musical and other factors impinging *on* the creator and

¹⁶ Indeed, in choosing his preferred account of a musical work over that of a *sound/performance means structure-as-indicated-in-musico-historical-context-C*, Levinson provides an argument to this effect. He argues that two composers who determine the same sound/performance means structure in the same musico-historical contexts will nevertheless compose distinct works even if they are structurally, aesthetically, and artistically identical at the time of composition. His reasoning is that the two works may diverge in their aesthetic and artistic properties at some later point, given differences in the composers’ respective *oeuvres*. See Levinson (1980a), 24-25. (Notably, Levinson later shows more openness to the alternative, context-based formulation. See “Art as Action” in Levinson, Jerrold (1996). *The Pleasures of Aesthetics*.)

time of creation. This being the case, the musico-historical context seems to be an implicit, rather than an explicit, factor in his account. Just the same, it seems reasonable to think that a similar contextual story could be told for any medium by modifying the account of musico-historical contexts to specify contextual painterly, literary, or other such factors. Indeed, as it would not be unusual for an artist working in one medium (say, music) to be influenced by works in another medium (say, painting), or for an artist to work in *more* than one medium, it might make more sense to modify Levinson's account of musico-historical contexts so as to make it medium unspecific.

Let us turn now briefly to the third criterion of Levinson's account, the Inclusion of Performance Means. Where the Creativity Requirement and Fine Individuation Requirement seem generalizable for authored works, the Inclusion of Performance Means seems more strongly specific to music, stating that musical works must be such that particular means of performance or sound production are integral to them. Although such a criterion might conceivably be easily expanded to include other performance-kinds (drama, dance, opera, etc.), it is at first glance difficult to see *how* such a criterion would apply to authored works more generally, or further *why* it should. Levinson's reasons for including this criterion seem to be to strengthen the case that musical works are more than mere sound structures. By tying sound structures to specific instrumental means of production, Levinson provides an account of musical works that supersedes a purely structural account, and further ties it to the individual creative act and the composer's intentions.

Let us assume for the sake of argument that Levinson is correct about paradigm Western musical works being instrument-specific.¹⁷ If this is indeed the case, then might we find analogs in other media? Recall from last chapter the discussion of the elemental entities that make up an authored work: where some such entities are formally-definable (“aesthetic complexes” made up of “aesthetic simples”), others are not. The former group includes such elements as fields of color and notes of particular duration, while the latter group includes such base entities as the material used in sculpture, the linguistic entities of literature, and the bricks and mortar of architectural works. If Levinson is correct about musical works being instrument-specific, it seems reasonable to think that the instruments used to properly perform Tchaikovsky’s Fourth Symphony are analogous to the bronze used in Rodin’s *The Thinker*: each is an integral element of the work. As such, if a performance of the Fourth Symphony is made using a synthesizer or computer, or a copy of *The Thinker* is made using lime Jell-O, we might reasonably question the integrity of each *as* a legitimate copy of the work. As the particular notes and instrumentation of the Fourth Symphony, and the particular shapes and materials of *The Thinker*, are arguably equally basic elements of the respective works, altering the instrumentation of the symphony is as much a violation of the work as is changing the notes, and altering the material of the sculpture is as much a violation as is changing its shape. As such, instrumentation is an aspect of the atomic dimension of art, rather than the causal dimension.

With instrument-specificity thus covered under the auspices of the atomic dimension of art, I will now focus on the creation and individuation of works. In

¹⁷ There is some contention about this issue, raised by Stephen Davies (2001) and others. I will investigate the matter further in Chapter Five: The Categorical Dimension of Authored Works.

particular, I take it that, for any authored work, there is a particular context of creation, made up of the time, the place, and the author or authors. That is, a given work, w , was caused by some particular author or authors, A , at some particular time, T , and in some particular place, P .

As properties of a work, we can as such point to a (the property of having been created by author A), t (the property of having been created at time T), and p (the property of having been created at place P). Picking out some particular created atomic structure, along with its a , t , and p properties, picks out some unique work. And, while two distinct works may share the same a , t , and p properties (as it seems not inconceivable that some author might create two distinct works at the same time and place), where any of these properties differ, a *different* work has been created. So, if some item, w_1 has the properties a_1 , t_1 , and p_1 , and another item, w_2 , has some different property, a_2 , t_2 , or p_2 (or any combination thereof), then w_1 and w_2 are different works in virtue of having different “causal properties”, even if they are *atomically* indistinguishable. A change to a , t , or p may result in different atomic properties, and it may not: atomic properties are independent of causal properties.¹⁸ A work may also possess different causal properties than do its composite elements. In the case of Duchamp’s *Bottle Rack*, mentioned above, the bottle rack of which *Bottle Rack* is composed will have been created by a different person, at a different time, and in a different place than was *Bottle Rack*. And, if Levinson is right about the nature of sound structures, in the case of a musical work, its composite elements may have *no* causal properties such as a , t , and p , existing sempiternally as

¹⁸ As well, a change to a , t , or p may result in different aesthetic properties, and it may not. This is a further distinct issue from any difference to the work’s atomic properties. Again, if two authors produce structurally identical works, these works may nevertheless possess wildly different aesthetic properties. Of course, it might be said, they may not.

sound structures do.¹⁹ Certainly, the creation of the musical work is to be distinguished from the *particular* sounds issuing from the *particular* instruments performing the work.

Just as we can distinguish the creation of a work from the creation of its composite elements, so too can we distinguish the creation of a work from its instantiation. As the properties of the composite elements that make up the original work are to be distinguished from the properties of the work itself, so too should be the properties of the material comprising *any* instantiation of the work. For instance, as the light-sensitive paper on which a photograph is developed is distinguished from the photograph *as a work*, so too is the light-sensitive paper on which future copies of the photograph are developed. And just as the composite elements (material or otherwise) that make up the work may have a distinct context of creation (or none at all) from the work itself, so too does a *duplicate* of the work have a distinct context of creation from the work itself. For the sake of clarity, let us refer to the former as the “context of instantiation,” composed of the instantiator (who may or may not be the same individual as the author of the work), the time, and the place of instantiation. The act of instantiation does result in something new—a new *instance* of the work—but it does not result in a new *work*.²⁰ As such, where we have a new work, we will have contexts of creation for the composite elements (where such are in fact created) and a unique context of creation for the work itself. Where we have a copy of the work, we will have contexts of creation for the composite elements (some of which may be the same as those of the composite elements making up the original, and some of which may not), the context of creation for

¹⁹ The relation between a work’s properties and the properties possessed by its physical elements will be further discussed in Chapter Four: The Abstract Dimension of Authored Works.

²⁰ This claim may be considered contentious with regard to some categories of authored work, specifically as regards the issue of forgery. This topic will be taken up in detail in later chapters.

the work itself (which will be the same context of creation for the original work, as they are instances of the *same* work), and a context of instantiation, unique to that instance.

The issue of instantiation is complicated, however, by cases of *imperfect* instantiation. Photographs might be reproduced blurrily, works of literature reproduced with typos, musical works performed with errors, and all sorts of other works reproduced with all sorts of errors introduced in the duplication process. So what is the relation between these imperfect duplicates and perfect ones? Let us recall the discussion from the end of last section on what qualifies as an instance, and what qualifies as a performance, of a given work. According to Levinson, for *a* to qualify as an instance of the sound structure of *w*, it seems, *a* merely need line up with *w* note-for-note. For it to qualify as an instance of the sound/performance means structure of *w*, *a* must line up with *w* not only note-for-note, but also instrument-for-instrument. Finally, for *a* to qualify as a performance of *w*, Levinson contends, it must be “a sound event which is *intended* to instantiate” *w*, and which “*succeeds to a reasonable degree.*” With instrumentation again being one of the atomic elements of the work, I agree with Levinson’s various assessments of what qualifies as an instance of the sound structure of *w*, and what qualifies as an instance of the sound/performance means structure of *w*. His assessment of what qualifies as a *performance* of *w*, however, is suspect. After all, *intending* to do something is different from *succeeding* in doing so. Were Tchaikovsky to be audience to a presentation of his Fourth Symphony performed using the proper instrumentation, but altering some of the notes or their sequence (whether intentionally or otherwise), he might legitimately question the integrity of the performance *as* a performance of his symphony. Calling such a performance an *attempted* performance of the Fourth

Symphony is one thing; calling it an *actual* performance of the symphony is another thing entirely. A failed performance of some work *w* is not, I would contend, a member of the class *performances of w*, but rather to the class *non-performances of w*, just as a failed leap over a fence is in fact no leap over a fence at all.

Adding, removing, or changing elements of the *work* means changing the *work*. And if the duplicate of the work changes the work, it thereby does not qualify as a instance of the work, either. It is something else: it is perhaps at best a new work. Levinson might legitimately ask, but who created this work? Was it the orchestra or conductor of the performance? Putting the question another way, however, we might ask, is *this* the work that the original author created? The composer would most likely answer, no, it is not the work that he created: it is very close, but it is not the same. As such, the new work was created by whoever introduced the elements diverging from the composer's original, be it the orchestra, the conductor, or someone else. Unlike the cases of identical haikus written by independent poets, and identical photographs taken by independent tourists, however, in such a case as an improper performance or other imperfect duplicate, even given the result of a new work, it seems, the author of the new work *owes* something to the original author. Put another way, the original author intuitively has some *claim* over the new work. The basis for this claim, however, will be spelled out later.

Before leaving this topic, let us consider one final example. Next to a photograph in Washington's National Portrait Gallery is a note indicating that the photograph on display is a copy of the original, the original having been removed to halt further deterioration from light exposure. The note does not indicate *how* the duplicate was

made, however. It may have been made by printing a new copy from the same negative used to create the original, though, given the age of the original, this seems unlikely. More likely, it was made by photographing the original to produce a *new* negative, from which the copy was printed. In either event, the instantiation may have been imperfect. And, as such, regardless of the method of reproduction, if the duplicate does *not* atomically line up with the original, it is not the same *work* as the original. Conversely, it seems, if the duplicate *does* line up atomically with the original, it *is* the same work as the original, again regardless of the method of reproduction.²¹ The same principle applies across media. Two performances of a musical work may be made using the same sheet music. Alternatively, the second performance may be made by transcribing the notes from the first performance to create new sheet music, and performing from this. In either event, if the second performance is atomically identical to the first, it is a performance of the same work; if it is not, then it is at best a performance of a different work, some change having been made at the transcription or performance stage.

Again, as stressed last chapter, it cannot be the atomic similarity alone that makes these two performances of the same work. That is, it is not atomic similarity that results in the two performances having the same context of *creation* (for as I have said, atomic properties are independent of properties of the context of creation). Rather, it is some other connection between these instances that makes them performances of the same work, and it is to this connection that I now turn.

²¹ This issue was introduced in the Foreword to this dissertation, and will be taken up again, below and in Chapter Five, with reference to the interesting case of photographers Walker Evans and Sherrie Levine.

The Historical Definition of Art

Where Levinson's "What a Musical Work Is" was developed largely as a response to structural and mental theories of art, his paper "Defining Art Historically" (1979) was largely a response to George Dickie's "Institutional Theory of Art."²² Dickie's theory rejects classical approaches to defining art (and classifying given objects *as* works of art), which tend to focus on observable characteristics of works, such as their representational or expressive nature. Responding to changes in the art world that saw such innovations as Duchamp's *Fountain*, Dickie argues that what makes a given item a work of art is that it occupies a certain place in the art world, such that it has had the status of art "conferred" on it.²³ Pointing out in particular the problem of private works of art (works of art never offered by the artist to the world at large), Levinson claims that Dickie's approach is little able to accommodate such works.

Agreeing with Dickie and others, however, that what makes a given item a work of art is not something discernible by merely perceiving it, Levinson argues that what makes one item a work of art is some special connection it has to *other* works of art. That is, he argues, some item, *x*, is a work of art just in case it bears the right relationship to some previously-existing artwork, *y*. And *y*, in turn, is a work of art because it bears the same relationship to some other work, *z*, and so on. The challenge facing Levinson is what this special connection *is*.

Levinson's approach to defining art parallels a particular move in the biological sciences. According to phylogenic approaches to species classification, a species is a particular group of organisms that share a lineage to a common ancestor. As such, some

²² See in particular Dickie (1974, 1984, 1992).

²³ Dickie (1974). Dickie has since modified his theory.

organism, x , is considered a member of the same species as some other organism, y , if and only if x can be shown to belong to the same genetic chain as y . If x has parents of a different species than y , then x cannot be of the same species as y . This approach to species classification is in contrast to the more classical morphogenic approaches, according to which x is considered a member of the same species as some other organism, y , if and only if x shares a substantial physiological similarity to y . The advantage that the phylogenists claim over the morphogenists is twofold: (i) that two animals can be physiologically very similar without being even remotely related, and (ii) that parents can produce offspring that does not in any substantial way resemble its parents. Put simply, if it looks like a duck, and quacks like a duck, it might yet be a cormorant.

For the same reason, Levinson discounts external similarity as the critical factor connecting any two items as art. Certainly, even considering the emblazoned “R. Mutt 1917,” Duchamp’s *Fountain* bears a more striking similarity to men’s room urinals than it does to any previously-existing works of art. Indeed, much modern art bears more similarity to scrap yard refuse than it does to any other gallery showpieces.

Further, Levinson argues, the critical factor that connects artworks is not that one work is intended to afford the same pleasure or experience as another work. Reasonably, one might encounter the same pleasure or experience in viewing a beautiful person or a beautiful landscape as in viewing a painting or photograph of the same. Indeed, even certain drugs might afford the same pleasure or experience as that of a work of art, but we would rightly refrain from calling such drugs works of art. These examples and countless others show that the pleasures and experiences derived from art are not necessarily

unique to art, and thus cannot be the critical factor connecting works of art and only works of art.

Levinson argues, instead, that the critical factor connecting some new work to some previously-existing work or works is that the new work is intended to be *treated* or *regarded* in the same way as the previously-existing ones. In particular, Levinson argues that some object, *X*, is an artwork at time *t* just in case:

X is an object of which it is true at *t* that some person or persons, having the appropriate proprietary right over *X*, nonpassingly intends (or intended) *X* for regard-as-a-work-of-art – i.e., regard in any way (or ways) in which objects in the extension of ‘artwork’ prior to *t* are or were correctly (or standardly) regarded.”²⁴

How exactly this “regard” is to be spelled out is a challenge, as how we regard works of art is not a stable condition. That is, we do not treat art in the same way today as we did 100 years ago, nor did they treat art in the same way as did people 100 years before them. For this reason, Levinson anchors the categorization of an item as a work of art to a particular time, *t*, and to how works of art are correctly or standardly regarded at *t*, this being a critical aspect of the work’s context of creation.

Weak and Strong Historical Links

Levinson argues that what makes a given object a work of art is this particular relationship it holds to some previously-existing work or works. Although I will remain

²⁴ Levinson, Jerrold (1979). “Defining Art Historically” in *British Journal of Aesthetics* (19:3), 240.

agnostic as to whether this relationship is definitive of what *makes* a given object a work of art, I suspect Levinson is correct in arguing that such a relationship *does* exist, and, with this having been established, I want to analyze some other important relationships linking works along similar lines.²⁵

One work might be related to another work in myriad ways: for instance, they may have been created by the same artist, they may be representations of the same subject, or they may simply be hanging in the same gallery. In particular, however, I am interested in the sorts of connections holding between works in the *causal* dimension. Certainly, most artists are influenced by works and artists that have come before them, and these influences tend to be apparent in their subsequent works. As Levinson points out with his historical definition, art is not produced in a vacuum. Indeed, if Levinson is correct, the very notion of art depends upon connections between works. And just as the connection between works may account for their *being* art, it also serves to explain the *evolution* of art. Present art builds on past and contemporary art: artists are influenced by their predecessors, by their contemporaries, and even by their own past work. And in some rarer cases, one artist might directly reference, appropriate from, or pay homage to, some other work or artist. Where, however, can we draw the line between such cases as constitute the ordinary evolution of art, and those cases where an artist might hold some *claim* over the work of another?

²⁵ Importantly, where Levinson is interested in defining art, my interests here take in a larger class of items. That is, where the category of “authored works” includes such items as boat hulls, computer programs, textile patterns, and potentially even men’s room urinals, in addition to standard artworks, I am not looking to restrict myself to this relationship holding only between artworks. Nevertheless, as artworks undoubtedly make up the largest and most obvious group of “authored works”, it is on these that I shall primarily focus.

To begin, let us consider an example: Andy Warhol's painting, *Myths: Mickey Mouse* (1981)²⁶. Although his name eventually came to be synonymous with pop art—a movement typified by its focus on American popular culture, both in form and in content—Warhol's foray into the movement was preceded by the work of such artists as Jasper Johns, Robert Rauschenberg, and, notably, Roy Lichtenstein. Warhol's early printed works focused on celebrities, commercial products, and iconic images of the 1960s such as civil rights protesters and mushroom clouds. Already, Warhol's style was clearly influenced by the works of Lichtenstein and others, featuring an adaptation of the simplistic, heavily-lined and flatly-colored illustrative technique of contemporary advertising and comic-book art. With *Myths: Mickey Mouse*, Warhol turned to a source of content popularized by Lichtenstein: the direct appropriation of images from popular culture sources, and adaptation of them to the print medium. In this case, the source was a 1935 Walt Disney poster advertising Mickey Mouse animated films.²⁷ Warhol's work, reproduced in a series of screen prints, depicts the easily-recognized image of Mickey Mouse in almost precisely the same pose, and from the same angle, as the Disney poster. Moreover, where the look of Disney's first mouse had evolved over the decades, Warhol's painting represented the character's classic look shown in the 1935 poster.

With *Myths: Mickey Mouse*, we can thus see connections to a variety of works. Certainly, first, the style of the painting is heavily influenced by other works in the pop art movement. Second, the painting is influenced by Warhol's own *oeuvre* over the previous two decades. And finally, the painting is clearly connected to the Disney poster

²⁶ See http://www.artbrokerage.com/artretail/warhol/_images/warhol_II.265mickey.jpg (Referenced January 28, 2007)

²⁷ See [http://mickey01.webcindario.com/1935%20Mickey%20Mouse%20\(ing\)%20\(promo\)%2001.jpg](http://mickey01.webcindario.com/1935%20Mickey%20Mouse%20(ing)%20(promo)%2001.jpg) (Referenced January 28, 2007)

whose art Warhol appropriated for his own purposes. I want here to separate the sorts of connections between *Myths: Mickey Mouse* and other works into two categories. In the first category, I include the other works already in the pop art canon, both Warhol's own, and those of others, which served to influence *Myths: Mickey Mouse*. In the second category, I place the Disney poster that Warhol used as his source. I will call the sort of relationship between *Myths: Mickey Mouse* and those works in the first category *weak* historical links and that between *Myths: Mickey Mouse* and the Disney poster a *strong* historical link.

Both weak and strong historical links connect a given work to some previously-existing work or works. Where there is a strong historical link, some property or properties of a new work depends on some property or properties of some *particular* previously-existing work. Alternatively, where there is a weak historical link, some property or properties of a new work depends on some property or properties of a *body* of previously-existing works.

Certainly, weak historical links are much more common than are strong ones, so let us begin by looking at this the weaker variety. A weak historical link can perhaps best be categorized as an influence relation, a weak sort of asymmetric dependency relation holding between works. Where there is a weak historical link, a given work is the way it is—has the atomic properties that it has—in part because of some body of previously-existing works. To return to *Myths: Mickey Mouse*, the dominant stylistic influence is the body of pop art works preceding it. As such, I argue, had the pop art movement (including Warhol's own contributions) not preceded the creation of the work, the work itself would not exist, or at least would look very different. Put another way, *Myths:*

Mickey Mouse could not have been created, say, in 1940, because it depends so heavily on the influence of the pop art movement from the 1950s to the 1970s. Some analog of *Myths: Mickey Mouse* might have existed, but it would certainly not be the *same* work, atomically-speaking, without the pop art influence.

Importantly, with a weak historical link, we are talking about a *body* of work to which the new work is connected. In most cases of mere *influence*, a new work's properties will not depend on the properties of any single, previously-existing work. Rather, the multiple influences have a cumulative effect, such that the alteration or removal of any one such influencing work is unlikely to have an effect on the new work. A neoclassical work such as Jacques-Louis David's *Napoleon at Saint Bernard Pass* (1800), for instance, is heavily influenced by the works of the ancient Greeks and Romans, but any change to a single work in the classical period would be unlikely to produce any atomic change in *Napoleon at Saint Bernard Pass*. A change to a large number of them, however, might certainly have had such an effect. The same holds true for *Myths: Mickey Mouse*: removing any given work from the pop art canon, even one of those depicting Mickey Mouse,²⁸ would be unlikely to have an atomic effect on Warhol's piece. Removing all of them, however, almost certainly would.

Note that a weak historical link is not a *direct* link between works; it necessarily operates via the artist creating the new work. As such, we can talk about David being classically-influenced, and alternatively about *Napoleon at Saint Bernard Pass* being classically-influenced (which is to say *Napoleon at Saint Bernard Pass* possesses a weak historical link to the body of works in the classical period). Levinson includes under the

²⁸ Such as Roy Lichtenstein's *Look Mickey* (1961), Claes Oldenburg's *Geometric Mouse* (1971), or any of Keith Haring's 1981 Mickey Mouse drawings.

list of factors that make up a musico-historical context the “musical influences operating on *P* at *t*.” And certainly for some work of art to possess a weak historical link to some previously-existing body of works, the artist at very least had to have been exposed to the works that make up that body. In other words, *Napoleon at Saint Bernard Pass* will not have a weak historical link to *all* works in the classical period, as many of these works will not have survived to David’s time, and David is unlikely to have been exposed to all such works that *did* so survive. As well, the influences acting on an *artist* at a given time will not thereby be identifiable with the weak historical links of any given *work*, for where any number of influences may be operating on a given artist at a given time, only some of these will actually make it into the final work.

Certainly, establishing a work’s particular weak historical links is an epistemic challenge for several reasons. First, a work may possess any number of weak historical links. That is, not only will a given weak historical link connect a given work to some particular body of previously-existing works, but that given work may be so connected to *several* bodies of works, each having its own effect on the new work. Untangling these links will in many cases be very difficult, if not impossible.

Second, weak historical links operate as *chains*. Consider again Levinson’s historical definition: some new work, *a*, qualifies as a work of art because it was intended to be regarded as some other work, or body of works, *b*, is regarded, and *b* is art. However, *b* qualified as art because it was intended to be regarded as some other work, or body of works, *c*, was regarded at the time that *b* was created, and *c* was art. And so on, *ad infinitum*, or nearly so. The same is true of weak historical links: some new work, *d*, is connected to some body of works, *E*, by a weak historical link, and each work in that

body ($e^1 \dots e^n$) may be connected by a weak historical link to some previously-existing body of works, $F \dots N$, and so on. As such, it may appear to the common observer that d has a weak historical link to the body of works, F , because it shares some stylistic similarities with works in F , but it may instead be the case that d has a weak historical link to the body of works, E , some member of which, e^1 , in turn, has a weak historical link to F .

Third, weak historical links can operate across media. As touched on earlier, it would not be unusual for an artist working in one medium (say, music) to be influenced by works in another medium (say, painting), or for an artist to work in *more* than one medium. Certainly, artistic movements do not tend to restrict themselves to any given medium. As such, some given work (say, a painting) may possess a weak historical link to works in various media (paintings, literature, film, etc.). A work by a surrealist poet might be influenced by (possess a weak historical link to) works by composer Bohuslav Martinu, films of Luis Buñuel, and paintings of Salvador Dalí and René Magritte. Certainly, artist H.R. Giger's work is influenced by the writings of H.P. Lovecraft, and director Tim Burton's films are influenced by the cartoons of Edward Gorey. The difficulty with establishing weak historical links across media is that the properties involved are not usually low-level atomic properties, but such higher-level elements as mood, character, and the like. As established in the preceding chapter, such elements may not be immediately apparent to a general audience, but will require a spectator with heightened sensitivity or knowledge.

Fourth, a weak historical link between some given work and some body of previously-existing works may not result in the new work being *similar* to the previously-

existing ones. That is to say, the new work may have been created in *response* to some body of work, and those properties in the new work linked to properties in the body of previously-existing works may not be similar at all. For example, we might look to the primitivist style of improvisational dance developed by Isadora Duncan in the early part of the 20th century. Raised and trained in traditional dance, Duncan became disillusioned with the rigidity and structure of the form. Where classical ballet stressed upright posture and geometric formation, Duncan's revolutionary style responded with organic fluidity. Where classical ballet employs music designed for choreography, Duncan specifically chose music not written to be danced to. Although tied to the body of traditional dance through weak historical links, Duncan's performances embody everything that classical ballet does not.

Finally, establishing a work's particular weak historical links can be a challenge for even the artist may not be aware of the active influences on his or her work. While it is necessary that the artist have been *exposed* to some body of work for his or her work to possess a weak historical link to such a body, it does not seem necessary that the artist be *consciously* influenced by such works, or that he or she even recalls that exposure.

Many of these same epistemic challenges arise for establishing a *strong* historical link between some new work and some previously-existing work or works. As mentioned above, where a weak historical link holds between some given work and some previously-existing *body* of works, a strong historical link holds between some given work and some *particular* previously-existing work. We might thus characterize this sort of link as a strong asymmetric dependency relation holding between particular properties in particular works. The strong historical link may be most perspicuously expressed as a

counterfactual relationship between the properties of the works involved. Roughly, for works x and w , there is a strong historical link between w and x if it is the case that, *had* some particular property of x been different, this difference would have resulted in a corresponding difference in some particular property of w .

Although weak historical links are undoubtedly much more common than strong historical links, cases of strong historical links tend to be much easier to establish. Consider some examples:

- (i) Where Warhol's *Myths: Mickey Mouse* possesses a weak historical link to works in the pop art canon, it holds a *strong* historical link to the 1935 poster advertising Mickey Mouse animated shorts. As such, were Mickey drawn in the 1935 poster without buttons on his shorts, the character would presumably likewise be depicted in Warhol's paintings without buttons on his shorts. However, it presumably would make no difference if the poster's background were blue rather than yellowy-orange, as Warhol painted the mouse on a black background. That is, where there is a strong historical link between one set of properties of Warhol's painting and the 1935 poster, there is no such link between the property of the background color of one and that of the other.
- (ii) In another example discussed above, Tchaikovsky's *Symphony No. 4 in F Minor* includes a famous Russian folk song, "In the Field Stood a Birch Tree", in its fourth movement. Tchaikovsky chose to incorporate the song, it seems, not simply because of its particular musical qualities, but because

he wanted to set a scene of folk merriment in this movement, one which the familiar Russian song would evoke in his audience. Had the song been different, Tchaikovsky's Fourth Symphony would have been similarly different to bring about this effect.

- (iii) Artist Sherrie Levine experimented by photographing already-existing photographs by Walker Evans and others. One such work by Levine, *Untitled (After Walker Evans)* (1979) is a photograph of Evans' *Alabama Tenant Farmer Wife* (1936). Had the subject of Walker's photograph, Allie Mae Burroughs, been photographed in front of a brick wall, rather than a wall of wooden siding, Levine's photograph would have been similarly altered. Certainly, it might be argued, Levine's photograph is *not* a photograph of Burroughs herself, but of Evans' photograph.²⁹ Ultimately, however, the strong historical link is not between the subject of one work and the subject of the other, but between the atomic properties of one and the atomic properties of the other.
- (iv) Just as a photograph of a photograph is sure to establish a strong historical link between one work and the other, so too is a painting of a photograph, a technique employed by photorealist and hyperrealist painters. Richard Estes, for example, would photograph urban storefronts so as to capture not only what was behind the glass, but what was reflected in it. He would then work to reproduce the image in oils on a large scale, though at times Estes would make alterations from the photograph in his final paintings for compositional reasons. Here again, there will be a strong historical link

²⁹ Robert Stecker points this out in *Aesthetics and the Philosophy of Art* (1995), p. 195.

between many elements in the painted work and the photograph, and not between other such elements (those that Estes altered for compositional reasons).

- (v) Thomas Mann wrote the novella “Death in Venice” in 1912. The work was translated into English from the original German by Kenneth Burke in 1925, by Helen Lowe-Porter in 1928, and by David Luke in 1988. In each case, aside from person and place names, the translations bear no linguistic resemblance to Mann’s original. However, there will nevertheless be strong historical links between the English translations and the original German. Translators, seeking to bring the work across the language barrier, work to best approximate though English equivalents what is said in German. Had Mann written something else, so too would have the translators. Strong historical links may be even more apparent between the higher-level entities employed in each work: the characters, the plots, and so on. The same sort of strong historical links between the higher-level entities in works tend to arise in cases of adaptations between media.

As with weak historical links, strong historical links are artist-dependent. With that in mind, where the examples above seem to indicate that strong historical links are the result of particular intentions on the parts of the respective artists, a strong historical link need not be the result of *deliberate* intention. Consider the case of former Beatle George Harrison’s song, “My Sweet Lord”, in which Harrison was alleged to have

subconsciously appropriated elements of The Chiffon's "He's So Fine".³⁰ Putting aside the legal issues of the case, it seems not altogether unlikely that a tune might occur to a musician apparently "out of the blue", but in fact be occurring because that tune belonged to a song the musician had previously heard. If the musician's creative process were such that he tended to compose songs based on tunes that just "popped into his head", he might naturally assume that this was also the case here. As such, while the musician might not be aware of the tune's origin, if the musician then uses the tune in a new composition, that composition *will* have a strong historical link to the earlier work.

Before moving on, it is worth considering two related complications arising from this discussion of strong historical links. First, in example (iii), above, it was noted that the strong historical link holding between Levine's *Untitled (After Walker Evans)* and Evans' *Alabama Tenant Farmer Wife* operated over the atomic properties of each, not the subject of each. But, it might be pointed out, based on the characterization I have given of strong historical links, and given that the scope of authored works is broader than that of artworks, isn't there a strong historical link between, say, Evans' photograph, and his subject, Allie Mae Burroughs? That is, had Burroughs herself had a large mole on her forehead, wouldn't Evans' photo also be respectively different? And, this being the case, wouldn't Levine's photograph of Evans' photograph be similarly altered? Indeed, this *is* the case. However, as Burroughs herself does not fall within the bounds of "authored works", this particular detail is unlikely to arise in the realm of copyright.³¹

³⁰ See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

³¹ The same will be true in the case of identical photographs of the Grant Canyon, raised earlier. Note that where cases of copyright involve representation of particular people, such cases may be further complicated by issues of publicity rights, and this detail may thus become relevant.

Nevertheless, it does appear that a strong historical link *can* operate transitively. Where a given work, *W*, has a strong historical link to another work, *X*, operating respectively over the atomic properties *a*, *b*, and *c* in *W* and *d*, *e*, and *f* in *X*, if another work, *Y*, has a strong historical link operating over atomic properties *h*, *i*, and *j* in *Y* and properties *e*, *f*, and *h* in *X*, then, in seems, *Y* will have a strong historical link to *W*. However, the strong historical link will only operate over unbroken chains in atomic properties. That is, if the artist behind *X* reproduced *some* elements of *W*, and the artist behind *Y* reproduced *some* of these same elements, but from *X*, then there will be a strong historical link between *Y* and *W* for transitive reasons. However, had *Y* reproduced elements of *X*, but *not* the elements that *X* had reproduced from *W*, then there will be a strong historical link from *Y* to *X*, and another from *X* to *W*, but no strong historical link between *Y* and *W*. Such transitivity issues, however, do not seem to arise as clearly for *weak* historical links.

The next complication arises when we consider not the relation between a work and its *subject*, but that between a work and its *materials*. To begin, let us consider Duchamp's *Fountain*. As noted above, Duchamp's *Fountain* bears a more striking similarity to men's room urinals than it does to any previously-existing works of art. As discussed in Chapter One, according to current copyright law, if the aesthetic elements of a urinal can be conceptually separated from its functional elements, then men's room urinals are not obviously excluded from the domain of authored works, and the collected aesthetic elements have at least some tentative claim of copyrightability. This being the case, we might reasonably discuss a strong historical link between *Fountain* and the men's room urinal of which it is composed. That is, if the urinal had some different

atomic properties (some change to its shape, or the number of holes in its drain, for example), the atomic properties of *Fountain* would be likewise altered. While the status of a urinal as an authored work is perhaps questionable, similar issues arise in the medium of collage, where previously-existing works are not *reproduced* in a new work, but are *incorporated* into that work. So, where a collage incorporates a photograph or drawing, there exists a strong historical link between the collage and the work it incorporates, such that if the atomic elements of the previously-existing work were different, so too would be the atomic properties of the collage.

In cases of both weak historical links and strong historical links, there is a causal connection between some given work and some previously-existing work or works. What marks the difference between the two is that, in cases of strong historical links, some given *particular* work depends upon some *particular* previously-existing work, but not so with weak historical links. Where some work has a weak historical link to some body of previously-existing works, its properties do not depend upon any *one* particular work from that body. As such, no artist whose work is among that body can reasonably claim that, had it not been for his particular work, the work to which it is connected by a weak historical link would be in any way different. However, where a strong historical link connects two works, it seems, the artist behind the previously-existing work *can* make such a claim.

To now connect the issue of strong and weak historical links to the earlier discussion of the context of creation, I believe we can say that where some given work is connected to some previously existing work by a strong historical link operating over *all* of the properties of *both* works, and where the properties so connected are the same in

each respective work, the new work is a *duplicate* or *instance* of the previously-existing work, and *not* a new work at all. Where there is anything less than a “complete” strong historical link, we will have two distinct works, however similar. In the latter case, each work will have its own context of creation; in the former case, the two works will share their context of creation, and the newer of the two will have a context of instantiation to distinguish it from the original. On these grounds, a plagiarist might defend the uniqueness of his text by pointing out that, though his written work lines up word-for-word with some previously-existing text, and indeed the word choice depends upon that of the previously-existing work, since he has used a different font, a different color, and so on, his work does not have a “complete” strong historical link with the previously-existing work, and thus is not a *duplicate* or *instance* of that work. Here, the plagiarist should be reminded that not all of the perceptual elements of an art object are part of the work itself. As discussed last chapter, while a literary work requires *some* font, typeface, or other means of conveying the words in order to embody the work, the work may not require any *particular* such font. The same will be true of the font’s color, size, and a host of other such properties. Likewise, if Levinson is correct, a performance of a paradigm musical work will require a particular type of instrumentation, but will not thereby require that it be played on *particular* oboe, some *particular* strings, or the like.³² As such, two art objects may differ wildly in terms of their perceptual and other properties, and yet be the same work.

³² However, if the plagiarist contends that his work is not an instance of ‘pure literature’, but some *other* sort of work that depends upon the font and colors chosen, he might very well have a case. Which elements of an art object are part of the work, and which are not, depends upon what category of work we are dealing with. This is a topic that will be taken up in Chapter Five: The Categorical Dimension of Authored Works.

It might now be contended that this claim is all well and good for works of literature, but that it fails where other kinds of work are concerned. In particular, it might be claimed, a painting is not the sort of work that *can* be properly duplicated, and that apparent duplicates are nothing more than forgeries, or at any rate, mere reproductions. This is, indeed, a contentious issue, and will require some further background before being taken on. As such, we now turn to the subject of our next chapter, The Atomic Dimension of Authored Works.

CHAPTER FOUR

The Abstract Dimension of Authored Works

Introduction

In this chapter, I investigate the abstract dimension of authored works. By this, I am referring to those aspects of an authored work that are to be distinguished from its physical, tangible instantiation. Several of the arguments made in previous chapters have foreshadowed this discussion. In particular, I argue that authored works, generally, are of a type/token sort, be they works of literature, music, sculpture, painting, or otherwise. Probably the most contentious aspect of this claim is that *all* kinds of authored works are of a type/token sort, including those such as paintings which are widely considered to be particulars not capable of admitting of multiple instances, a claim that I shall attempt to undermine below. Before considering the details of my type/token account, however, let us first survey some competing theories that attempt to establish the abstract dimension of works in other ways. Although the theories I consider below are not exhaustive of the field of alternative considerations, I believe they represent some of the strongest contenders, both traditional and contemporary.

Universals and Particulars

When we speak of some work, say, Dickens' *Hard Times*, we are in most cases not referring to any particular *copy* of *Hard Times*, but to something else. According to a universal/particular account, we are referring to the universal. Put bluntly, the *work* is a universal, while any given copy is merely a particular. On a standard, Platonic view of the universal/particular relationship, universals exist prior to any particulars. They can be

neither created nor destroyed. Rather, they exist without beginning or end. Particulars, meanwhile, participate in universals by embodying them. As such, while an artist might mold, shape, or print a given particular, he does not create the universal itself; he merely gives it physical form. That is, he does not *create* the work, but *discovers* it.

One difficulty with this view, owing to Jerrold Levinson, was raised in last chapter. This is that the idea that a composer simply discovers a work, rather than creating it, flies in the face of our deeply-embedded intuitions. If we were to accept such a view, Levinson argues, it would also take away a major ground of our reverence for artists, generally. This is, however, a bullet that some theorists seem willing to bite.¹ After all, we still revere scientists and mathematicians despite generally recognizing that their work consists more in acts of discovery than it does in acts of creation. The difference between scientists and mathematicians on the one hand, and artists on the other, it might be said, is in the nature of their discoveries.

Even with this issue put to the side, the universal/particular account faces further problems. As noted in the last chapter, Levinson argues that musical works are not merely sonic structures, but rather are instrument-specific. That a musical work consists in more than a string of tones and other such sonic entities does not, in itself, indicate that such a work is not abstract. It does, however, seem to preclude its being of a universal/particular sort. That is, while a sonic string seems to be the sort of thing that could exist sempiternally, and be instantiated at any point in time by any person, the same does not hold true for instrumentation. Let us recall again Tchaikovsky's *Symphony No. 4 in F Minor* (composed 1877-1878). As discussed last chapter, the Fourth Symphony has

¹ See Currie, Gregory (1989). *An Ontology of Art* (more on Currie's view below); and Kivy, Peter (1993). *The Fine Art of Reproduction: Essays in the Philosophy of Music*.

the property of being Beethoven-influenced. Had the sound structure been instantiated a century earlier by Mozart, calling it Beethoven-influenced would be nonsensical. When we consider that instrumentation is an integral aspect of the work, we realize that it could *not* have been instantiated by Mozart. The Fourth Symphony is scored for piccolo, two flutes, two oboes, two clarinets, two bassoons, four horns, two trumpets, three trombones, tuba, timpani, triangle, cymbals, bass drum, and strings. Notably, the tuba was developed in the 1830s by German trombonist Wilhelm Wieprecht. This act took place decades after Mozart's death. Sonic structures may exist sempiternally, but works that depend on the particular instrumentation cannot reasonably exist prior to those instruments having been created. The same, it seems, will be true of any work whose essential properties include base entities that are not structurally definable. Just as a musical work that depends upon particular instrumentation cannot reasonably be instantiated prior to the invention of those instruments, neither can an architectural work be instantiated prior to the invention of its materials, nor a work of literature prior to the development of the linguistic entities of which it is composed.

Other approaches to the universal/particular relationship attempt to avoid these apparent difficulties for the traditional Platonic view. A more Aristotelian view of the universal/particular relationship holds that the universal is what is held in common among some set of particulars. As such, the many copies of Dickens' *Hard Times* have in common a certain linguistic structure. This structure, abstracted from the various copies, is the universal, and those objects embodying this structure are the particulars. With regard to structure-based works, the apparent advantage of the Aristotelian view over the Platonic is that on the former works can be created and destroyed, where on the latter

they cannot. For example, prior to Dickens' writing *Hard Times*, there was no object that embodied that linguistic structure, and there was no object for that linguistic structure to be abstracted from. The same would be true were all copies of *Hard Times* to be destroyed. In the interim, however, the universal exists because the particulars exist, and those only because of Dickens' creation. As such, the Aristotelian view of the universal/particular relationship also circumvents the problems raised above regarding instrumentation and other such non-formal base constituents of a work.

If we take the Aristotelian view, however, we still find problems, the first of which is determining the boundaries of a work. If the universal, *Hard Times*, is what is in common among its particular instances, and all of those instances have been printed with some particular font, then, it seems, *Hard Times* is font-specific. That is, it is font-specific *until* it is printed in some other font. But then, it seems, what is held in common between these particulars *excludes* the font. If we are to identify the "work" with the universal (as opposed to the particular), then it seems the work is subject to potential change with each new particular. If a copy is printed with a page upside-down or missing, it seems that page is no longer held in common between all particulars of the work, and is, as such, no longer a part of the work. Certainly, this cannot be correct. Rather, I think the Aristotelian will hold that that copy simply does not qualify as a true instance of the work. But then we are left with the more difficult question of determining what is, and what is not, an instance of the work. If the universal, *Hard Times*, is what is held in common between the particulars, how are we to tell what is among the particulars that the universal is abstracted from, if not by appealing to what they have in common?

Equally problematic on such a view are examples of atomic indistinguishables, such as the identical haikus and photographs of the Grand Canyon, discussed earlier. According to an Aristotelian view, if two haikus or photographs are indistinguishable in their properties, then they are particulars of the same universal. That is, they are instances of the same work. However, as discussed in previous chapters, if these haikus or photographs have been created independently of one another, we do not want to call them the same work, but rather indistinguishable, but nevertheless independent, works. We do, I think, want to hold that there is a relationship that holds between copies of *Hard Times* that does not hold between these indistinguishable but independent haikus and photographs, and both the Platonic and the Aristotelian view seem incapable of capturing this difference.

Kinds and Instances

In *Works and Worlds of Art* (1980), Nicholas Wolterstorff argues for the position that an artwork is a norm-kind, capable of having both correct and incorrect examples. On his view, the artist selects for a work certain properties as “criteria for correctness”. As such, a certain set of properties determined by the artist is *normatively* associated with a work. In the case of a musical work, these properties will consist in a string of sounds, in the case of literature, a fixed sequence of words, and so on. In each case, the selected properties specify what counts as a correct instance. Thus for example, a correct occurrence of a musical work will be some live performance or else reproduction of a performance (say, on a phonograph or player piano) that has all of the properties normatively associated with that work. An incorrect performance of a work, meanwhile,

is one that comes “*fairly close to exemplifying the properties normative within*” that work.²

Wolterstorff notes:

What the composer does must be understood as consisting in bringing it about that a preexistent kind becomes *a work*—specifically, a *work of his*. To compose is not to bring into existence what one composes. It is to bring it about that something becomes a work. And the composer does that by selecting certain properties as criteria for correctness in occurrence. Though a composer may be eminently creative in his selection, he is not a creator. The only thing a composer normally brings into existence is a copy, a token, of his score. In music, creation is normally token creation.³

Of course, on my view, this is what the creation of art and other authored works largely amounts to: selection and arrangement of pre-existent entities. However, as I have previously stated, while it might be reasonable to refer to a flawed performance of Tchaikovsky’s Fourth Symphony as an *attempted* performance of the work, calling it an *actual* (if incorrect) performance seems problematic. The same seems to be true of other instantiated works that admit of multiple instances.

None of this, however, seems to directly contradict Wolterstorff’s view that the properties of works are essentially normative, set by their respective authors, such that for some item to qualify as an instance of some work, it should have such-and-such

² Wolterstorff (1980), 86.

³ *Ibid.*, 88-89.

properties. This said, the notion of a kind is broader than that of a type, and Wolterstorff admits that at least most cases of musical (and presumably other art-kinds) will be of a token-type sort. As such, it seems the only remaining major point of disagreement is that, according to Wolterstorff, the artist does not bring into existence any type, but only tokens. However, as argued above, most authored works involve elements that do not (and, I think, cannot) exist sempiternally, including instrumental, material, and linguistic components. As such, by connecting some sound structure to some instrumental components, by including some material elements in some architectural schema, or by arranging some linguistic entities in some particular order, the author has created something that cannot exist sempiternally—something new.

In a related vein, as Gregory Currie notes, on Wolterstorff's theory, if two artists pick out the same norm-kind by selecting the same properties as "criteria for correctness," they have picked out the same work: "Once we know how a work is properly to be played, then we know all there is to know about the identity of the work itself."⁴ The same will hold true, it seems, for works of literature, visual works, and so on. As such, according to Wolterstorff's view, the poets who independently produce word-for-word identical haikus, and the tourists who independently produce visually indiscernible photographs of the Grand Canyon, have brought about the same work. As we have seen, this is a deeply counter-intuitive result.

Action Types and Action Tokens

Gregory Currie argues in *An Ontology of Art* (1989) that an ontology of works must account not only for the structural elements of a work (the sound structure, word

⁴ Currie (1989).

sequence, etc.), but also the context of composition. It must allow for cases of works that are structurally indiscernible without being identical, and should avoid including as constitutive those elements that are inessential to the work. Finally, he argues, an ontology of works must contribute to our understanding of appreciation.⁵

In light of these constraints, Currie argues that works of art are “action types”. Put simply, artworks consist in the actions of discovering certain structures by certain heuristic paths, where a heuristic path is best described as the process whereby the structure was arrived at. As such, although art works display a type/token ontology, a work is not a type that has as its tokens copies of books, prints of photographs, or musical performances. Rather, tokens of a work will consist in tokens of creation enacted on particular occasions by particular people.

To formalize matters, on Currie’s view, Beethoven’s composition of the Hammerklavier Sonata would be characterized as the event, $[B,S,H,\mathbf{D},t]$, where B represents Beethoven, S the particular sound structure of the work, H Beethoven’s heuristic path to S , \mathbf{D} the three-place relation x discovers y by means of z , and t the time of composition. This is will be a token of the action type, $[x,S,H,\mathbf{D},t]$, or *the discovering of S via heuristic path H* . Where \mathbf{D} is a constant element in all works, and x and t are “open places” that may be filled by any particular person and time so as to describe a given token, a work’s “identifying elements” are its structure and its heuristic path.⁶

Following this, two poets who independently produce word-for-word identical haikus do not produce identical works unless they arrive at the same structure via identical heuristic paths. What constitutes a heuristic path—the process whereby the artist

⁵ Currie (1989), 64-65.

⁶ *Ibid.*, 70-71.

arrives at the work's structure—is left largely unspecified by Currie, but it seems that it should include *at least* those elements described by Levinson in the preceding chapter as making up the “musico-historical context” in which the work is composed (or their medium-unspecific equivalents). As such, while it is *possible* that two poets might create the same work, it is extremely unlikely that they should be situated in identical contexts of composition. As well, a photographer who photographs a photograph taken by another photographer invariably produces a different work because she will have arrived at the identifying structure by a different heuristic path.⁷

As such, Currie argues that he has met the conditions for an ontology of works set out above. And so, it seems, he has. However, his account is unsatisfying for a number of reasons. Most damningly, Currie is arguing that a work is to be identified with a generative *process*, not with the end *result* of this process. As many have noted, it is more than a little counterintuitive to claim that the book in my hand, and the music I hear, are not, in fact, instances of the works created by George Eliot and Beethoven. However, seemingly, unless the printer or performer followed the same heuristic paths as the respective artists themselves, the book I read and the music I hear cannot properly be considered instances or performances of those works. Moreover, on Currie's account, the canvas painted by Leonardo Da Vinci and currently hanging in the Tribune room of the Louvre is not, itself, a work of art, nor an instance of a work of art. Rather, it is merely the instantiation of a structure, and none but the artist himself seems capable of experiencing the work.⁸

⁷ See my discussion of Sherrie Levine and Walker Evans, last chapter.

⁸ Stephen Davies suggests that, on this view, we might encounter the work, properly speaking, only if we were present at its creation (see “Ontology of Art” in Jerrold Levinson, ed. (2003), *The Oxford Handbook*

Part of Currie's basis for arriving at his action-type theory is that, in appreciating a work of art, we are appreciating the artist's achievement, his heuristic path. As Levinson points out, however, "When all is said and done, in art we primarily appreciate the *product*, viewed in its context of production; we don't primarily appreciate the *activity of production*, as readable from the product."⁹ Currie claims, as I do, that all works are of a type/token sort—that is, that all works admit of possible multiple instances. However, Currie's theory seems to imply that the vast majority of works will have only one such token, and further, that most of us will never experience these works.

Following Currie's lead, David Davies argues in *Art as Performance* (2004) that works should be identified not with their final product, but with the performance—the actions or processes—by which the products are brought about. Looking to avoid some of the problems encountered by Currie, however, who argues that a work is to be identified with the action *type*, Davies contends that the work should be identified with action *tokens* (which he calls "doings" or "happenings"¹⁰). Davies provides three main arguments for his view, the most ontologically interesting of which is an argument from modality. Regarding any given work, Davies contends that the very same product (what he calls the "work-focus") could have been painted, sculpted, or otherwise composed at some time or place other than when and where it was in fact created. For instance, Picasso could have performed the same creative activities that brought about *Guernica* a week later than when he actually created the product, and Davies contends that said actions would be the *same* actions, and *Guernica* the same work, and not merely distinct

of Aesthetics, 174). However, even here, it seems the most we can do is to view the work, and not actually experience it.

⁹ Levinson, Jerrold (1996). *The Pleasures of Aesthetics*, 141.

¹⁰ Davies, David (2004). *Art as Performance*, 116.

instances of some action *type*. As such, Davies argues, what constitutes the work is some particular *token*—some “doing” or “happening”—which is time- and place-contingent.

While Davies’ conclusion is different than Currie’s, it faces many of the same problems already noted: that the book I read and the music I hear cannot properly be considered instances or performances of works, nor can it ever reasonably be said that I can encounter the work, unless I am the artist herself, or in her presence when the work is “performed”.

Before putting Davies’ theory to the side, however, it calls for further consideration in that it seems to directly contradict my claim from last chapter that a given work, *w*, is created by an author, *a*, at time *t*, and in place *p*, and that where any of these factors differ, a *different* work has been created. Davies, it seems, wants to argue that, at very least, the time or place of creation could differ, and the work would nevertheless be the same. To show the problem with this claim, however, let us consider an admittedly unlikely scenario: an artist is working on some piece of sculpture. Having finished the work, the sculpture accidentally rolls off its pedestal and lands on the sculptor’s head, rendering him unconscious. The sculpture rolls to some unlit corner of the studio, and the sculptor wakes with a headache and, more importantly, a complete loss of memory for the period in which he sculpted the work. Over the next few hours or days, he goes on to perform precisely the same actions as before, resulting in a work indistinguishable from that which sits in the darkened corner of the studio. According to Davies, having performed the same actions, but at a different time, the sculptor has nevertheless “performed” the same work. I would argue, rather, that while his actions of chiseling may be considered tokens of some event-type, what results cannot be identified

as the same work. In our case, both the products and the processes that brought them about are indistinguishable. What is missing, however, is any *connection* between one process and the other, or one product and the other, on the basis of which we should identify them.

As Currie contends, a reasonable ontology of works requires a basis for individuating works whose instances are structurally indiscernible. While Davies' theory allows for some cases of structural indiscernibles to be ontologically distinguished—cases where artists arrive at structurally indiscernible products through different actions—he argues that where the actions that bring about those products are identical, so too are the works. What Davies seems to overlook in his theory are cases where the actions performed by artists are the same, but their final products are structurally discernible. To show this, let us consider another case: two artists, A and B, are working independently on sculptures, and perform precisely the same actions in doing so. However, due to some flaw in the stone being chiseled at by Sculptor A, several fissures appear in his sculpture that are not reflected in the work of Sculptor B. Sculptor A accepts the fissures as part of his work (or perhaps does not even consciously notice them), and continues along, performing precisely the same actions as does Sculptor B. It seems that, on Davies' account, having performed precisely the same actions, Sculptors A and B have created (i.e. “performed”) the same work. However, I think it is reasonable to contend that where two sculptures differ in their structural properties, even where the actions that brought them about are identical, the works cannot be so identified. On the face of it, if there is some difference in the structural properties of two works, we have

sufficient reason to consider them distinguishable works, however indistinguishable the generative processes that brought them about.

Davies might retort that Sculptor A's action amounts to 'chiseling in such-and-such a way despite fissures' and B's, 'chiseling in such-and-such a way without inducing fissures,' and so are different actions. In doing so, however, Davies would be defining the action in reference to its product, and this seems antithetical to his program. As regards a given work, Davies demands that the action, not the product, be given conceptual priority. If the action is defined by its product, however, the inverse relation seems to hold.

Types and Tokens

The ontological distinction between types and tokens was first introduced by Charles Sanders Peirce in "Prolegomena to an Apology for Pragmaticism" (1906):

A common mode of estimating the amount of matter in a MS. or a printed book is to count the number of words. There will ordinarily be about twenty *the*'s on a page, and of course they count as twenty words. In another sense of the word 'word', however, there is but one word 'the' in the English language; and it is impossible that this word should lie visibly on a page or be heard in any voice, for the reason that it is not a Single thing or a Single event. It does not exist; it only determines things that do exist. Such a definitely significant Form, I propose to term a *Type*. A Single event which happens once and whose identity is limited to that one

happening or a Single object or thing which is in some single place at any one instant of time, such event or thing being significant only as occurring just when and where it does, such as this or that word on a single line of a single page of a single copy of a book, I will venture to call a *Token*. [...]

In order that a Type may be used, it has to be embodied in a Token which shall be a sign of the Type, and thereby of the object the Type signifies. I propose to call such a Token of a Type an *Instance* of the Type. Thus, there may be twenty Instances of the Type “the” on a page.¹¹

Peirce thus distinguishes between objects on two levels: first, between a *type* and its *tokens*, where the former is some “definitely significant Form” and the latter is some single object or event that serves as an *instance* of the former; and second between individuals tokens which, although both tokens of the same type, are nevertheless singular. Introduced by Peirce within his theory of signs, the type/token distinction has since been employed and developed in various fields of philosophy.

Types have often been treated as equivalent to universals, with tokens as particulars. Certainly, both types and universals are abstract, where tokens and particulars are concrete. Likewise, universals are instantiated in particulars, and types are instantiated in their tokens. Beyond these factors, however, the similarities end. Universals are typically thought to be predicated of particulars: to say that some particular sheet of paper participates in, or is an instance of, the universal ‘whiteness’, is

¹¹ Peirce, C.S. (1906). “Prolegomena to an Apology for Pragmatism”. *The Monist* (16), pp.492-497. Reprinted in C.S. Peirce (1933). *Collected Papers of Charles Sanders Peirce: The Simplest Mathematics*, Vol. 4. Hartshorne and Weiss (eds.). Cambridge: Harvard University Press, §4-537. Peirce interchangeably refers to ‘types’ and ‘legisigns’, and to ‘tokens’ and ‘sinsigns’. He further introduces a third concept, ‘tones’ or ‘qualisigns’, which has largely disappeared from contemporary debate.

to say that 'white' is a predicate of the sheet of paper, and certainly this reflects our ordinary language. The same sort of talk, however, does not seem to apply as easily to types and tokens. An instance of "the" on the page cannot comfortably be described as participating in 'the-ness', nor does it seem that an instance of "the" has some predicate 'is the'.¹²

Further distinctions are pointed out by Richard Wollheim, who introduced the type/token distinction into the field of aesthetics in *Art and Its Objects* (1968). In particular, Wollheim notes that although both types and universals bear similarities in their relationships to their instances, many of the sorts of properties held in common between a type and its tokens are not those found in common between a universal and its particular instances. That is, a token of the Union Jack is rectangular and thus so too is its type, but where a particular sheet of paper is white, and so instantiates the universal 'whiteness', the universal 'whiteness' is not itself white. That is, the predicate 'is white' is not further predicated of 'is white'.¹³ Whether we are discussing universals of the Platonic or Aristotelian variety, such talk simply does not make a lot of sense. Maintaining a universal/particular distinction becomes all the more difficult when dealing with authored works. To say that this book in my hand is a copy of Dickens' *Hard Times* is not to say that *Hard Times* is predicable of it.

The theory that works of art are of a type/token sort is, I believe, most fully developed by Joseph Margolis, who employs the distinction to account for many of the ontological peculiarities of art. Contra Wollheim, Margolis argues that both types and

¹² This issue and others are described more fully in Linda Wetzel's "Types and Tokens" (2006) in the *Stanford Encyclopedia of Philosophy* (<http://plato.stanford.edu/entries/types-tokens>)

¹³ See Wollheim, Richard (1968). *Art and Its Objects*, 74-79.

tokens should be individuated as particulars.¹⁴ By this, he does not mean that both types and tokens are concrete, in any ordinary sense, but that both types and tokens (at least in cases of artworks) can be created and destroyed.¹⁵ Works of music, literature, paintings, and so on, are, as discussed earlier, created by their respective authors and artists. As such, while its sonic structure may exist sempiternally, prior to Tchaikovsky's scoring of *Symphony No. 4 in F Minor*, the *work* itself did not exist. In this sense, while some sonic structure may qualify as a universal, the work is something over and above this. Further, Margolis claims, once all means of performing the work (whether from score or from memory) are destroyed, so too is the work. To employ type/token terminology, then, the *type* corresponding to Tchaikovsky's Fourth Symphony only comes into existence with its first token¹⁶, and goes out of existence when all tokens and means of producing tokens have been destroyed. Margolis thus refers to types as 'abstract particulars' that are instantiated in their tokens. One does not directly experience a type, as it seems more than a little strange to say that one has heard, read, or seen an abstract object. Rather, one experiences the type instantiated in its tokens. Margolis further notes that types and tokens are not separable: they cannot exist independently of one another. That is, unlike universals, there can be no type without its tokens, and, conversely, no tokens without types. As types are instantiated by their tokens, to be a token is simply to *be* a 'token-of-a-type'. There are no tokens or types *tout court*.

Certainly, while reading a poem, viewing a painting, or listening to a piece of music, one experiences not only the work, but also some more concrete thing: the book in

¹⁴ *Ibid.*, 75.

¹⁵ See Margolis, Joseph (1977). "The Ontological Peculiarity of Works of Art" in *Journal of Aesthetics and Art Criticism* (36:1), 45-46. See also Margolis, Joseph (1980). *Art and Philosophy*.

¹⁶ Or, perhaps, with its first notation; more on this below.

which the poem is printed, the painted canvas, or the sounds emanating from the orchestra. As such, Margolis distinguishes between the properties of the work, and the properties of the physical object in which it is *embodied*. As discussed last chapter, the work *Bottlerack* did not exist prior to Duchamp's authorial activity. However, certainly, the physical bottlerack of which it is composed *did*. And, it seems, the work *Bottlerack* may be destroyed without the physical bottlerack being also destroyed. The work and the physical object are not, as such, identical. The embodied particular, *Bottlerack*, possesses *some* of the properties of the embodying particular, say, being of a particular shape or size or color. However, Margolis notes, the embodied particular will also possess properties that the embodying particular does not, such as having been created by Marcel Duchamp. Moreover, he argues, the embodied particular possesses properties of a kind that the embodying particular *cannot* possess, such as *being embodied* in multiple places at the same time (a property that, it seems, only abstract objects can possess). Finally, Margolis argues, the individuation of the embodied particular *presupposes* the individuation of the embodying particular: there cannot be multiple tokens of *Bottlerack* embodied in only one bottlerack.

Now, we might ask, to what degree do we allow differences of the physical sort before having to admit of different *types*? That is, certainly, one performance of Shakespeare's *Hamlet* may differ substantially from another performance; my copy of *Middlemarch* will have been printed in one font, and yours in another; my copy of a photograph will be wallet-sized, and yours poster-sized. On what grounds can we say that they are each tokens of the same respective types? As I have argued in previous chapters, a given work will possess a certain set of properties. A work of literature, for example,

will consist of a certain string of words and punctuation, structured as stanzas, chapters, or the like. And, while, to be printed, it will need to be printed in a certain font, the type identified with *Middlemarch* will not have the property of any *particular* font. It is, in other words, variable as regards fonts.¹⁷ The string of words, etc., however, will *not* be a variable feature of the type *Middlemarch*. In a similar way, a dramatic work, such as *Hamlet*, will consist of not only a certain set of spoken words, in a particular order, as spoken by players in particular roles, but also of stage directions, and the like. And, while the type, *Hamlet*, possesses the property that, in Act II, scene ii, the character of Prince Hamlet enters reading a book, there seems no restriction on *which* book Hamlet is reading.¹⁸ Again, to be an instance of the work (a token of the type), Hamlet must enter in Act II, scene ii, reading *a* book, but, like the font in which *Middlemarch* is printed, it does not matter *which* book. The particular font in which a copy of *Middlemarch* is printed, and the particular book that Hamlet is reading, are not properties of the respective *works* (the types or the tokens), but properties of the physical *objects* in which the works are instantiated. The same will be true of the particular instruments on which a musical work is performed (*this* tuba, *that* oboe), the size at which a photograph is printed, and so on.¹⁹ The same distinction will hold for other properties as well, such as, for instance, the *weight* of a work (*Middlemarch*, the work, has no weight, though every

¹⁷ And, as noted earlier, a work of literature can be *spoken*, thus requiring no font at all for its instantiation.

¹⁸ It may be argued that, given when *Hamlet* was *written*, the prince cannot come onstage reading a copy of *Middlemarch* and be historical accurate. I would argue, however, that performances of Hamlet that are outfitted in contemporary dress and set not otherwise specified by Shakespeare may qualify as genuine performances (and thus instances) of the work. Had the text of *Hamlet* specified the year in which the story takes place, however, I could foresee an argument that, by implicature, anachronisms in a performance will count against that performance being a genuine instance of the play.

¹⁹ Certainly, one can imagine apparent counterexamples to what I have claimed. An author *might*, for instance, require that his poem be printed in a particular font, and a photographer might require that his photograph be printed only as 8 x 10 glossies. This point will be taken up in Chapter Five: The Categorical Dimension of Authored Works.

printed copy certainly will), the duration of a play (performances of *Hamlet* may vary wildly in duration; the work itself has no particular duration), and so forth.²⁰

As described in Chapter Two, the sorts of properties had by an authored work can be both formally-definable (aesthetic simples and complexes), and otherwise (linguistic elements, instrumentation, building materials, etc.). There will, as well, be higher-level features arising from these foundational parts, including such elements as characters, plots, melodies, and rooms, and such properties as balance, symmetry, harmony, and patterning. Where some of the properties and elements of a work will be found in the physical embodiment of a token, such as its being of a certain size or material, others will not.

As outlined in Chapter Three, a work will also have causal properties, such as those that make up its context of creation (having been created by author *a*, at time *t*, and in place *p*). And, given the relationship between a type and its tokens, such properties will adhere to both the type and the tokens of a given work. As such, where a type was created by author *a*, at time *t*, and in place *p*, tokens will be distinguished from one another by their contexts of instantiation, such that while both tokens 1 and 2 will have the context of creation $\langle a, t, p \rangle$, token 1 will have the context of instantiation $\langle i_1, t_1, p_1 \rangle$, and token 2 $\langle i_2, t_2, p_2 \rangle$. The materials that embody the work, in turn, may have different properties relating to their creation or instantiation. So, where the bottlerack that embodies a token of *Bottlerack* will have been created by some artisan, and at some particular time and

²⁰ One might argue that a play like *Hamlet* has some *range* of duration, however, imposed by the limits of the work or medium, or what could reasonably have been allowed by its author. For example, it seems impossible that *Hamlet* could be performed in fewer than 15 minutes, and it seems unlikely that a 24-hour performance would have been envisioned by Shakespeare as an instance of the play.

place, these properties will not necessarily line up with the context of creation of the work, nor with the context of instantiation of the particular token.²¹

As such, for some item to be a token of some given type, it is not enough that the item have all of the same formal properties as the type, nor even all of the same “perceptible” properties. Rather, it must be properly causally linked to the type. As discussed last chapter, for some item to qualify as a copy of the work, it must have not only the same atomic properties as the work, but also a *strong historical link* operating over all of the atomic properties of both works, such that had there been a difference in the original work, there would likewise be a difference in the copy. This is, in essence, the relationship that holds between a type and its tokens: for some object to qualify as a token of type w , it must be the case that the token has not only the same atomic properties as w , but also a strong historical link operating over all of the atomic properties. And, where this is *not* the case, the object will not be a token of w .

There are a number of ways that this duplication or multiple-instantiation may be brought about. Multiple copies of a work may be created by the original artist, with reference only to the type. This seems to have been the case, for instance, with Duchamp’s *Bottlerack*, with the first token being instantiated in 1914, and another in 1961. Perhaps more commonly, some new token is created through conventional copying. I can photocopy an article, photograph a photograph, and so on. In each case, I have duplicated all of the relevant properties of the work and have maintained the

²¹ The particular material bottlerack that embodies *Bottlerack* may, of course, be a token of another type, “bottlerack” or some such. This does not appear to present any particular problems for my view.

necessary strong historical links.²² Sculptor Auguste Rodin employed a device known as the Collas machine, which uses a pantograph system to make proportionately larger or smaller duplications of a sculpture. With the Collas machine, Rodin made enlarged and reduced tokens of several of his sculptures, including tokens of *The Thinker* as large as seventy-nine inches tall, and as small as fourteen and three-quarter inches (the original token being twenty-eight inches in height). With some kinds of works, however, tokens are made with reference to or through the intermediary of an outside item: a *notation* or a *template*.

Notations & Templates

Margolis and others have made special examination of notations, being certain objects with reference to which tokens of some particular type can be instantiated. These will include, for example, musical scores, theatrical scripts, architectural blueprints, and perhaps even paint-by-number kits. Properly speaking, a notation is itself not a token of the relevant work-type: a musical work does not consist in notes on a page, nor an architectural work in drawings on a blueprint. Rather, a notation serves as a *schema* for instantiating a token of that type. As such, it will describe, or specify, employing appropriate notational conventions, all of the relevant information required of a token to *be* a token of some particular type. That said, however, the schema may not specify, for instance, the color of brick to be used in constructing a token of some architectural type, or the style of dress to be worn by actors instantiating a token of a theatrical type. Although the bricks of a building must have *some* color, and the actors in a play *some*

²² This applies, again, to standard works of literature and photography. A black-and-white photocopy of a work of literature for which color of text is an essential property, for instance, will not qualify as a token of the same type. More on this next chapter.

style of dress,²³ such specifications are not included among the atomic properties of the work, and so are variable in token instantiations of the type.

With this said, although Margolis seems to include among his list of notation-kinds the bronze casts used by sculptors like Rodin,²⁴ it seem an important distinction can be drawn between such items and those notational-kinds discussed above. In service of this distinction, in *A Philosophy of Mass Art* (1998), Noël Carroll introduces the notion of a template:

To get from a film-type to a token performance, we require a *template*; to get from a play-type to a token performance, we require an *interpretation*. Moreover the different routes from type to token performance in theatre, versus film, explains why we regard different theatrical performances of the same play as artworks in their own right, while, at the same time, we do not regard film performances (i.e., film showings) as individual artworks. [...] Each film showing is a token of the film-type; each token showing gives us access to the film-type. But in order to present a token performance of a film, we require a template—a film print or a video cassette or a laser disk—which template itself is a token of the film-type. The token film performance is generated from the template mechanically (or electronically), in accordance with routine technical procedures. Thus,

²³ To forestall at least one possible object, it should be noted that here, I consider nudity a “style of dress”.

²⁴ Margolis (1977), 46.

the token film performance—the film showing—is not an artistic performance and does not warrant aesthetic appreciation.²⁵

In addition to the sorts of templates that Carroll lists here with regard to films, we might similarly consider compact discs (with regard to musical works and other auditory kinds), bronze casts (with regard to sculptures) engraving plates (with regard to prints), negatives (with regard to photographs), computer programs and files (with regard to electronic media), broadcast signals (with regard to television and radio programs), printing plates (with regard to printed works of literature and others), and many more besides. Again, like a notation, the template for a work is not itself a token of the relevant work-type, particularly in virtue of not having the necessary atomic properties. What marks the difference between notations and templates, however, seems essentially to be that, in instantiating a token with reference to a notation, some work (perhaps *creative* work) remains to be done by the instantiator, where as with instantiating with the use of a template, this is not the case.

Although Carroll is correct that working from a notation requires an interpretive act on the part of the instantiator, what is interpreted in this act are not the atomic properties of the work, but rather (to borrow a term from Roman Ingarden) “spots of indeterminacy”, being properties not constitutive of the work, but required of an instantiation of the work. Where an instantiator works from a template, no such spots of indeterminacy seem to be left to be filled in.²⁶ We might say that while a notation

²⁵ Carroll (1998). *A Philosophy of Mass Art*, 212-213. See also Carroll (1997). “The Ontology of Mass Art” in *Journal of Aesthetics and Art Criticism* (55:2), 192.

²⁶ We might more closely reconsider the case of sculpting molds and casts. Under my characterization of a template, there are no spots of indeterminacy to be filled in by the duplicator. However, there seems to be

provides what is *necessary* for producing a token of the type, a template provides what is *sufficient* for doing so.²⁷ Properly used, a template will allow for a perfect replicate of the work.

This said, I believe Carroll is mistaken when he states that the “template itself [the film print, video cassette, or laser disk] is a token of the film-type.” I assume that a film’s atomic properties include certain visual and auditory elements spatially and sequentially arranged over a given duration. A film print, video cassette, or laser disk will not, properly speaking, possess these properties. Rather, it will allow some individual to instantiate the token, which does. Just as a notation is not a token of the relevant work-type, neither is a template.

A Note on Translations, Adaptations, and Megatypes

Given the foundation of type/token talk in Peirce’s theory of signs, much ink has been spilled over how we are to regard signs with, say, identical meaning, but non-identical shapes or sounds. Should we regard “table” and “mensa”, for instance, as tokens of the same type, based on their shared meaning? Or should we regard them as tokens of different types, given their diverse shapes and sounds? Quoting from C.L. Stevenson, Margolis introduces the notion of a *megatype*:

nothing about a mold that is specific to any given material except insofar as that material is liquid when put into the mold and solidifies thereafter. One might use bronze, but one might also use lime Jell-O. Assuming that one of these is the *correct* material element of the final sculpture, sculpting molds and casts do not unproblematically qualify as templates. But they clearly do not qualify as notations.

²⁷ This assumes that the template is *properly* used. For instance, a film print must be properly strung into a projector, the projector turned on and faced at an appropriately-sized screen, focused, and so forth.

Two tokens will belong to the same megatype if and only if they have approximately the same meaning; so it is not necessary that the tokens belong to the same language or that they have that similarity in shape or sound that makes them belong to the same type. Thus any token of “table” and any token of “mensa,” though not of the same type, will nevertheless be of the same megatype.²⁸

The same principle, Margolis maintains, holds for works of art of the type/token sort. In order to tell if two tokens belong to the same megatype, Margolis claims, we often need to refer to the “prime instance” of the work, often the signature manuscript of the work. If a token can be said to embody the same “design” (which Margolis takes as equivalent to the same “meaning”), even if not the same language as the prime instance, then, Margolis claims, it is of the same megatype.²⁹

This characterization is, I think, problematic, though it may point us in the right direction. While it is surely an appropriate objective to explain in ontological terms the connection between Thomas Mann’s *Der Tod in Venedig* and its English translation, *Death in Venice*, according to Margolis’ view, the same connection would hold if the English text were written entirely independently of the German. And this much seems unsatisfactory. There would seem to be a much more intimate connection between an English translation and the German original than between an English text and a German text that, by happenstance, share the same meaning or “design”.

²⁸ Margolis (1980), 54.

²⁹ *Ibid.*, 53 ff.

Nevertheless, I suspect, the notion of a megatype holds some value for us. That is, while on my view the English translation of *Death in Venice* cannot be identified as the same work as what Mann wrote (because it possesses some wildly different properties), it would at least be not unintelligible for me to say that I have read Mann's book, and so my view should at least capture the right sort of intimate connection between the English translation and the original. In this regard, I suspect that we can continue to use Margolis' term, but will need to modify how we characterize it. It seems that, atomically speaking, where translations and their originals differ is in their lower-level elements (the words and sentences of which they are composed), and where they coincide is in their higher-level elements, such as their plots, characters, representations, and so on. The same again seems to be true of adaptations of a work from one medium to another. However, to rely on atomic similarity alone—at any level—will be to cast our net too broadly. Over and above similarity in their properties and elements, there must also be the right sort of *causal* connection holding between such works.

Given these factors, I think we can best roughly characterize the relation of one type to another *within* the same megatype in terms of a dominant/subordinate relationship between the types, where the higher-level elements of one work are atomically similar to those of another work, and where those same higher-level elements of one have a strong historical link to those of the other. As such, some work-type will be of the same megatype as some other work-type if the two works possess substantially similar higher-level elements and the higher-level elements of one type possess a strong historical link to those of the other. Alternatively, two *different* translations or adaptations of some work

may be said to belong to the same megatype on the basis that each has the proper derivative relationship to the *original* work.³⁰

We might also note, as was pointed out last chapter, that a proper translation of some work will also exhibit a strong historical link to the original operating over its lower-level properties (its words, sentences, and so forth), but there need not also be an atomic similarity holding between the lower-level properties of the translation and those of the original work. The same sort of relationship does not seem to hold as stringently with regard to works and their adaptations into other media.

“Singular Works” and the Allographic/Autographic Illusion

Probably the most contentious aspect of my view is my claim that *all* authored works are of a type/token sort, even those kinds that are traditionally considered singular works, such as paintings and carved sculptures. Wolterstorff, for one, argues that because painters and sculptors of that sort simply create their works rather than setting up normative conditions for their instantiation, such works cannot be considered, like literary and musical works, multiply instantiable kinds, and thus cannot admit of more than one token. However, lacking any specified conditions, it seems counterintuitive to claim that were some item *exactly* like an instance of a work, and possess the proper causal links to that work, it would nevertheless fail to have the necessary properties to qualify as another instance of the work. If it *is* exactly like a correct instance, and

³⁰ Exactly how many higher-level elements must connect two works, or to what degree of similarity, for these works to qualify as belonging to the same megatype, is an open question. Certainly, adaptations will differ as to how faithful they are to their originals. As such, while the notion of a megatype may provide some useful explanatory power in discussing the ontology of authored works, the boundaries according to which some work belongs to the same megatype as another are not clear.

possesses the requisite causal links to that work, it seems reasonable to think, it has not only the necessary properties to be, but simply just is, an instance of the work.

Although Currie defends a type/token view of works that clearly differs from my own, he contends, as I do, that all kinds of art works allow for multiple instances. This is the Instance Multiplicity Hypothesis (*IMH*) proposed in the final chapter of *An Ontology of Art*. Currie centrally claims that a copy of a painting is a correct instance of the work if the substitution of the copy for the original will not affect *appreciation* of the work, and that this will be the case if the copy *looks exactly like* the original.³¹

While Currie's view rests on the issue of appreciation, I would argue that, provided an item has the same atomic properties as some work, and all of these properties of this item are linked to those of the work by a strong historical link, then the item is a copy or correct instance of the work, which is to say, a token of the same type. Currie's claim has been taken to imply the possibility of a sort of "super-Xerox machine," and indeed before him P.F. Strawson argued,

[I]t is only because of reproductive techniques that we identify these [particular paintings and sculptures] with works of art. Were it not for these deficiencies, the original of a painting would have only the interest which belongs to the original manuscript of a poem.³²

³¹ Currie (1989), 121-123. Currie argues that for some item to be an instance or copy of a work (presumably, whether "correct" or "incorrect"), it must possess the correct causal relation to the original, or to the notation. Currie describes this causal relation as one of counterfactual dependence much like my characterization of strong historical links. See Currie (1989) 98-101.

³² P.F. Strawson (1959). *Individuals*, 231.

While mere science-fiction when Strawson was writing, several companies today have been working on the technology to do precisely what he imagined. One such company, Brushstrokes, uses optical and laser-scanning to capture in precise detail not only the forms and colors of original oil paintings, but also the depth, sweep, and force of each of the artist's brush strokes. The works are then reproduced on canvas in three dimensions with the same forms, colors, textures, and size of the original. And, although Brushstrokes does not do so, one can easily imagine this process being done *using* oil paints. Such an item would, I contend, qualify as a copy or instance of the work, a token of the type.

Although accepting such a process for the sake of argument, Noël Carroll nevertheless challenges the view that all art works are essentially multiply tokenable. To counter Currie's claim, Carroll invokes examples of earthworks such as Robert Smithson's *Spiral Jetty*, a 1500-foot coil of rocks and earth curling counterclockwise into Utah's Great Salt Lake:

Their relevance to the discussion of singular versus multiple arts is, of course, that the very vicissitudes these works undergo as they interact with their environments are part of what these artworks are about. These works are involved with processes, not merely with products. It is hard to imagine that, in the known physical universe, one could replicate the exact processes undergone by the original site-specific works by means of Currie's super-Xerox machine. Let us grant that Currie's super-Xeroxing machine can replicate a site-specific structure and its surrounding

environment at T1. Yet, it is unimaginable that physically all the events that the original undergoes from time T2 through Tn will occur in the putative replica. But if the future histories of the supposed replica do not experience the same events as the original, then the artworks are not identical.³³

The question, here, is what does and does not qualify as a part of the work. To summarize, Carroll contends that, since it is integral to the nature of an earthwork sculpture that it weather, erode, and otherwise change as a result of its interaction with its environment, and since it is all-but-impossible to recreate this precise ‘erosion’ or ‘development’ of the work, it is therefore all-but-impossible to multiply instantiate such works.

Spiral Jetty was constructed during a period of drought in Great Salt Lake, and within a few years, the water level rose, and the work was submerged. It remained hidden beneath the surface of the lake until 1999, when the water level once again dropped, and the work again became visible. Due to recent runoff from record snow in the nearby mountains, *Spiral Jetty* is currently partially submerged. Since its reemergence, both the rocks and the water of *Spiral Jetty* have changed color, such that where it was once black against red, it is now white against pink.

Certainly, it seems reasonable that Smithson would foresee his work being subject to the changes in its environment. And, certainly, it seems unlikely that Smithson would foresee the particular changes that it would undergo. However, we can ask how the case of *Spiral Jetty* is any different from that of the frescoes of the Sistine Chapel, which built

³³ Carroll (1997), 196.

up centuries' worth of patina composed of candle smoke, soot, and layer after layer of poor-quality varnish, until recently restored in the 1980s and '90s to their original condition. In both the *Spiral Jetty* and Sistine Chapel cases, the sorts of changes we seem to be talking about are changes to the material objects that *embody* the works, but not changes to the works, themselves. To explain, we might imagine a peculiar sort of individual who purchases world-famous portraits and, having hung them on the walls of his private gallery, paints moustaches on all of the faces. His having done so to Whistler's portrait of his mother, and to the *Mona Lisa*, we do not want to say that these portraits are now representations of hirsute women (or, alternatively, hirsute portraits of un-moustachioed women). Rather, I think, we want to say that these are now damaged portraits, and that the works, themselves, do not include moustaches. To put the matter another way, I suspect we want to say that while the objects that *embody* the works have been altered or damaged, the works themselves remains un-moustachioed, just as they would be had some mud been splashed upon them. The moustaches, like the mud, do not serve to *change* the works; they serve to *obscure* them. And the same seems to be true for both the build-up of patina on the Sistine Chapel frescoes, and the changes to the salt and water in the environment of *Spiral Jetty*. That is, *Spiral Jetty* (the work) has not been changed; only the physical objects that embody it have.

Carroll would likely object that *Spiral Jetty* is not like the frescoes, which, while likely created with the *foresight* that they would erode, were not created with the *intention* that they would erode. That is, where such erosion of the embodying objects of the frescoes was taken as inevitable by their creators but not thereby a part of the works, the erosion of *Spiral Jetty* is itself a part of the work. In this sense, then, *Spiral Jetty*

would be more like a performance piece than a standard sculpture. Here, however, we can ask, what is it exactly that Smithson intended? Since it is extremely unlikely that Smithson would foresee the *particular* changes that *Spiral Jetty* would undergo, it seems the most he could have successfully intended would have been *that* the work erode, perhaps over a set period of time, or with regard to such particular environmental factors as the rising and falling of water levels. In this, we might compare *Spiral Jetty* with a performance of John Cage's *4'33"*, which, as discussed earlier, consists in a set of instructions to the composer to play *no* notes over three short "movements". While we might consider the ensuing ambient noise from the audience a *part* of the performance of *4'33"*, it seems a performance of the work is variable over any *particular* ambient noise. A similar issue would seem to be the case for *Spiral Jetty*, such that while we can consider the erosion of the work a *part* of the work, no *particular* erosion need occur for the work to be so instantiated. In this, the erosion is not unlike the fonts used in standard literature or the size of a photograph: just as it is essential that, to be instantiated, a work of literature have *some* means of conveyance, and a photograph *some* size, an instance of *Spiral Jetty* must be subject to *some* erosion, but not any *particular* erosion.

As such, it seems that *Spiral Jetty* could be instantiated again, perhaps even on the same site as the original after its eventual disappearance, provided it was created with the correct atomic properties, and allowed to erode. Had the original *Spiral Jetty* eroded in a different fashion than that in which it in fact did, we should still want to call it the same work. And if this is true for the original, then I see no reason why a difference in the erosion of a second instantiation should disqualify it as an instance of the work.³⁴

³⁴ It may be argued here that *Spiral Jetty*, if instantiated in 2008, would (or at least could) *mean* something different than it did in 1970. And this much seems true. However, the same seems to be true of a 2008

Such a conclusion, however, by no means puts an end to the debate. In the third chapter of *Languages of Art* (1976), Nelson Goodman proposes another means of distinguishing multiply tokenable kinds such as literature and music from essentially singular kinds like painting and sculpture. He calls *allographic* those works which admit of multiple genuine instances, and *autographic* those works which, even where duplicated exactly, do not. To put the matter another way, autographic works admit of *forgeries*, and allographic works do not, where a forgery is some item “falsely purporting to have the history of production requisite for the (or an) original of the work.”³⁵

On Goodman’s theory, a correctly-spelled copy of a work of literature, for instance, will qualify as a genuine instance of the work, where a copy of a painting, however perfect, will qualify only as a forgery. Goodman’s reasoning is that “an art seems to be allographic just insofar as it is amenable to notation,” and is otherwise autographic.³⁶ In his impressive theory of notation, Goodman’s qualifications for notational systems are largely syntactic and semantic in nature, each amounting to a system of characters with specifiable rules of use. In this, Goodman’s concept of a notation seems to have a good deal of overlap with Margolis’, above, though architecture (with its blueprints) and theater (with its scripts) come out at best as quasi-notational in Goodman’s sense.³⁷ In all, Goodman categorizes literature and music as allographic arts, and sculpture (both carved and cast), printmaking, and painting as autographic arts.³⁸

performance, say, of Shaw’s *Arms and the Man*. Yet as we do not, I think, want to say that a 2008 performance and the inaugural 1894 performance are performances of *different* plays, we should not want to say that the 2008 instantiation of *Spiral Jetty* is a distinct work from the original instantiation.

³⁵ Goodman (1976), 122.

³⁶ *Ibid.*, 121.

³⁷ See *Ibid.*, 199-201, 218-221.

³⁸ Goodman also hesitantly includes dance as an allographic form, given the developing use of labanotation (named for Rudolf Laban) at the time of his writing. Since Goodman’s writing, however, dance became largely fractured into two camps, one following the tradition of Laban in its focus on body mechanics, and

With this said, Goodman's system of classification—or, at very least, his basis for the dichotomy of allographic and autographic categories—runs into some immediate counterexamples, even by his own admission. He states, for instance, that “even the most exact copy [of a print] produced otherwise than by printing from that plate counts not as an original but as an imitation or forgery.”³⁹ Presumably, then, printing a copy from the original plate *will* qualify as an authentic instance of the work, despite printmaking being a non-notational form. Where a work's being allographic entails its admitting of multiple instances, and a work's being autographic entails the contrary, what are we to make of printmaking, which on Goodman's admission admits of multiple genuine instances, but which does not employ a notational system as Goodman defines them?

To remedy this apparent problem, Jerrold Levinson, in “Autographic and Allographic Art Revisited” (1980), attempts to save Goodman's theory from Goodman. After examining the problems of Goodman's approach in depth, he proposes the following condition:

A work of art (and the artform it belongs to) is autographic(3) *iff* the identity of genuine instances of the work is *not at all* determined by identity of character in a notation or compliance with a character in a notation.⁴⁰

the other following the tradition of Isadora Duncan in its focus on a “body-liberating aesthetic”. With a further developing synthesis of these camps, labanotation has largely fallen by the wayside. See Sparshott, Francis (1993). “The Future of Dance Aesthetics”. *Journal of Aesthetics and Art Criticism* 51(2).

³⁹ Goodman (1976), 114.

⁴⁰ Levinson, Jerrold (1980b). “Autographic and Allographic Art Revisited” in *Philosophical Studies* (38:4), 376.

As such, an allographic work or form is one in which genuine instances are determined either wholly or partially by its notational character. This will include literary, theatrical, musical, and dance forms, but not sculpture, painting, and printmaking, which have no notational character.

While still resting on the issue of genuine instances, and so in the spirit of Goodman's project, on Levinson's interpretation, the classes of autographic and allographic forms are not coextensive, respectively, with the classes of forgeable and non-forgeable forms. Levinson argues, rather, that we can find cases of forgery in both autographic and allographic forms of art as Goodman conceives them—where they differ is in *how* genuineness is determined. Where Goodman's characterization of the allographic and autographic forms, on its face, does not allow for genuine copies of sculptures and prints (even those made using the original templates), Levinson's interpretation has no such implication. Rather, it allows for standard cases of prints made from printing plates and sculptures cast from molds to count as genuine, while those copies made without the use of the proper templates will only qualify as forgeries.

Levinson distinguishes between two sorts of forgery: *referential* and *inventive*. Referential forgeries are those that directly copy some pre-existing work (and so, in a loose sense, "refer" to the earlier work), while inventive forgeries are those that purport to be *by* some artist who did not in fact create the work. Where inventive forgeries are relatively common in art (such as Han van Meegeren's infamous Vermeer forgeries), most referential forgeries are probably not forgeries of artworks, but forgeries of currency. In both sorts of cases, the history of production of the object is other than what it purports to be, but where autographic forms allow for both referential and inventive

forgeries, allographic forms seem to only allow for the inventive sort. That is, if I make a copy of a literary, musical, or theatrical work, and present it as a work of the artist whose work I am copying, I have not thereby made a forgery. I have, rather, simply instantiated a token of the type. However, Levinson argues, if I do the same with a painting or sculpture, I have not made a genuine instance of the work, because I have misrepresented its history of production. As Levinson puts it, “the notion of essential structure is inapplicable to painting [and presumably to sculpture and the other autographic forms] as it presently exists. There simply is no structure-capturing notation for painting.”⁴¹ With no structure-capturing notation, Levinson contends, there is no way to check an instance against the essential structure prescribed by the notation—indeed, there is no essential structure.

Although I believe Levinson’s distinction between referential and inventive forgeries is both valid and valuable, and I believe that Goodman’s original notion of declaring something a forgery according to a misrepresentation of its history of production is correct, I think both Goodman’s initial ontological distinction between autographic and allographic kinds, and Levinson’s reimagining of it, are mistaken. While it seems patently true, as Levinson states, that we have no standard structure-capturing notation for painting, it seems strange to say that, by implication, there is not essential structure of paintings *to be* captured.

We might ask, what would it mean to say that paintings have no essential structure? Presumably by this we would not mean that any given arrangement of shapes, colors, and the like would as easily qualify as an instance of the work, or would be substitutable for the work—in other words, that all of the formal and material properties

⁴¹ *Ibid.*, 378.

of the work are *inessential*. Instead, I suspect that Levinson wants to say that because there is no structure-capturing notation available for painting, we simply have no means to distinguish the essential features of a painting from its inessential or accidental features. As such, it would seem to follow that we could not reliably make a “perfect” copy of a painting, and so could not have multiple genuine instances of it. However, this seems to be largely an *epistemic* issue, and it seems premature to draw a metaphysical conclusion based on this epistemic limitation.

To recall from above, I contend that any given work has essential atomic properties, both formal and material, and that the physical objects that embody tokens of these works will have some same, some different properties of that sort. What seems to be the difference between some work that employs notations or templates (such as music, theater, or cast sculpture), and some work that does not (such as painting or carved sculpture) is that in the former, there exists some object with reference to which the essential elements of a proper token can be established, and, in the latter, there is no referent by which what is essential to a work can be easily distinguished from what is accidental to its embodiment. This is not to say, however, that a painted or sculpted type may not *have* essential atomic properties to be distinguished from the accidental properties of its embodiment; rather, we simply have no independent means to determine what they are.

Ensuring that what one is writing or printing qualifies as a genuine instance of a poem, or that some performance is a genuine instance of a musical or theatrical work, is a relatively easy process: one simply needs to check it against the notation. Ensuring that one is creating a genuine instance of a painted or carved type, however, allows for no

such easy procedure. Nevertheless, where an exact duplicate of such a work can be created, including both its formal properties (shapes, colors, size, duration, etc.) and its material ones (paint, canvas, marble, brick, and so on), it seems that the duplicate has all of the manifest properties required to *be* an instance of that work. Granted, where there are accidental properties in the original, those same accidental properties will appear also in the duplicate, but as this duplication of accidental properties would not seem to have a bearing on, say, tokens of a novel or token performances of a sonata, I cannot see how their duplication in these other sorts of works should make any difference.

With forms admitting of notations, we can, indeed, partly determine if some object is genuine by referring to its notation (we will, of course, also need to establish the correct strong historical links). With other forms, however, we refer not to a notation, but to an *exemplar*, which in most cases will be the original token. On my view, where some object possesses the same atomic properties as the exemplar, and the correct strong historical links can be established, that object will simply *be* a token of the same type.

With this said, most of us, I suspect, would much rather see the original token than some other token instance of a painting: we would single it out as being of *particular* value. And I do not mean to argue against this intuition. However, I contend that the same is true for those forms that admit of notations. That is, where we value, say, *Hard Times* as a work of literature, we would nevertheless single out Dickens' handwritten manuscript as being of particular value. The sort of value that the manuscript has which subsequent tokens do not, however, is not a value of the work *qua* work, but a value of the *object* in which the work is embodied. That is, we would value the manuscript because Dickens' own hand touched it, penned it, and so forth, in much the

same way that we would value a handwritten letter by Dickens. The manuscript is all the *more* valuable because it is so historically connected with the work that it embodies. It is, in other words, some historical property of the object that we are valuing over and above the work that it embodies. And the same, I contend, would be true for a famous painting that we could properly duplicate.

Goodman argues, “The only way of ascertaining that the *Lucretia* before us is genuine is [...] to establish the historical fact that it is the actual object made by Rembrandt.”⁴² Goodman is correct that we need to ascertain that the object was made by the artist purported to have made it, but, I contend, the object we should be concerned with is not the *physical* object, but the *abstract* object identified as the *work*. Just as Dickens *made Hard Times*, irrespective of when any particular copy was printed, so too should we say Rembrandt *made Lucretia*, regardless of how many copies of it are made. If Rembrandt did *not* make *Lucretia*, then we are dealing with, in Levinson’s terms, an inventive forgery.

It might be contended at this point that the foregoing comparison of works like Rembrandt’s *Lucretia* with those like Dickens’ *Hard Times* is a flawed one. That is, it might be argued, a painter’s actual handiwork—the traces of his manual skill—are part of the painting in a way in which the writer’s manual particularities—his handwriting, say, or typing—are not a part of the novel. In other words, it might be argued, it is essential to being an instance of some painting *P* that the object be fashioned by the artist’s own hand.

This would be a very unusual requirement, indeed. To understand why, let us imagine an artist, *A*, who has lost the manual dexterity in his hands. Let us further

⁴² Goodman (1976), 116.

imagine, however, that *A* has found an assistant, *B*, who is capable of following the artist's every direction perfectly, without providing any personal input. Now, if a painting is made in a case such as this, to whom do we want to attribute the work: to *A* or to *B*? I suspect what we want to say is that the painting is a work by *A*, but perhaps constructed or crafted by *B*. Although this example is admittedly contrived, the arrangement very closely describes how many 'singular' sculptures and installations are made, especially those built on a large scale. For example, sculptor Mark di Suvero is renowned for his modern sculptures composed predominantly of steel I-beams. However, Suvero himself does not maneuver the I-beams into place. Rather, Suvero directs those who operate the cranes and other heavy machinery needed to fabricate the work. Still, like our imagined painter, I believe we want to attribute the work to Suvero, and Suvero alone, regardless of who physically manipulated the composing materials.

On my account, then, most forgeries of authored works will be of the inventive sort, as any *exact* duplicate of a painting, sculpture, or other "singular" work will qualify as a genuine instance of that work. An inexact duplicate will be an inventive forgery because it will be purported to be an instance of a work which it is not, for it does not have (all of) the atomic properties essential to that work. We do not, however, have to entirely abandon the notion of referential forgeries of authored works. Rather, we can find, I think, two main sorts of referential forgeries: those that exactly copy some previously-existing work, but credit the creation of the work to someone other than the original author (an inverse of the inventive forgery); and those that exactly copy some previously-existing work, but purport it to be the original token. In the former case, the forger will be misrepresenting the context of creation of a work; in the latter, its context

of instantiation. In neither case, however, should the copy be discounted as a genuine instance of the work—it merely misrepresents the work’s history of production in one way or the other. In the end, a copy is a copy, whether authorized by its original creator or not.

Discussion on forgery of art has been a lively topic in aesthetics literature, and there remain many nuanced and inventive approaches that demand answers from my view. I endeavor to consider one such approach, established in a series of papers by Mark Sagoff, but to do so requires first outlining the final factor in my ontological account, the categorial dimension of authored works, and so this will have to wait until the next chapter.

Some Points of Clarification

Before moving on, it is worth taking a moment to address some potentially worrying issues arising from what has been said in this chapter. First, throughout the foregoing discussion, I have referred to “exact” duplicates, and it might rightly be pointed out that my use of “exact” requires some further explanation. That is, in discussing an “exact” duplicate, do I mean a molecule-for-molecule simulacrum? Do I mean some item that is simply indiscernible from the original to the trained eye? Need it remain indiscernible forever, or only be so at the moment of being made?

Given my account of creation as the selection and arrangement of pre-existing properties and elements, it would seem that the degree of exactitude required for being an instance of some work, or an exact copy of some pre-existing token, is determined by what properties and elements *could* reasonably have been selected and arranged by the

work's author in creating that work. As the vast majority of authors are not working on a microscopic scale, say, in selecting and arranging atoms, this degree of exactitude exceeds what would be required for some item to be an exact duplicate of an original. As such the ultimate test would seem to be whether the copy instantiates those properties and elements selected and arranged by the author, and not whether a trained eye could distinguish two such copies. The central issue, as my argument in further chapters will illustrate, hangs on what was *created* by the author—that is, what the artist is *responsible* for. What constitutes the authored work is what was brought about by the artist's creative act, and not how the embodying object changes over time, for unless selected and arranged by the artist in the creative act, such alterations do not constitute alterations to the authored work *per se*, but, like splashes of mud on a painting, serve only to *obscure* the authored work.

Here, the defender of a view of object-specific or inherently 'singular' works will beg to differ. After all, he has on his side a deeply-ingrained set of common beliefs regarding art objects that are not easily dispelled, no matter how coherent and self-consistent the alternative. For example, the *Mona Lisa* is generally regarded as a strictly singular—and, moreover, physical—object, an object that has itself *changed* over the centuries, as it has faded, built up a patina, developed craquelure, and so on. The work, says the object fetishist, has changed over time, and damage to this object, he will contend, constitutes damage to the *work*. On my view, these changes do not alter the work *per se*, but only the vehicle for the work. With neither side gaining nor losing ground, a stalemate might reasonably be called, with the fetishist claiming that all I have managed with my type/token account is to provide a coherent and self-consistent

alternative to his own. However, as my view flies in the face of many ingrained folk beliefs held by both aestheticians and the public at large, it will seem decidedly revisionary by comparison.

On this basis, we might endeavor to make a distinction between some item's being an *art work* and its being an *authored work, per se*. To this point, I have been discussing the class of art works as a subset of the class of authored works, with the latter also encompassing such disparate items as bicycle racks and bathtub designs. An alternative view, however, is that authored works should be considered as entirely distinct from art works. This is not to say that a work of literature or painting must be considered exclusively as *either* an art work *or* an authored work, but rather that its properties *as* an art work will not necessarily be coextensive with its properties *as* an authored work. Instead, they may (and in most cases *will*) overlap. That is, what makes some item an authored work will not necessarily be what makes it an art work, though there will certainly be some commonalities between these conditions.

As our choice is now between a revisionary view of art works and a view that adds an entirely new category of ontological kinds, I shall continue to lean towards the former in my discussion, first as it simplifies discussion of authored works, and second as it requires less ontological commitment. Ultimately, however, I believe that either view will work as well, and be equally coherent and internally consistent, within the domain of copyright.

CHAPTER FIVE

The Categorical Dimension of Authored Works

Introduction

In previous chapters, I have investigated the *atomic*, *causal*, and *abstract* dimensions of authored works. In this chapter, I will discuss the fourth ontological factor I believe is critical in contributing to the copyrightability of works: the *categorical* dimension. To begin, I will outline the theory proposed by Kendall Walton in his seminal paper “Categories of Art” (1970), and explain its relevance to the present project and application to the wider domain of authored works. After proposing what I believe is a problem for his stated theory, I will proceed to show how multiple works belonging to mutually-exclusive categories can be embodied in the same physical object. Finally, I will return to the issue I promised to revisit at the end of last chapter: the relevance of the categorical dimension of works to the problems raised by forgery. In particular, I will outline and analyze an interesting and intuitive argument proposed by Mark Sagoff that to assess a forgery as an instance of the work it copies is to incorrectly assess the work. I will show that while Sagoff’s argument is sound when applied to some kinds of forgery, it falters with regard to others.

Categories of Art

Perhaps one of the single-most influential articles in twentieth-century aesthetics is Kendall Walton’s “Categories of Art”, which has had direct or indirect repercussions on nearly every topic in the field. Walton’s central thesis is that the aesthetic properties that a work actually possesses are those that are found in it when it is perceived correctly.

Responding to views that a work's history plays no role in its aesthetic evaluation, Walton contends that "(some) facts about the origins of works of art have an *essential* role in criticism, that aesthetic judgments rest on them in an absolutely fundamental way."¹

Following Frank Sibley, Walton roughly distinguishes a work's non-aesthetic properties from its aesthetic ones. Of the former sort are such familiar properties as colors and shapes, pitches and timbres—the sorts of properties I discuss as "aesthetic simples" in earlier chapters. Of the latter sort are a wide array of properties, including some of what I refer to as "aesthetic relationals" such as balance, symmetry, patterning, and the like, and such properties as grace, beauty, tension, and sentimentality. Walton also includes among the aesthetic properties "representational" and "resemblance" properties, which Sibley ignores, and which I classify as high-level atomic *entities*. In the end, however, Walton admits to only rough delimitation of the boundaries of these categories, and so, one imagines, is open to some revision.

Again following Sibley, Walton takes it as true that aesthetic properties arise or emerge out of a work's formal or non-aesthetic properties. Walton diverges from Sibley, however, by contending that a work's aesthetic properties depend not only on its non-aesthetic ones, but also on which of its non-aesthetic properties are "standard", which are "contra-standard", and which are "variable".

Walton's standard, contra-standard, and variable properties are to be understood as properties relative to perceptually distinguishable categories of works of art, including media, genre, styles, forms, and so on.² A feature of a work is *standard* with respect to

¹ Walton, K. L. (1970), "Categories of Art" in *Philosophical Review* (79:3), 337.

² *Ibid.*, 338-339.

some category just in case it is among those features that tend to determine category membership. Conversely, a feature of a work is *contra-standard* with respect to some category just in case it is among those features that tend to *negate* category membership. With the category of paintings as an example, then, a standard property might be *flatness*, where a contra-standard property might be *being kinetic*. Likewise, then, another standard property of paintings would be *being static*, and a contra-standard property, *having protruding materials*. Where admitting of such, the converse of a standard property will typically be contra-standard as regards a particular category. A host of other features, however, are neither standard nor contra-standard, but *variable* with respect to a given category, and do not tend to determine or to negate category membership. In the category of paintings, this will include such properties as colors, shapes, size, dimensions, and so forth.³

Some properties standard for a given category will be standard as the result of limits to a medium, where others will be standard as a result of certain “rules” or conventions for producing works in that category. Works in musical categories, for instance, may be limited in their range of pitch, due to the instruments used, or in their tempo, due to physical abilities of their performers. But they may also be limited by conventional rules of composition, such as counterpoint.

For a feature to be contra-standard is not simply for that property to be rare with respect to some category. Rather, contra-standard features are *misfit* properties, and their appearance within a category often seems shocking, upsetting, or controversial. Clear examples are black-and-white paintings and film without movement. Where a work

³ As Walton notes, some characteristics will be variable as regards a particular category, such as size or tempo, but a certain *range* will be standard.

features too many such contra-standard properties, we have difficulty viewing the work in the relevant category. Where a contra-standard feature becomes more prevalent in a category, however, it may become variable, or a new category may be recognized in which that feature is standard, as happened with the case of kinetic sculptures in the 1950s and '60s.

To perceive some work as being a work in a certain category, such as that of paintings, is, on Walton's view, to perceive the "*Gestalt*" of that category in the work. So, to perceive a work as a painting involves perceiving the *Gestalt* of standard painterly qualities in that work—its being flat, static, and so on. The same will hold true for tighter categories such as that of impressionist paintings, paintings in the style of Cézanne, and so on, each with its own particular *Gestalt*. The standard features of the category are perceived combined into a single *Gestalt* quality. So perceiving a work, Walton argues, involves more than momentary *recognition* of the *Gestalt* quality—an "ah-ha!" moment—rather, it is a continuous state. Moreover, he contends, we can in some instances simultaneously perceive a work in several categories, provided the respective *Gestalt* qualities of those categories are not mutually exclusive.

Whether we view a work in one category or another may be influenced by a number of factors: what other works we are familiar with; what others have said regarding works we have experienced; and how we are introduced to that particular work. If one is unfamiliar with paintings, generally, or with impressionist paintings, or with the paintings of Cézanne, one will be likewise unfamiliar with the *Gestalt* of that category, and so will not perceive the *Gestalt* of that category in the work. Similarly, if one has been misinformed about the standard qualities of some category, one is unlikely to

perceive the true *Gestalt* of that category in a work. And, if one is told that the work before him is a Cézanne painting, and one is familiar with the *Gestalt* of that category, one will be likely to perceive it within that category. What remains to be determined, however, is whether this is the *correct* category for viewing the work.

Walton argues that in at least some cases it is *correct* to perceive a work in a certain category, and *incorrect* to perceive it in other categories: our judgments of it when it is perceived in one category are likely to be *true*, and in others *false*. Although he does not provide us with a precise method for determining into which category or categories a work is correctly perceived, Walton proposes four factors that weigh towards it being correct to perceive some work, *W*, in some category, *C*.

First, Walton contends, the presence in *W* of a relatively large number of features standard to *C*, and the absence of features contra-standard to *C*, count towards *W* being correctly perceived in *C*. Assuming some object is predominantly flat, composed of paint on canvas or wood, and has no protruding objects, then, all other things being equal, the object is probably correctly perceived in the category of paintings.

Second, Walton contends, if perceiving *W* in category *C* means the work will be more interesting, more valuable, or more worth experiencing, than had *W* been perceived in some other category, then all things being equal this counts towards *W* being correctly perceived in *C*. A given Dadaist work, for instance, may come off better when perceived in the category of paintings, than in the category of literature, despite the inclusion of literary elements. It will likely be all the more interesting or valuable perceived in the category of Dadaist paintings, than the category of representational paintings. As such, all

other things being equal, the object is probably correctly perceived in the category of Dadaist paintings.

Third, if *C* is the category in which the artist of *W* intended or expected *W* to be perceived, this counts towards *W* being correctly perceived in *C*. So, although perceiving *W* in the category *C'* may result in a more interesting or valuable work, if the artist was intending *W* to be perceived in category *C*, it seems on its face faulty to perceive the work in *C'*. Of course, if *W* is the *first* Dadaist painting, it seems a stretch to imagine that the work should be correctly perceived in the Dadaist painting category. After all, even if the artist imagined such a category, he couldn't likely expect his *audience* to perceive his work in that category.

As such, finally, if *C* is a category with which the society in which *W* was produced and presented is familiar, and is the category in which the artist's contemporaries would have, or would likely have, perceived the work, this counts towards *W* being correctly perceived in *C*.

Walton further contends that the third and fourth factors (the historical conditions) tend to outweigh the first, and certainly the second, factor. Again, if it were the case that correctly perceiving a work depended crucially on perceiving it within the category such that it comes off best, we could simply perceive each work in its *own*, uniquely occupied category. Every work would be artistically flawless. However, as we want to allow for reasonable cases of artistic failure, such *ad hoc* conditions are not an option. Instead, we want to consider a work, at least in part, against a background of the author's intent, and within the category in which his contemporaries would have perceived the work.

Categories of Authored Works

As mentioned several times in earlier chapters, my view is agnostic towards many of the “aesthetic” properties with which Walton is primarily concerned, such as that of a work’s being *graceful*, or *beautiful*, or *elegant*. As such, given Walton’s thesis, it might reasonably be asked, why am I employing Walton’s theory as one of the cornerstones of my own? The reason is that the category into which an authored work *properly* fits can have an enormous impact on that work’s copyrightability, and the degree to which that copyright might be said to be infringed by other works.

As mentioned above, Walton’s taxonomy of properties differs from my own, as laid out in Chapter Two. Again, Walton restricts his class of *non-aesthetic properties* to formal properties such as colors, shapes, pitches, and the like, and this is roughly coextensive with my class of “aesthetic simples”. Walton’s class of *aesthetic properties* includes other formal properties such as balance, symmetry, and patterning, which I call “aesthetic relationals”, as well as such properties as grace, beauty, tension, and sentimentality.

Notwithstanding these taxonomic differences, like Walton, I have argued that certain properties and entities depend on certain other properties and entities. In particular, for example, we would both agree that a work’s being balanced would depend upon its having certain other formal properties, such as shapes, colors, and pitches, in particular arrangements. There is, however, at least one sort of property that I consider which Walton does not. Interestingly, Walton makes no mention of material properties, such as particular instrumentation, or being composed of paint, marble, or brick. It seems, however, that such material properties would contribute to a work’s aesthetic properties

(in Walton's terms) in much the same way as the work's base formal properties. It also seems that material properties are often standard, contra-standard, or variable relative to particular categories. That is, being composed of paint seems straightforwardly standard to the category of paintings, being composed of lime Jell-O seems contra-standard to the general category of sculptures, and being performed on stringed instruments seems variable to the category of classical sonatas. Given this, it seems odd to me that Walton makes no room for material properties in his discussion of artistic categories. On the letter of his theory, such properties seem necessarily excluded, though they seem to fit quite well with the spirit of his theory. As such, I expect the theory could be reconfigured without a great deal of trouble to accommodate material properties.⁴

Now, as the class of "authored works" that make up the domain of potentially copyrightable objects outstrips that of the class of artworks, we need to likewise consider the other sorts of objects to which copyright may apply. In particular, we need to consider what copyright calls "useful articles", being items having "intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."⁵ Certainly, categorial issues apply as easily to utilitarian and manufactured works as to the domain of artworks. Indeed, if anything, standard categories of utilitarian articles are even more widely recognized than those of artworks. That said, where standard and contra-standard properties of artwork categories tend to be shaped by convention, rules, and limits of the respective media, the standard and contra-standard properties of utilitarian categories tend to be shaped more by functional (and, in some cases, legally

⁴ It is worth noting that Walton elsewhere does take account of material properties and their importance to a work, esp. in Walton, K. L. (1979) "Style and the Products and Processes of Art" (in Berel Lang, ed., *The Concepts of Style*); however, his doing so is not an attempt to explicitly include such within his theory of art categories.

⁵ Copyright Act of 1976, §101, reproduced in Cohen et al. (2006b), 8.

mandated) considerations. Whether one is creating a bathtub, or a boat hull, or a ballpoint pen, the size, shape, and materials will heavily depend upon that item's intended use, and such functional considerations will, I believe, tend to be standard across utilitarian categories. Further, where one is creating an item that may present potential safety or public concerns, such as a building, a vehicle, or an appliance, the law will mandate standard guidelines. And category membership seems to be determined by largely the same considerations as those of artistic categories. That is, whether some object should be classified as a hammer will be determined by (i) the number of standard and contra-standard properties that object has relative to the hammer category, (ii) whether the object comes off best in the hammer category (i.e. whether it hammers well); (iii) whether its creator intended it to be seen in the hammer category; and (iv) whether the creator's contemporaries (his customers, perhaps) would have seen the object in the hammer category.

With the properties standard and contra-standard relative to given utilitarian categories being determined largely by functional and legal constraints, the properties *variable* relative to a utilitarian category will include all those properties *not* standard or contra-standard relative to that category. That is, where properties standard relative to the hammer category will include, for instance, restrictions on shape, size, and material, what color the hammer is seems entirely variable, and disconnected from that object's ability to perform its intended function. However, where the value we place on an artwork seems, on Walton's theory, to be largely influenced by that work's properties that are *variable* relative to its correct category, the value of a hammer *qua* hammer seems more heavily dependent on that object's having certain properties that are *standard* relative to

the hammer category. This said, as copyright seems to exclude considerations of *value*, this distinction between artistic and utilitarian categories appears to make no great difference so far as copyright is concerned. As with the issue of material properties, I expect that Walton's theory is not damaged by this distinction between artistic and utilitarian categories, nor do I expect it to have any particular impact upon my own theory.

Mutually-Exclusive "Correct" Categories

I believe there is, however, a question that Walton leaves unanswered, and which does risk damaging his theory: how are we to deal with mutually-exclusive properties arising from viewing a work within categories, each of which seems to have equal claim to being the "correct" category in which to view the work? To illustrate this problem, let us consider a work such as Picasso's *La Celestina* (1903). Here, we might ask, under which category (or categories) should the work be perceived? Certainly, we should consider it a work of *art*, but this will do us little good in determining the work's properties. Given the wide berth of such a category as *artworks*, almost all properties will, of necessity, be deemed *variable* properties. That is, whether a work is made of a certain material, is performed or static, is visual, auditory, or otherwise, does not seem, in itself, to count towards or against some item's being an artwork.

So, rather, we might consider *La Celestina* within a tighter category, that of *paintings*. Certainly, here, we can more easily identify classes of standard, contra-standard, and variable properties. Standard painterly properties will include that of being composed of paint, that of having been painted on canvas, board, or other suitable

surface, and that of having been so painted by means of brushing, splattering, dripping, or other such painterly conventions. Properties contra-standard to the category of paintings will include, for example, that of being kinetic, that of having depth beyond the texturing of brushstrokes, and perhaps that of including materials other than that of paint. Variable properties will include the work's colors, its shapes, its representations, its size, and so on. Certainly, the category of *paintings* is intuitively a correct category in which to view *La Celestina*, but it is still rather a broad category.

We might, as such, go further and consider *La Celestina* within the more finely-grained category of *paintings by Picasso*. However, because of the several "periods" that make up Picasso's *oeuvre*, the standard, contra-standard, and variable properties associated with *paintings by Picasso* will be largely the same as those associated with the category of *paintings*, generally. With this said, we might rather consider *La Celestina* within the category of *Picasso's blue period*. The blue period, making up Picasso's painted works from 1901-1904, might reasonably be characterized by the same standard properties as those of the *paintings* category, but additionally by a prevalence of blue and green hues, and the depiction of prostitutes, beggars, and other societal outcasts. Leaving out peculiar *ad hoc* categories, generally speaking, it seems, the more fine-grained the category, the more precisely identifiable the relevant formal properties, and therefore, the aesthetic properties.

With this in mind, we might then consider *La Celestina* within the even more restricted category of *paintings by Picasso in 1903*, which will also include *The Old Guitarist*, *The Blind Man's Meal*, *The Tragedy*, *La Vie*, *Poverty*, and his controversial portrait of Angel Fernandez de Soto, *The Absinthe Drinker*. Coming mid-way in the blue

period, there are likely to be features standard to Picasso's 1903 paintings that are not standard for, say, his 1900 or 1905 paintings. On Walton's view, this would seem a good candidate for a "correct" category for viewing the work.

Consider, however, that we might also view *La Celestina* within the broader category of *early twentieth-century paintings*, a category with seemingly equal claim of "correctness". That is, whether viewed in the category of *paintings by Picasso in 1903* or in the category of *early twentieth-century paintings*, *La Celestina* seems to have roughly the same proportion of standard-to-contrast-standard properties. As well, it seems reasonable to think that Picasso himself could have intended or expected the work to be viewed in either, or both, of these categories, and his contemporaries, too, may have done so. And the work could, it seems, come off roughly equally well, whether viewed in one of these categories or the other. The problem that arises, however, is that viewing *La Celestina* in the category of *early twentieth-century paintings*, or in the category of *paintings by Picasso in 1903* give rise to very different—indeed, mutually-exclusive—aesthetic properties. Considered in the latter category, the image of the blind procuress represented in the painting seems indecorous and detached. Considered in the former category, however, *La Celestina* seems vividly personal, and perhaps even dignified. With each category seemingly having equal claim as the "correct" category in which to perceive the work, each set of properties arising from so viewing the work seems to have equal claim to being the properties that the work *actually* possesses. However, I contend, as a work cannot reasonably be thought to be both detached and personal, both indecorous and dignified, *La Celestina* cannot be said to possess all of these qualities.⁶

⁶ It may be contended that the viewing categories may be fused without general contradiction if the more specific one is given priority—that is, where there is a clash between the properties relative to the category

As noted above, Walton contends that a given work might be *correctly* viewed relative to a number of categories. Indeed, he claims:

The occurrence of such impasses is by no means something to be regretted. Works may be fascinating precisely because of shifts between equally permissible ways of perceiving them. And the enormous richness of some works is due in part to the variety of permissible, and worthwhile, ways of perceiving them.⁷

However, this somewhat catholic perspective carries the caveat that the aesthetic properties should not be mutually exclusive, as seems to be the case with *La Celestina*. Indeed, it carries the possible implication that the object created by Picasso in fact embodies *more than one work*, one of which is detached and indecorous, the other of which is vividly personal and dignified. And this much seems deeply unintuitive, for whatever Picasso meant to create, it seems unlikely he intended to create two mutually exclusive works with the same brushstrokes.

of *early twentieth-century paintings* and those relative to the category of *paintings by Picasso in 1903*, the latter will win out. Such a contention does seem to solve our dilemma, but, we might ask, *why* should the more specific category be given priority? As noted above, generally speaking, the more fine-grained the category, the more precisely identifiable the relevant formal properties, and therefore, the aesthetic properties. However, unlike the distinction between the categories of *paintings* and *early twentieth-century paintings*, discussed above, the classes of standard, contra-standard, and variable properties relative to the categories of *early twentieth-century paintings* and *paintings by Picasso in 1903* are identifiable with comparable ease. While identifiability of properties provides a reason for generally prioritizing more finely-grained categories over less finely-grained ones, where this heuristic does not provide a means of prioritizing categories, it remains unclear why the general rule should continue to hold.

⁷ Walton (1970), 362.

One Object, Multiple Works

As Walton discusses, whether a property of a work is standard, contra-standard, or variable relative to its correct category can have an enormous effect on that work's aesthetic effect. However, as discussed last chapter, not every property of the physical object is a property of the work that it embodies. An example already offered is the font in which a work of literature is printed. My copy of *Middlemarch* is printed in one font, and yours in another, but neither is any less a token of the type on this basis. I stated, in this and similar cases, that such a property is *variable* in token instantiations of the type. It might be thought, then, that the font in which a novel is printed is a property variable relative to the category of literature, in Walton's terms. However, this does not seem to be the case. Rather, standardly, a given work of literature *has no* font. That is, while a font is a property of the physical object, it is not standardly a property of the work of literature. And so, at least in standard cases, the font is not a property of the work *at all*. The same will be true for such properties of the physical object as page length and size, weight, and so on.

This is not to say, however, that a font *cannot* be a property of a work of literature—it will simply be so *contra-standardly*. Mark Z. Danielewski's novel *House of Leaves*, for example, is printed in a variety of fonts, and uses particular colors to highlight particular words in the text.⁸ Where font and font color are not properties of a standard work of literature, there seems ample reason to think that these *are* properties of *House of Leaves*. Properties of the embodying object, as such, may point to certain properties being properties of the embodied work, where they might not standardly be so.

⁸ In fact, *House of Leaves* is printed in several editions, the most robust featuring differing fonts, colors, images, and Braille. Other editions are in two-color or black-and-white printing (with no Braille), indicating, I think, that these are different *works*, as they include different properties.

However, determining whether a property of the object is a property of the work embodied is not always so simple a task. That a novel is printed in, say, Times New Roman font does not itself indicate one way or the other that the font is a property of the work. And that a work of literature has been printed with selected words highlighted in select colors may, as in the case of *House of Leaves*, indicate that the color *is* a property of the work, but it also may not. Some editions of the Bible, for example, print the words of Christ in red, but it seems strange to say that the color red is in any way a property of the Bible (as a literary work), or perhaps even to say that the editions that do so print Christ's words are tokens of a different *work* than those that do not.

As discussed in earlier chapters, the creative act centrally involves the selection and arrangement of elements to be included in a given work. The author of a work of literature may as easily select a particular font as not. If she so selects some font as an element of her work (say, Times New Roman), it will be printed in that font. However, if she does *not* select a particular font as an element of the work, it will nevertheless need to be printed in *some* font, and so may be nevertheless printed in Times New Roman. The same applies within other art forms, as well. What are we to make of the lime Jell-O *Thinker* example raised in earlier chapters? It seems whether or not the lime Jell-O *Thinker* qualifies as a genuine instance of Rodin's *Thinker* will depend on whether particular materials (or material constraints) were among those elements selected by Rodin to be included in the work. If apparently authentic tokens of *The Thinker* have been made with a variety of materials, this gives some weight to the idea that particular materials are not among the properties that comprise the work.⁹ The same will hold true

⁹ It may reasonably be argued, however, that, first, as Jell-O did not exist at the time Rodin created *The Thinker*, and, second, as such material would regardless have fallen outside the practices and conventions

for the properties of other media, such as the fonts associated with particular literary works: where multiple tokens can be found that vary across some property of the physical object, that property is unlikely a property of the *type* or its tokens. Conversely, however, absent authorial pronouncement or such evidence of property selection as found in *House of Leaves*, determining which properties common to all tokens (and especially where only a single token is extant) are in fact properties of the *type* will prove difficult if not impossible.¹⁰

With this said, where multiple works being embodied in the physical object of Picasso's *La Celestina* seems problematic, more general cases of the embodiment of multiple tokens in a single physical object seem less so. Indeed, in many cases, such a conclusion has great explanatory value. In his opus, *The Transfiguration of the Commonplace*, Arthur Danto wrestles with the ontological distinction between Duchamp's *Fountain* and the ordinary urinal of which it is composed:

[T]he question is whether the artwork *Fountain* is indeed identical with that urinal, and hence whether those gleaming surfaces and deep reflections [of the urinal] are indeed qualities of the artwork. [... C]ertainly the work itself has properties that urinals themselves lack: it is daring, impudent, irreverent, witty, and clever. [... T]he properties of the object deposited in the artworld it shares with most items of *porcelainerie*,

of the time, a lime Jell-O *Thinker* simply could not qualify as an instance of *The Thinker*. For such an argument to bear any great weight, however, we would have to assume that rather than failing to select any *particular* material, Rodin in fact selected a *range* of materials, either consciously or by convention, and that Jell-O falls outside this range.

¹⁰ In such cases, I suspect, we should refer to categorial conventions. That is, for example, as it contra-standard that modern works of literature be printed in particular fonts, where all apparently authentic instances of some literary work are printed in the same font, we should nevertheless consider font variable across instances of the work.

while the properties *Fountain* possesses as an artwork it shares with the *Julian Tomb* of Michelangelo and the *Great Perseus* of Cellini.¹¹

Danto and others consider the object of the urinal *transfigured* in the creative process—that the object-as-urinal has *become* the object-as-sculpture through Duchamp’s creative act. Surely, however, the story is not so simple. Indeed, such a transfiguration would rob *Fountain* of much of its controversial value and meaning. It is not enough that *Fountain resembles* a urinal, nor that it *was once* a urinal; rather, it seems integral to *Fountain* that *it is* a urinal. *Fountain*, the work, *transcends* the object’s original utilitarian nature, but without that utilitarian nature to anchor it, its meaning *as a work* is lost. *Fountain* is at one and the same time *both* a urinal *and* an artwork. However, as Danto stresses, the artwork is not *identical* with the urinal; the properties of one only *overlap* with those of the other.

On my view, the properties of the artwork will be those selected by Duchamp, while those of the urinal will be those selected by the urinal designer. Where the urinal will have a particular context of creation determined by when, where, and by whom it was created, as well as, presumably, a context of instantiation, the context of creation of the artwork *Fountain* will be composed of different such properties. The same object will embody the artwork and the urinal design without one displacing the other. Much the same story seems applicable to the wide variety of *objets trouvés* and other such works using as their materials common utilitarian objects.

Moreover, where this is true of utilitarian objects, the same principle seems equally applicable to more standard art objects. Consider, for example, an illuminated

¹¹ Danto (1981). *The Transfiguration of the Commonplace*, 93-94.

manuscript such as the Book of Kells. Considered as a single, physical object, the book embodies multiple work-tokens, including the four Biblical Gospels (a work or works of literature), and the illumination itself (arguably separate works of calligraphy and illustration). As with *Fountain* and its embodying urinal, the works of literary and visual art embodied in the Book of Kells possess different properties, dependent on their respective acts of creation. And where the Gospels will have contexts of creations differing from those of the calligraphic and illustrative works, the context of creation of the visual works will seemingly coincide with the Gospels' context of instantiation. That is, *in* creating the calligraphic and illustrative works so singularly associated with the Book of Kells, the artist or artist also instantiated the pre-existent literary works.

Similarly, a collage artist may use scraps of paper torn from a book in the creation of a new work. Where the literary work initially embodied in the physical book from which the scraps are torn may possess plots and characters, the collage composed of such scraps, even if the collage is composed of all and only scraps from that one book, will presumably possess no such literary properties. It might, however, reasonably be thought to possess the property of having whatever font and colors the book was printed in, where the literary work itself does not. In general, then, where a physical object embodies works from different categories, and where these categories have different standard, contra-standard, and variable properties, it seems all the more likely that the multiple works embodied in a physical object will be possess different properties, both from each other and from their shared physical object. And, as such, two perceptually indiscernible objects (or, indeed, the same physical object) may be correctly viewed in different—perhaps mutually-exclusive—categories.

Where the creative act centrally involves the selection and arrangement of elements to be included in a work, different creators might select different elements from perceptually indistinguishable objects, or the same object, and so create different works. As the examples of *Fountain* and the collage illustrate, viewing an item in a new category centrally consists in foregrounding or attending to different properties. And, as such, by selecting elements from a pre-existing object relative to a different category than that which the artifact's creator intended, an artist can create a new work, distinguishable from the original, yet embodied in the same physical object.¹² Although the physical object remains unchanged, the creative act of selecting particular elements to be included in the work certainly amounts to an original act of authorship.

There are a number of immediate implications arising from the above discussion that are worth briefly considering here. First, let us recall the case of *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), discussed in Chapter One. Rural brought suit against Feist for reproducing large chunks from its laboriously-researched telephone directory. The court found for Feist, arguing that there was nothing in Rural's directory that merited copyright protection. The listings themselves were of a strictly factual nature, and so outside the realm of copyrightability, while the method of arrangement of these listings was simple alphabetization, and so certainly not original to Rural. While the court's finding seems straightforwardly correct, we need not therefore come to the conclusion that white-page telephone directories are not copyrightable *per se*, only that

¹² Timothy Binkley makes a similar point in "Piece: Contra Aesthetics" (1977), though Binkley reaches this conclusion by arguing that works of art are identified intensionally, not extensionally. Binkley contends, "[A]lways what separates the readymade artwork from the 'readymade' object it was ready-made from is a simple act of indexing. [...] The Readymade demonstrates the indexical nature of the concept 'work of art' by showing that whether something is an artwork is not determined by its appearance but by how it is regarded in the artworld." (275)

they are not copyrightable *per accidens*. That is, while some object identifiable as a telephone directory may not be copyrightable *as a telephone directory*, it may be copyrightable *as something else*. We might easily imagine, for instance, an artist who chooses to include a telephone directory as the central object in an *avant-garde* sculpture. In doing so, we can further imagine, he has not selected the facts and alphabetical arrangement selected by the directory's original creators—rather, he has selected the object because of its particular place in modern society. He has selected its overall *visual* look: its size, shape, and so on. Indeed, he might claim, this *particular* directory is not critical; any similar such item would do as well. Here, the sculptor might have some claim of originality in what he has selected, where the object's original creator (who, we might reasonably contend, selected only the facts and their method of arrangement) did not. As a sculptural work, the telephone directory might have some claim of copyrightability; as a telephone directory it does not.

Next, let us recall the photographic works of Sherrie Levine, discussed in Chapter Three, and in particular Levine's *Untitled (After Walker Evans)* (1979). As earlier discussed, *Untitled (After Walker Evans)* is a photograph of Walker Evans' own photograph, *Alabama Tenant Farmer Wife* (1936). While it might be argued that Levine has created something new, we might ask, what is it about Levine's photograph, exactly, that is new? Seemingly, all that Levine has done is photograph Evans' work (thereby creating a photographic negative) and print a copy of that photograph. What is it that Levine has done that someone who publishes a book of Evans' photographs has not done? If, in creating *Alabama Tenant Farmer Wife*, Evans selected and arranged certain properties and elements as a part of the work, and left other properties of the physical

objects that instantiate tokens of the work unspecified (such as the work's size), all that Levine has done is instantiate another token of this type. Now, had Levine created a *film* consisting of nothing but frame-after-frame of Evans' photograph, she might have a better claim to having created something *new*. For instance, she would have introduced as a part of the work a particular *duration*, a property not found in Evans' photograph. Likewise, had she created a particular work of performance art, consisting in dropping a copy of Evans' photograph, she would have created something new, as such a work would attach to the physical object some particular movement (or, more probably, a range of movement)—again, a property not found in Evans' photograph. With *Untitled (After Walker Evans)*, it seems the best argument Levine would have for having created something new would be that her work (as opposed to Evans') has, say, a particular size, as having a particular size is not among the properties of Evans' work. In making such a claim, however, Levine would seemingly have to contend that a reproduction of her work at a different size is not, strictly speaking, a copy of the work. Moreover, as such, she will have to contend that her photograph possesses properties contra-standard to the category of photographs in which her audience would most likely have viewed the work.¹³

Forgeries and Categories

Before closing out this chapter, I briefly return to an issue left unfinished at the end of last chapter—the issue of forgeries. In a series of papers, Mark Sagoff has sought to

¹³ Levine may alternatively argue that what distinguishes her work from Evans' is not their relative atomic properties, which are identical, but their relative *subject matter*. That is, while Evans' photographs depict people, Levine's photographs depict Evans' photographs. Certainly, this seems to be her reasoning. However, to compare the matter with a parallel case in another medium, if I were to retype, say, *Moby Dick*, can I reasonably claim to be *representing* Melville's great novel, and not simply *copying* it? It seems, at least intuitively, that I cannot, and this being the case for literature, it is unclear why the opposite result should occur with respect to photographs.

extend Goodman's argument that some art kinds, such as paintings, are essentially of a singular nature, and so do not admit of multiple instances, and that forgeries, in particular, cannot be classified as instances of the works they copy. However, rather than resting on Goodman's notational claims, Sagoff takes up a perspective similar to that of Walton. Where Walton contends that the aesthetic properties that a work actually possesses are those that are found in it when it is perceived correctly (i.e. in the proper category or categories), Sagoff argues that to assess the aesthetic qualities of a forgery against the same class as the original is to *incorrectly* assess it.¹⁴

Sagoff's central claim is two-fold: first, that many aesthetic quality predicates are two-place relations between an object and a class of objects such that the object is implied to belong to that class; and second, that there is no significant such class that contains both the original painting and its forgeries. As such, Sagoff argues, "A forgery will not have relational aesthetic qualities [...] in common with the original no matter how closely it resembles it or how difficult it is to tell the two paintings apart."¹⁵

Following Goodman in focusing on stylistic predicates, Sagoff notes that to call a painting "geometric", for example, is meaningful only relative to a certain class of works. To say that a certain painting by Giotto has the stylistic quality of being geometric is to say that it is geometric *for a Giotto*, for example, or *for a fourteenth-century Florentine painting*, but not, *for a Mondrian* or *for a Neo-Plasticist painting*. It is part of the meaning, in this context, of "geometric", that the work is geometric relative to a certain class of objects of which that work is a member. The same principle, Sagoff argues, applies to a wide variety of aesthetic predicates. For instance, to call Audrey Hepburn

¹⁴ In particular, see Sagoff (1976, 1978a, 1978b, 1985).

¹⁵ Sagoff, Mark (1976) "The Aesthetic Status of Forgeries" in *Journal of Aesthetics and Art Criticism* (35:2), 170.

“beautiful” implies a reference class other than that implicit in saying the Taj Mahal is beautiful. “Beautiful”, as with “geometric”, should always be considered as an ellipsis for “beautiful (for such-and-such a class). As such, “geometric (for a Giotto)” and “beautiful (for a person)” mean something very different from “geometric (for a Mondrian)” and “beautiful (for a mausoleum)”, respectively, and, Sagoff contends, the same holds true for at least a wide variety of stylistic predicates.

The problem for forgeries, Sagoff holds, arises from the nature of the sortal categories in which we class works. Class membership, he argues, is significant for critical inquiry “only if it affords interesting aesthetic discriminations among many of its members not just in relation to each other but also as a class in relation to classes and categories already in use.”¹⁶ And this, Sagoff notes, is precisely how our widely-accepted conceptual framework for art criticism is organized: along “who-when-where” lines. In particular, critical discussion focuses on particular artists, particular periods, particular schools, and the like.¹⁷

According to Sagoff, then, some work, x , has a stylistic property, P , only if there is some author, school, period, place, S (a who-when-where sortal property), such that P is specifically descriptive of the class of objects picked out by S (being those works that possess this sortal property), and x belongs to that class. Two paintings, x and y , meanwhile, can have the same stylistic property, P , only if there is some who-when-where property S that picks out some class of objects which includes both x and y .

However, Sagoff contends, at least the vast majority of cases of forgery involve wildly different who-when-where properties, with the forgeries having usually been

¹⁶ *Ibid.*, 173.

¹⁷ In this, Sagoff seems very much in line with Walton’s story of category development.

created in places and times and by persons substantially distant from the creators of the original works. Thus, however perceptually indiscernible a forgery is from an original, there is no *S* such that both the original and the forgery possess it.¹⁸ To assess a forgery of a Giotto as “geometric (for a Giotto)” is to imply that the forgery belongs to the same class of works as the original (the class of Giottos, which has the who-when-where property *S*). However, as the forgery does not belong to the class of Giottos (indeed, as there is no significant class to which both the forgery and the Giottos belong), to so assess the forgery is to incorrectly assess it. That is, to say that the forgery is “geometric (for a Giotto)” is akin to saying Audrey Hepburn is “beautiful (for a mausoleum)”.

Sagoff largely restricts his discussion to forgeries distant from their originals in authorship, time, and place, but concedes that cases may be more complex than this:

If an artist copies his own painting we would not call it a forgery but another authentic art work very similar to the first. If someone of the same school, period, etc., copies the painting, we might think of it as a learning exercise rather than a fake.¹⁹

And certainly, this much seems to match with standard practice. As contended by both Goodman and Levinson, what seems to mark the difference between cases such as these and cases of forgeries is that, one presumes, neither the original artist nor the pupil is misrepresenting the work’s history of production. In cases of forgery, however, whether (in Levinson’s terms) *inventive* or *referential*, the forger does indeed misrepresent the

¹⁸ Sagoff, Mark (1978a). “Historical Authenticity” in *Erkenntnis* (12:1), 89-90.

¹⁹ *Ibid.*, 89.

item's history of production by claiming it was painted by the hand of an artist that it in fact was not. Recognizing the distinction between inventive forgeries on the one hand and referential forgeries on the other is critical to understanding how my view can answer Sagoff's challenge.

A referential forgery, we will recall, is essentially a copy of a pre-existing work by some artist other than the original, where an inventive forgery is a new work in the style of some other artist. With inventive forgeries, I believe Sagoff has the story exactly right. Put simply, to assess work *W* against the class (or, in Walton's terms, category) of *works by artist A*, where in fact *W* was created by artist *B*, it to incorrectly assess *W*. Referential forgeries, however, require more explanation. Where we are concerned with a "perfect copy" or "forgery," I contend that such an item should be *correctly* assessed in the same class or category as the work it copies.

Assuming, as Sagoff does, that we are dealing with indistinguishable objects, one copied from the other, then on my view each is an instantiation of the properties and elements selected and arranged by the original artist. As such, the referential forgery, *O'*, simply *is* a token of the same type as the original work, *O*. That is to say, it is the same work. The difference between them lies not in when, where, and by whom the *work* was created, but in when, where, and by whom it was *instantiated*. The forger *does* misrepresent the item's history of production, but what he misrepresents is the item's context of *instantiation*, not its context of *creation*. He says, in essence, that the work was created by artist *A*, and that the paint was physically applied also by artist *A*. The first part is true, the second false. As I have claimed that creation centrally amounts to the selection and arrangement of properties and elements by a given individual, the forger

tells the truth when he says that the properties and elements that make up *O'* were selected and arranged by A. If the forger has accurately reproduced this selection and arrangement of properties and elements, as Sagoff assumes, then he has not added anything new to this creation. He has not, in other words, *created* a new work. Rather, what he has done is *duplicate* or *instantiate* a pre-existing work.

While the properties that make up a work's context of creation (when, where, and by whom it was created) certainly seem to be reasonable factors to consider when assessing the work, the properties that make up a work's context of instantiation (when, where, and by whom it was instantiated) do not. For example, in artistically or aesthetically assessing a standard literary work, it seems very much appropriate to ask where the work was written, when, and by whom, as such factors seem to contribute to the work's meaning and aesthetic properties. However, it seems spurious to think that when, where, and by whom the work was instantiated have any bearing on such an assessment of the work itself. Granted, there are many ways that the duplication of a work might *obscure* that work: a work may be *inaccurately* duplicated (with typos in a literary work, the wrong color used in a print, the wrong material used in a molded sculpture), or it may be otherwise accurately duplicated but in a fashion that makes it difficult to get *at* the work (for example, while a literary work may not require any particular font, certain fonts can *distract* the reader). However, it seems clear that to assess such factors is not to assess the work itself, but rather to assess the choice of physical object used to embody the work, or the *act* of embodying the work.

This is not to say that assessing the physical object that embodies a token of the work, or assessing the act of embodying such a work, is not a common or, indeed,

legitimate activity. It is simply a different activity than assessing the work *per se*. Consider these questions posed by Levinson in his article, “Zemach on Paintings” (1987):

Is the museum that includes in its collection a particular Van Eyck happy to agree that that painting may very well form part of hundreds of other collections? Is the private patron who commissions his portrait in oil inclined to think the portrait will no longer belong to him alone if he lets the photographers in? Is the art critic about to undertake a definitive analysis of Caravaggio’s style likely to content himself with a good set of slides? Will art lovers who undertake a journey to a small town in France to view a *tableau* of Chardin they believe they have not seen suddenly realize they already have, in virtue of an excellent Phaidon book of reproductions? Will competent forgers who, having put the finishing touches on their efforts, are now preparing to pass them off as the paintings they believe they are not, suddenly understand that they needn’t bother, that no deceit is involved or called for? And, finally, will earnest restorers engaged in saving what they think of as a painting, by careful removal of varnishes, partial and conservative replacement of paint losses, painstaking filling of cracks with appropriate materials, at last comprehend that there’s no point in all that—that a new acrylic effort after good catalogue photos will do as well?²⁰

²⁰ Levinson (1987). “Zemach on Paintings” in *British Journal of Aesthetics* (27:3), 281.

Although Levinson poses these as rhetorical questions, I believe they deserve answers. First, as I assume some of the properties that constitute a painting are its size, material composition and, perhaps, texture, a photograph or projected slide of a painting certainly will not qualify as an instance of that work. At best, it will be (in Sagoff's analysis) a *representation* of the work—indeed, this is all it will be purported to be.²¹ Where indistinguishable paintings are concerned, however, I contend these *do* qualify as instances of the works in question, the new “forgery” no less than the original. What marks the difference between the two is their respective contexts of instantiation. As a *physical object*, the original instance of the work will carry considerable value over and above that of the embodied work, as we can imagine would a discovered *Hamlet* manuscript penned by Shakespeare's own hand. But this value is not a value of the work *per se*, but one of the physical object embodying the work. Just as the museum curator possessing one of Shakespeare's original manuscripts would not trade his prize for a Penguin paperback, nor would the owner of a Van Eyck original or a restorer trade his prize for a perfect copy. For the value placed on these originals, and the value the forger seeks to imitate, is not merely the value of the embodied object, but the value of the embodying one. It is the historical value that attaches to when, where, and by whom the work was *instantiated*, not when, where, and by whom it was *created*.

What is implicit in the above discussion is that the referential forger has copied a pre-existing work, where the inventive forger, strictly speaking, has not. Rather, the inventive forger has attempted to create a new work in the style of another artist. While the work of the inventive forger and that of the referential forger each possess a historical link to one or more earlier works, the *kinds* of historical links at issue are different. The

²¹ See Sagoff (1976), 176.

work of the inventive forger, I contend, possesses a *weak* historical link to some body of work created by the other artist. The work of the referential forger, conversely, possesses a *strong* historical link to some particular work.²² Although the actions of the forgers in each case are deceptive, I would contend that only one constitutes potential infringement.

This brings me to my central argument. In the next chapter, based on the *atomic*, *causal*, *abstract*, and *categorical* dimensions of authored works I have outlined, I will present my case for the conditions under which we should consider an authored work copyrightable, and the conditions under which that copyright will be infringed.

²² Here, I might point out a kind of case that straddles the clear-cut classes of inventive and referential forgeries—that of the pastiche forger. With pastiche forgery, the forger paints a new work, combining elements of existing paintings by another artist. As such, the new work is not, strictly, a referential forgery, for it “refers” to multiple works; nor is it comfortably an inventive forgery, for the forger is inventing very little. I would simply contend that the forged work possesses strong historical links to more than one work. For a particularly good example of pastiche forgery, see plates 35 and 36 of Arnau, Frank (1961) *The Art of the Faker: 3,000 Years of Deception* (Boston: Little, Brown, and Company).

CHAPTER SIX

Obtaining and Infringing Copyright

Introduction

In the preceding four chapters investigating, respectively, the atomic, causal, abstract, and categorial dimensions of authored works, I have sought to lay the groundwork for the aims of this chapter: establishing the conditions for the copyrightability of authored works, for the infringement of those copyrights, and for the creation of derivative works. As such, I will regularly refer to material from these earlier chapters in outlining these conditions. Toward the end of this chapter, I will consider a number of outcomes of these conditions, and a handful of cases selected to investigate the conditions in a real-world setting.

To begin, copyright is a proprietary claim, and as such is conceptually similar to standard property claims. How it is like, and how it differs from, standard property claims will be examined in more detail in the next chapter. For now, however, I shall take it that copyright is *a right over the products of one's creativity as realized in an authored work*. More specifically, it is the right to determine when such a work (or parts thereof) may be copied.

The Objects of Copyright

As a right stemming from the products of one's creativity as realized in an authored work, copyright is limited to what an author has in fact created. As a form of expression, *viz.* the manifestation or embodiment of an idea or ideas in a perceptible form, an authored work is to be first distinguished from the idea or ideas themselves. As discussed

in Chapter Two, ideas and their respective expressions are of ontologically distinct sorts, and ideas cannot at any point *become* expressions. Rather, they are one of the kinds of things that are *expressed*.¹ Expressions such as authored works give us *access* to ideas, but should not thereby be confused with them: the sorts of properties possessed by the former are not the sorts of properties possessed by the latter.

As a right to the products of one's creativity, copyright extends to an entity only insofar as that entity was in fact created by the author. As such, simply put, if some element of a work was not created by the work's author, the author holds no copyright over that element. Many elements of authored works, of course, were created by no one. Colors, shapes, tones, and other such atomic simples seem to exist sempiternally, and owe their origin to no human author. They are, as such, uncopyrightable. Other elements of authored works were created by man, but perhaps not by the author using them. For example, although I claim a copyright in what I am currently writing, I do not claim to have created any of the particular words I am using. Likewise, the composer of a sonata does not claim to have created any of the particular notes he employs, nor the sculptor the marble, stone, wood, or any of the other materials integral to his work. And where a musician might produce a sound never before heard by human ears, he at best claims to have *discovered* the sound.² With aesthetic simples and such base entities disqualified from copyright protection, we might ask, what is it that the copyright owner owns?

¹ Along with facts.

² I think it is worth briefly noting arguable exceptions to certain kinds of entities discussed as falling outside the realm of copyrightability. First, words are entities that conventionally associate certain letter symbols and/or sounds with certain meanings, and new words are invented all the time. About 4,000 new words are annually added to the *Oxford English Dictionary*, and these have to come from somewhere—or, more precisely, from some person or persons. Words, of course, are a paradigm case of the type/token distinction—of created abstract entities capable of multiple instantiation. Owing their origin to particular individuals, new words as used in authored works certainly seem open to ownership claims. Although specifically excluded from copyright protection by the Code of Federal Regulations (37 C.F.R. §202.1),

While I cannot lay claim to having created the particular words I am using, I *can* claim to have created their particular selection and arrangement. Indeed, as I have contended, this is precisely what creation amounts to: the selection and arrangement of pre-existing elements. The same will hold true for the musician, who selects and arranges notes and sounds, for the sculptor who combines certain materials with certain shapes, for the painter who selects particular colors of paint in particular arrangements, and so on in other media. Selecting and arranging pre-existing elements thus gives rise to *new* entities: sentences, characters, plots, and so on, in works of literature; musical phrases and melodies; architectural rooms, buildings, and cathedrals; and uncountable others.

That said, copyright does not thus extend to sentences, melodies, and cathedrals *per se*, but to such sentences, melodies, and cathedrals *as created by* some particular author or authors. For while I may lay claim to having created *this* sentence, the very same words that make up the sentence may have been selected and arranged in the very same order by some other author, and I cannot thereby lay claim to his creation, nor he to mine: his sentence, after all, was created by him, and mine by me, however indistinguishable the two might seem. To make sense of this, we must turn to talk of types and tokens, and to the conditions for the copyrightability of a work.

there seems no clear and obvious reason why new words should not on their face be afforded copyright protection.

The notes that make up musical works are similarly conventional. In musical notation, a given note represents a pitched sound with particular duration. Over time, the pitches or fundamental frequencies of notes have become more or less standardized. For instance, the note A above middle C (A4) in “standard” or “concert” pitch is measured at 440 Hz (the result of centuries of standardization). With A4 as the “central note”, all other notes in the ordinary 12-note scale are mathematically derivable based on standardized intervals between notes. (Although 440 Hz is the mathematical baseline for notes, in practice, it should be noted, performances tend to vary substantially in their precision.) That said, as a convention, there seems no reason one could not invent a new system of musical notation, representing the same, or different, sounds. Although such an author could not own the sounds represented by his new notation, nor the system *per se* (with a system as a conceptual framework most likely qualifying as an idea, and not an expression), there seems good reason to think he could lay claim to the representations themselves.

The Conditions of Copyrightability

A claim to copyright in an authored work arises from a claim to have created that work—to being responsible for the selection and arrangement of entities that compose it. As such, necessary for establishing a copyright in an authored work is establishing that no one else can make such a claim—that is, that no one else created it. For a new work to be copyrightable, it must be of a new *type*.

As established in Chapter Four, authored works are ontologically of a type/token sort, and, as such, unlike universals (at least of the Platonic sort), can be created and destroyed. And being the sort of entity that is created, any given type thus has a *context of creation*, determined by when, where, and by whom it was so created.

As tokens are tokens-of-a-type only insofar as they instantiate the properties of the type, the context of creation adheres primarily to the type, and only secondarily to the token. When a type is instantiated in tokens, these tokens carry (or have associated with them) the same context of creation as the type itself. That is, as a token is a token only inasmuch as it is a token-of-a-type, it does not represent a new creation (i.e. a new selection and arrangement of entities), but rather a mere instantiation of the created type. Thus, as the author of the work holds the copyright in the type, and as the type is instantiated in its respective tokens, the author thus holds copyrights in the tokens inasmuch as they are tokens of a type. The instantiation of the token therefore does not supplant the work's context of creation, but rather adds a context of instantiation, a property of the token, and not of the type.

One cannot trump or displace a pre-established copyright. Where an individual molds, paints, or writes an item that merely instantiates a type, the individual has no claim to having created a new work. Rather, all he can claim is that he instantiated a token of a preexisting type. He is responsible for a context of instantiation, but not a new context of creation, for what he has instantiated is some particular selection-and-arrangement *as created by* some other author. This new token of the type will not qualify for a new copyright, as it will already be copyrighted by the author of the type of which it is a token. As such, in order to obtain a copyright in a work, it is necessary that the work be of a new type, and not merely a token of a pre-existing type.

As the type is distinguished from its tokens, the claim of ownership over an authored work should also be distinguished from the ownership of the physical object that embodies the work. Although an individual might rightfully lay claim to having created a certain physical object, the physical object is not coextensive with the work itself, and as the object is to be distinguished from the work, ownership of one does not thereby extend to ownership of the other. An author might sell or give away the physical object without thereby selling or giving away his copyright in the authored work. Conversely, an author might sell, give away, or abandon his copyright in the authored work, and yet retain possession of the physical object. Again, ownership of one does not thereby entail ownership of the other.

Having thus outlined the necessary condition for copyrightability—that the work must be of a new type—let us turn now to the sufficient conditions of same. As discussed in Chapter Four, for some item to qualify as a token of a particular type, it must (i) possess the same atomic properties as the type, and (ii) possess a strong historical link

operating over all of the atomic properties of both the token and the type. If the item fails either of these conditions with regard to all pre-existing types, it will not be a token of any pre-existing type, but may thus constitute the first token of a *new* type. As such, to qualify as a new type, it is *sufficient* either that the work (i) possess atomic properties that differ from those of any pre-existing work, or (ii) fail to possess strong historical links to any pre-existing work. Let us consider these in turn.

First, for a work to possess atomic properties that differ from those of any pre-existing work is sufficient for the new work (of which the token in question is an initiator) to constitute a new type. Although atomic similarity is not sufficient to establish that two tokens are of the same type (see below), atomic *dissimilarity* is sufficient to establish that two tokens are *not* of the same type. In speaking of atomic dissimilarity, here, it should be noted, I mean *any* atomic dissimilarity, for tokens of a type, insofar as they *are* tokens of that type, are atomically identical. A difference among the properties chosen by the author will, of necessity, result in a different work, however otherwise similar the works might be.

The difficulty, here, lies in separating the essential properties of the work from the accidental properties of the physical objects that embody its respective tokens. For instance, to return to an example from Chapter Four, your copy of *Middlemarch* is easily distinguishable from my own. My copy is larger than yours, has a different cover and binding, is printed in a different font, and so on. None of these properties, however, are properties of the work (either the type or the token), but rather are the properties of the physical object in which the work is instantiated. Presumably, neither the size, cover, binding, nor font of a printing of *Middlemarch* was selected by Eliot as a property of her

work. And, as such, no such property is a property of the work *per se*. Putting aside such properties of the physical object, we can consider instead the atomic properties of the work itself: its sentences, characters, scenes, plot, and so forth. Insofar as such properties are concerned, the properties of my copy of *Middlemarch* will be identical to the properties of your copy. A copy with different words, however, will fail to be atomically identical.³ And so, such copies would constitute tokens of different types.⁴ For two tokens to differ in their atomic properties simply is for them to be tokens of different types.⁵ And so, where a work is atomically dissimilar to any previously-existing work or works, it will qualify for copyright protection, for it will constitute a new type.

Second, for a work to fail to possess *strong* historical links to any pre-existing work is sufficient for the new work to constitute a new type. This is not to say, however, that the work need fail to have *any* connection to earlier works, for no work of art exists in an influential vacuum. For art to develop, new works must grow out of what came before them, and most such chains of development are not difficult to trace. For example, the roots of Jackson Pollock's drip paintings are typically traced to surrealism, with its emphasis on spontaneous or subconscious creation. Art critic Clement Greenberg, more concerned with formalism, traces the genealogy of Pollock's work to Cubism and, before that, to the works of Cézanne and Monet, with Pollock's paintings emerging at the end of

³ Presumably, as I have stated earlier, for two works to differ with regard to their characters, scenes, or plots, they would have to also differ with regard to their composite words. Borges' "Pierre Menard", however, gives us some reason to think this may not necessarily be the case.

⁴ In point of fact, your copy of *Middlemarch* may indeed differ from my own in this way, as there are three different versions of *Middlemarch* written by Eliot. These would, as such, constitute different (though certainly closely related) works. See my "When Is a Work of Art Finished" (2008), and the section on derivative works, below.

⁵ Note that some kinds of properties may complicate, but not override, this issue. For instance, the author of a literary work might select among the properties of the work that it be always be printed in a serif font. As such, one copy might be printed in Times New Roman, and another in Garamond, but each will nevertheless be atomically identical insofar as they are tokens of a type. Similarly, a sculptor might select a certain range of size for his work, say, from 16 to 60 inches in height. An item falling outside this range will fail to qualify as atomically identical to those that fall within the range.

this chain as the purest and most essential form of art.⁶ There is probably some truth to both sides. Each of these preceding schools, likewise, finds its birth in artistic traditions that came before it, whether expanding on its predecessors, or otherwise reacting to them. This is to say that new works are *influenced* by their predecessors. And it is this sort of influence relation that I have dubbed one of *weak* historical links. Typically, a given work will have weak historical links to a *body* of pre-existing works, such that the new work does not depend in any historical way on any *particular* work from that body. Certainly, weak historical links are very common. In the realm of art, especially, when a given work possesses no such apparent links, we tend to be at a loss for how to treat the work (as in some cases of “outsider art” or “Art Brut”).⁷

However, where weak historical links are exceedingly common, strong historical links are much less so. To recall from Chapter Three, where there is a strong historical link, some property or properties of a new work depend directly on some property or properties of some particular pre-existing work, such that had the earlier work been different, so too would be the new work. Stated thus, a strong historical link may be manifest in a number of ways: a new work might *copy* a pre-existing work, or it might otherwise *respond* or *react* to the earlier work. In the former, there will be at least some atomic similarity between the works; in the latter, there may be none. However, where there is *no* strong historical link operating between works, the new work *cannot* rightly be considered a copy or instance of the pre-existing work—i.e. a token of the same type—however similar the two might be, atomically speaking. Consider again the cases

⁶ Greenberg, Clement (1961) “The Crisis of the Easel Picture” in *Art and Culture Critical Essays*, 154-157.

⁷ Indeed, under Levinson’s historical definition, such works may not even qualify as art. See Chapter Three. Where we are dealing with functionally-oriented objects, however, such as bathtubs and boat hulls, this may be less of an issue.

of the identical haikus and photographs of the Grand Canyon, discussed in earlier chapters. In each case, the new work is indistinguishable from the old, with the properties selected by the new author being identical to those selected by the old author. But a change to either earlier work would have, presumably, *no* impact upon the latter. That is, some difference in the selection made by the first author would not thus result in some difference in the selection made by the second.

Where a work possesses no strong historical link to any earlier work, regardless of how atomically similar the two might be, the new work will qualify for copyright protection, for it will be the product of *its* author's creativity, and not that of any other agent. That is, the work will have its own context of creation, and thus qualify as a new type. The test for copyrightability is essentially a test for originality, and where a work does not owe its origin to any earlier work or author, it is thus be original to *its* author.

The Conditions of Copyright Infringement

Where a work is copyrightable, it thus risks infringement. To have infringed a copyright is for some new work, or parts thereof, to depend in a special way on some pre-existing, copyrighted work. Put another way, if work *B* infringes the copyright of work *A*, then the author of *A* has some claim over *B*, or some part or parts thereof. Copyright ownership is based on a claim of having created some work (or some part thereof), and where an individual cannot claim to have selected and arranged pre-existing elements to create some new thing, he cannot therefore claim a copyright in it. Further, however, where another individual *can* claim a copyright in that thing (be it an entire work, or a part thereof), and so retains the right to reproduce it, another individual who reproduces it

without the consent of the copyright holder infringes that copyright. Establishing copyright infringement is a different matter than establishing the copyrightability of a work, though it rests on the same ontological principles. Where establishing copyrightability depends necessarily on establishing that a work is of a new type and sufficiently on establishing atomic dissimilarity or an absence of strong historical links, to pre-existing works, establishing copyright infringement is a matter of a necessary *and* sufficient condition in two parts, each being necessary, and together being sufficient. Establishing infringement requires (i) atomic similarity between the new and old work, and (ii) a strong historical link operating over the property or properties held in common between the two works.

Before turning to this composite condition, let us first consider whether either (i) or (ii) alone might be sufficient to constitute copyright infringement. As discussed in Chapter One, U.S. courts have devised tests for “substantial similarity” such that, if some new work is found to be substantially similar to some pre-existing, copyrighted work, the new work is *assumed* to have copied the earlier work. The examples of the identical haikus, and the identical snapshots of the Grand Canyon, however, show how problematic this notion is. In the former case, because of the limitations on the haiku form, it seems not altogether unlikely that two poets might independently select and arrange precisely the same words in precisely the same order. In the latter case, given the sheer number of photographs taken from any particular vantage point overlooking the Grand Canyon, it seems entirely likely that two or more photographs would appear indistinguishable. Yet in neither case do we want to claim that the newer of the works in any way depends on the older, however atomically similar they might be.

In discussing substantial similarity in Chapter One, I further raised the case of Piet Mondrian and Theo van Doesburg, each a member of the De Stijl art movement in the Netherlands in the 1920s. In particular, let us consider Mondrian's *Composition with Large Blue Plane, Red, Black, Yellow, and Gray* (1921) and van Doesburg's *Counter-Composition V* (1924). Each painting is composed of squares and rectangles colored in black, light grey, blue, red, and yellow, and each is dominated by one large, colored square (red in Mondrian's work; blue in van Doesburg's). Although van Doesburg's quadrangles are on a 45-degree angle relative to those of Mondrian's, and although van Doesburg's composition lacks the grid pattern found on Mondrian's, the two paintings are unquestionably "substantially similar". However, a claim of infringement in this case would be very likely unsubstantiated. Rather than *copying* Mondrian's piece, van Doesburg was much more likely *influenced* by it and by several others of Mondrian's works. That is, van Doesburg's work likely holds *weak* historical links to a great number of preexisting works. Were any of these pre-existing works to be different, it is unlikely that any element of *Counter-Composition V* would likewise be altered. Moreover, as both painters were working within the same school of art, they were working from the same "first principles", in this case the search for ultimate simplicity and abstraction, employing only straight lines and rectilinear shapes, the primary colors (red, blue, and yellow), and the primary values (black, white, and grey). Had the two artists *failed* to have produced substantially similar works that would be much more surprising than the fact that their works were in fact so similar. The same issue threatens to arise for artists working in any particular school. As such, we are not surprised to find substantial similarity between Georges Braque's *Viaduct at L'Estaque* (1908) and Pablo Picasso's

Maisons sur la Colline (Horta de Ebro) (1909), nor, for that matter, between Cimabue's *Madonna Enthroned* (c. 1280-1290) and Giotto's *Madonna Enthroned* (c. 1310). Nor are we surprised to find substantial similarity in works of other media where artists (writers, composers, cinematographers, and so on) are working in the same tradition, and from the same guiding principles, though the visceral effect of similarity is going to be more apparent in some media than in others.

Establishing atomic similarity is not always a simple matter. Some cases of atomic similarity will be straightforward and obvious: a photograph of a painting (or, in the case of a photorealistic painting, a painting of a photograph), a word-for-word correspondence of two literary works, or a note-for-note correspondence of two musical works. Comparing such basic entities that make up works is usually a relatively trivial matter; comparing higher-order entities such as characters, melodies, and plots, however, can be a challenge. For comparing higher-order entities requires abstraction and sensitivity, a non-trivial matter, and similarity at such a level is thus unlikely to be as apparent as it is at lower levels.

Turning now from atomic similarity to strong historical links, the existence of a strong historical link between some new work, *B*, and some pre-existing work, *A*, seems a reasonable basis for the author of *A* to claim that, had it not been for his creating *A*, *B* would be different. As such, an author might reasonably claim that where there is a strong historical link between some new work and his own pre-existing work, even where there is no substantial similarity between them, the new work *depends* upon his own as it is tied through the causal effect of a strong historical link to the pre-existing work. What he cannot reasonably claim on this basis alone, however, is that he created any part

of the new work, and *this* is what is required for a claim of infringement to hold any weight.

To illustrate, let us imagine a simple case. Taking a simple musical composition, say, Mozart's *Andante in C*, I assign each note a color value. Then, in a simple grid of squares, I fill in each square in sequence with the color corresponding to each note in the sequence of Mozart's composition. What we will be left with is a sort of visual representation of *Andante in C*, with each colored square possessing a strong historical link to a note in Mozart's piece such that, had Mozart used a different note in any particular place, the corresponding square in my painting would be a different color. However, one would be hard-pressed to find any atomic similarity between Mozart's piece and my own. The basic entities that make up each work are of fundamentally different kinds, as are any properties that arise from these entities. While one might claim my work depends in a very strong way on Mozart's, there is no reasonable claim that Mozart himself created any aspect of my painting.⁸

Strong historical links arise also in other ways so as to connect distinct works without one thereby infringing the other. For example, let us consider three Hollywood films: *Weird Science*, *My Science Project*, and *Real Genius*. *Weird Science* involves a pair of teenage technophiles who, through various technological machinations, create something of a genie, who grants them all their pubescent wishes, and, in the process,

⁸ Although the method used in my painting is fairly arbitrary, and the example itself rather fanciful, the potential connections between musical composition and abstract painting have been explored by the likes of Paul Klee and Wassily Kandinsky, and more complex and interesting such experiments are not difficult to imagine. See Duchting, Hajo (1997) *Paul Klee: Painting Music*; Kandinsky, Wassily (1919). "On Stage Composition". Where I have merely linked notes and sequences to colors in my imagined work, a more complex piece hoping to connect the visual with the musical may represent not only notes but also harmonies, melodies, and other such higher-level entities. This will further complicate matters, as discussed below. For more musical/visual possibilities, see Jerrold Levinson's "Nonexistent Artforms and the Case of Visual Music" in Levinson, Jerrold (2006). *Contemplating Art*. For more on Klee, see Case 3, toward the end of this chapter.

teaches them valuable life lessons about being technophiles. *My Science Project* focuses on a pair of teenage grease-monkeys who discover a strange device that opens time portals, and, with the help of some teenage technophiles, manage to save their high school from becoming the hub of a space-time cataclysm. In the process, the grease-monkeys learn a valuable life lesson about teenage technophiles. *Real Genius* is the story of a prodigy (read: teenage technophile) who attends MIT, and, with the help of the resident prodigy (who embodies something best described as “geek chic”), averts a gross misuse of science, and learns a valuable lesson about teenage technophiles. All three films opened in theaters within a week of each other in the summer of 1985, and each might be described as an expression of the basic plot idea: technophile(s) are disenfranchised; using their knowledge of science, technophile(s) do something amazing; technophile(s) become the subject of a valuable life lesson. Certainly, while there exist cases of amazing coincidences in similarity between popular works, this particular case seems to stretch the bounds of coincidence. It seems difficult to doubt there had been some idea-appropriation at work in the months leading to the summer of 1985.⁹ Nevertheless, one would be hard-pressed to find any similarity between any of the three works. Certainly, there is similarity between the ideas expressed, and most likely there is a strong historical link between these ideas, but as ideas are outside the domain of copyright protection, such idea-appropriation does not constitute copyright infringement. Where the test for copyrightability is essentially a test for originality, the test for

⁹ Given the amount of time it takes to produce a feature film, especially films such as these with (at the time) generous special effects needs, any idea-appropriation would have had to have occurred long before the summer of 1985.

infringement is essentially a test for *copying*, though *what* has been copied can make the difference between infringement and non-infringement.¹⁰

Just as there are difficulties in establishing atomic similarity between works, so too are there difficulties in establishing strong historical links. Problematically, just as a weak historical link may come about unconsciously (a work of art may be the result of an influence of which the artist herself is unaware), so too is it conceivable that a strong historical link may come about unconsciously. Recalling an example from Chapter Three, we can easily imagine a musician who, lost in some activity, has a tune pop into her head, seemingly from nowhere. Unable to exorcise the tune, the musician decides to incorporate it into a song. Unbeknownst to her, however, the tune did *not* just pop into her head from nowhere, but from an unconscious memory of a song she heard in the distant past. Catchy tunes, after all, have a way of sticking in one's memory. Although she would be unaware of it, the tune, thus incorporated into a new song, would not be her own creation, but that of another. That is, unbeknownst to her, it would possess not only atomic similarity, but also a strong historical link, to the pre-existing work. Indeed, this very issue has been at the center of several actual copyright cases, and has certainly contributed to the continued enforcement of the "substantial similarity" rule, discussed above.¹¹

¹⁰ We might further imagine a case where some new work has not only a strong historical link to, but also atomic similarity with, some pre-existing work, and yet fail to infringe upon the earlier work. All that is required for this to be the case is that the elements over which there operates a strong historical link are not the elements that are atomically similar in the two works.

¹¹ See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), contending George Harrison's song "My Sweet Lord" (1969) infringes the copyright on "He's So Fine" (1963), written by Ronald Mack and recorded by the Chiffons; *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477 (9th Cir. 2000), cert. denied, 531 U.W. 1126 (2001), contending Michael Bolton's song, "Love is a Wonderful Thing" (1990) infringes the copyright on the Isley Brothers' "Love is a Wonderful Thing" (1964); and *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984), contending the Bee Gees' "How Deep is Your Love" (1977) infringes the copyright on Ronald Selle's "Let it End" (1975).

Now, while neither atomic similarity, nor a strong historical link, is alone sufficient to grounding a claim of copyright infringement, each is necessary, and the two conditions, when operating over the same properties, constitute a sufficient condition for infringement. To expand, let us suppose some work, *B*, contains some element, *e*. For the sake of simplicity, let us say that the element at issue is a character, though the same principle would apply to any product of creativity as realized in an authored work. Let us further suppose that some pre-existing work, *A*, contains a character, *d*, which is atomically identical to *e*. And finally, let us suppose that there is a strong historical link operating between *e* and *d*. In such a case, I believe we can reasonably say that the author of *B* did not create *e*, for he is not responsible for the selection and arrangement of pre-existing elements to form *e*. Rather, as *e* is not only atomically identical to *d*, but also possesses a strong historical link operating between its properties and those of *d*, such that, had *d* been different in some way, so too would have been *e*, we can say that *e* is a copy of *d*. Or, to put the matter another way, *e* and *d* are tokens of a type, which has a particular context of creation, to which the author of *A*, but not the author of *B*, contributes. As the author of *B* is not responsible for creating the character, but only for instantiating it in *B* (and so contributing only to its context of instantiation), he can claim no copyright on it. As the author of *A*, however, can claim such a copyright, the author of *B* infringes this copyright by reproducing the character.

To further explicate the nature of infringement, let us suppose an addendum to the above case: that of work *C*, which contains a character, *f*, which in turn bears the same relationship to *e* that *e* bears to *d*. Because the author of *B* can claim no copyright in *e*, *C* does not, on this basis, infringe any copyright in *B*. Rather, because the author of *A*

created *d*, which is atomically identical to *f*, and *f* possesses a strong historical link to *d* (albeit via *e*), *C* infringes the copyright of *A*, just as *B* does. Where atomic similarity is a transitive (and symmetric) property, and a strong historical link is likewise transitive (though not symmetric), copyright infringement, which requires both atomic similarity and a strong historical link, is not transitive (nor symmetric).

Though the above case deals specifically with copying a character, a claim of infringement can be made on the basis that the *whole* of a work has been copied, or on the basis that a *part* of a work has been copied. Where the whole of a work has been copied, every element of the copy will be atomically similar to, and possess a strong historical link operating over, corresponding elements in the original.¹² In such a case, the copy will simply constitute a token of the same type as that copied. Where something *less* than the whole of the work has been copied, however, copying can occur at essentially any level of the work, from the basic atomic complexes that make up the work to such higher-level elements as characters, plots, melodies, and harmonies. And where copying a sentence or a musical motif requires copying its composite words or notes, a melody may be copied without copying a single note, and a character may be copied without copying a single word. Because some such higher-order elements do not reduce to their composite elements, the copyright of the work in which they originally appear can be infringed in either the same media (as in literary translations), or across media boundaries (as in adaptations).¹³

¹² Keeping in mind, as per the above, that “every element of the copy” refers to the essential elements of the work *per se*, and not to the accidental features of the physical object in which the work is embodied.

¹³ It should be noted that copyright *infringement per se* should not be confused with *violation* of the copyright holder’s rights. This topic will be discussed in the next chapter.

Some Immediate Consequences

Before moving on, I think it worth pointing out a few apparent but, I suspect, non-obvious consequences of the foregoing analysis. First, it seems, one can neither copyright nor therefore infringe a style, *per se*. Style is a slippery concept, but whether we are concerned with that of a particular artist, or that of a school or period, a style consists in certain features *characteristic* of the *works* of an individual or group by which such individuals or groups can often be *identified*.¹⁴ As such, unlike lower-order elements such as sentences and fields of color, or higher-order elements like plots and melodies, a style is not an aspect of some particular work, but rather of a body of work. Copyright, however, is work-specific. And although a style might be *exemplified* in a particular line, string of sounds, or syntax, such a line, string of sounds, or syntax is not *constitutive* of the style. While an individual might imitate a style *by* copying some particular work, so too might one imitate a style without copying any aspect of any particular work, but by drawing on the stylistic *gestalt* of an artist's or school's body of work.¹⁵ In the latter sort of cases, the elements of a new work will almost certainly possess weak historical links to a body of work in a given style, but need not possess any of the strong historical links required for a charge of infringement.

A second notable consequence is that, on the arguments provided, some notations, like musical notations, would not qualify as infringements of their respective musical

¹⁴ As such, we might consider styles as major categories under the categorial analysis of Chapter Five. Beyond the rough sketch at a definition provided, the particulars of style are the subject of ongoing debate. To begin, see Arnheim, Rudolf (1981) "Style as a Gestalt Problem" in *Journal of Aesthetics and Art Criticism* (39:3); Goodman, Nelson (1984) "The Status of Style" in *Ways of Worldmaking*; Robinson, Jenefer M. (1985) "Style and Personality in the Literary Work" in *Philosophical Review* (94:2); Walton (1979); Wollheim, Richard (1987) *Painting as an Art*; Carney, James D. (1991) "Individual Style" in *Journal of Aesthetics and Art Criticism* (49:1).

¹⁵ Where the former is the basis of referential forgeries, discussed in Chapter Four, the latter is typically the basis of inventive forgeries.

works, or vice versa. Where the sounds played in a musical performance may centrally depend on the notes of a musical notation (and thus have a strong historical link between them), sounds have no atomic similarity whatsoever to little black marks on a page.¹⁶ Although creating a musical score by carefully observing a performance would not thus infringe a copyright in the performance,¹⁷ employing such a notation to create a new performance, however, would infringe the original work, as the performance would both possess the requisite strong historical link, and (unlike the notation) atomic similarity between the elements over which there is such a link.¹⁸

The same basic issue arises in the digitization of visual or auditory works. At base, a computer file consists in a series of zeros and ones which, when processed by the correct program, can be used to fairly faithfully reproduce the original work. However, where a painting has color and a song has sounds, a series of zeros and ones has neither. Granted, the string of zeros and ones will possess a strong historical link to the original work, but it will possess no atomic similarity. Creating such a file will not, thus, infringe the work so digitized, though, as with musical notation, the use of a program to reproduce the work *from* the digital file will infringe, for the image or sound produced will indeed possess atomic similarity to the original work, and, via the digital file, a strong historical link operating over these atomically similar elements.¹⁹

¹⁶ This said, the case might be made that a performance *does* infringe on the basis of melodies, harmonies, or some other higher-order entities that may be expressed both visually and sonically. However, I suspect such a case would require a great deal more explanation than I can give room to here.

¹⁷ See Chapter One, footnote 21, regarding the case of Murphy and Taffy.

¹⁸ This, of course, assumes that the musical performance was not itself based on musical notation.

¹⁹ The digitization of a literary work poses different issues. Converting standard written English (or another language) to computer code likewise results in a string of zeros and ones which, given sufficient skill, could be *read*. Although the zeros and ones will possess no atomic similarity to the original literary work, as a readable language, a sufficiently skilled reader could get at the story represented, and so to the plot, characters, and the like, which do not reduce to a particular language. As such, it might reasonably be

Finally, recall that, on Margolis' account as discussed in Chapter Four, a type can be destroyed when all of its tokens, and all means of producing new tokens, have been destroyed. This is a contentious matter.²⁰ However, this much seems clear: having destroyed all tokens and all means of producing new tokens (whether by notation or by memory), any copyright worries regarding the respective type likewise disappear, for if new tokens cannot be instantiated, any copyright remaining in the work cannot be infringed. Assuming there is no means of accessing the earlier type, in whole or in part, whether by tokens (including partial entokening in another work), by notation, or by memory, there can be no new work that possesses any strong historical link to the earlier work. As such, any new work that appears following the destruction of the old type, even if atomically indistinguishable from it, will nevertheless constitute a new type, with a new context of creation. And, as such, the new work will not infringe any copyright of the earlier work, even assuming that such a work still exists.

Derivative Works

The observant reader will notice in the above a peculiar asymmetry between the conditions for copyrightability, and those for copyright infringement: where the conditions for copyrightability require that the new work be of a new type, the conditions for copyright infringement do not require that the infringing work be a token of the same type as the infringed, only that the infringing *element* of the work be of the same type as

contended that the plot, characters, and other such higher-order elements have been infringed, possessing both strong historical links and atomic similarity between those elements so linked.

²⁰ The contentiousness tends to depend upon one's ontological assumptions regarding art, whether works of art are of a type/token or universal/particular sort, whether certain art kinds are inherently singular, and so forth, as discussed in earlier chapters. To begin, see Young, James O. (1989) "Destroying Works of Art" in *The Journal of Aesthetics and Art Criticism* (47:4), pp. 367-373.

the infringed element. Indeed, it seems, a new work might infringe an old work (or any number of old works) and yet qualify for copyright protection of its own. In fact, this is very much the case, and opens the door for an unusual sort of authored work: the derivative work.

Each of Jacques-Louis David's *Oath of the Horatii* (1784), Igor Stravinsky's *Histoire du Soldat* (1918), and Nashville's Schermerhorn Symphony Center are "derivative" in the ordinary sense of drawing on themes, motifs, and styles of works in the classical canons of their respective media. Despite being derivative, as such, these neoclassicist works are rightly highly regarded. Less highly regarded, but equally derivative in the ordinary sense, are the countless works that draw on the oeuvre of a particular genre or tradition, and yet contribute nothing of note of their own. Here, the term "derivative" is used derogatorily. Still, whether highly regarded or not, these ordinarily derivative works possess weak historical links to a body of traditional works, but, at least in these cases, no strong historical links to any particular works in those bodies.²¹ As such, they do not qualify as infringements of works on which they draw, and thus provide no particular worries for the domain of copyright. In the domain of copyright, however, "derivative" means something more precise.

As discussed in Chapter One, the 1976 Copyright Act defines a "derivative work" as:

a work based upon one or more preexisting works, such as a translation,
musical arrangement, dramatization, fictionalization, motion picture

²¹ Though the libretto of *L'histoire du soldat*, written by C.F. Ramuz, does possess a strong historical link to a particular Russian folk tale, but which, as it may not constitute any single work, may not itself be copyrightable.

version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work or authorship, is a “derivative work”.²²

Perhaps the most common sort of derivative work, so defined, is today found in the cinema. Film adaptations of literary works have been common since the days of silent film (*Frankenstein* (1910); *The Phantom of the Opera* (1925); *Metropolis* (1927)). Films today, however, are also regularly based on graphic novels (*V for Vendetta* (2006)), video games (*Resident Evil* (2002)), stage plays (*Rent* (2005)), and even such unexpected sources as magazine articles (*Live Free or Die Hard* (2007)) and trading cards (*Mars Attacks!* (1996)). Films are also more and more frequently based on earlier films.

Regardless of how faithful an adaptation may be, however, it will not qualify as a token of the same type as its source. Even Gus Van Sant’s 1998 remake of Hitchcock’s classic *Psycho* (1960), purportedly an attempt to recreate the original, shot-for-shot (including reproducing unintentional errors), falls well short of so qualifying. Where two works differ atomically, they will not be tokens of the same type. However, where one work represents an attempt to recast, transform, or adapt another, a special sort of relationship seems to hold between the two. In Chapter Four, I characterized this relationship as a dominant/subordinate one, where the higher-order elements of the new work are the same as (or, at least, approximate), and possess a strong historical link to, those of the pre-existing work. So characterized, I co-opted Margolis’ term *megatype* to

²² Copyright Act of 1976, §101, reproduced in Cohen et al. (2006b), 5.

categorize this relationship between a derivative work and that upon which it draws. As such, a derivative work represents a special sort of infringement, and further includes translations, cover songs, different “editions” or “versions” of a work, and many others.

Such megatype-derivative works, however, fall within a larger category, which I shall refer to as derivative works, generally, which involve what I termed in Chapter One “elemental appropriation”.²³ Falling between tokens of a type and entirely non-infringing works, derivative works infringe, and yet are themselves copyrightable. Such works are distinguishable from the works that they infringe, for they include elements newly created by their authors and/or lack elements created by the authors of the works that they infringe. This will be the case for each of the megatype-derivative works discussed above, but also for a host of other works, in a variety of ways, including: Roy Lichtenstein’s *Takka Takka* (1962), a painting based on an anonymous comic-book panel; Richard Hamilton’s *Just what is it that makes today's homes so different, so appealing?* (1956), a collage made using images clipped from a number of sources; Duchamp’s *L.H.O.O.Q.* (1919), consisting of a moustache and title penciled onto a color reproduction of Da Vinci’s *Mona Lisa*; and Bob Thomson’s *Crucifixion* (1963-4), a modern symbolist restyling of Lucas Cranach the Elder’s *Crucifixion* (1503). In each case, the author clearly infringes upon the earlier work, but at the same time adds something new, and, more importantly for this discussion, something copyrightable. However, this copyright extends only to those elements of the work created by its author.

²³ Megatype-derivative works fall within this larger category because the pertinent issues pertaining to megatype-derivative works apply also to other works in the larger category, and there appear to be no further issues pertinent to the megatype-derivative works that, for the purpose of this study at least, serve to distinguish it from the other works in the more general category.

Let us consider the case, outlined earlier in this chapter, of works *A*, *B*, and *C*. Recall that *B* copies a character from *A*, and *C* copies the same character from *B*. If only a character has been copied, work *B* is surely a derivative work (for certainly a work cannot consist solely of a character). Where work *C* copies the same character from *B* that *B* copies from *A*, however, *C* does not infringe *B*, but rather infringes *A*. That is, because the author of *B* did not *create* the character, the author of *B* does not hold a copyright in the character. The same will be true of each of the derivative works discussed above, as regards those elements infringed from other works.

Cases

Having thus outlined the conditions for copyrightability and copyright infringement, and the peculiar category of derivative works, let us consider a handful of real-world cases selected to illustrate these issues. These cases are drawn from two sources: from the parade of cases discussed in depth in Chapter One, there used to illustrate the central concepts of copyright law; and from Paisley Livingston's "Nested Art" (2003), a fascinating study of what it means for one numerically distinct work of art to be "nested" in, or form a part of, another.²⁴ It should be noted that a number of the works to be discussed are not (and, in many cases, have never been) protected by legal copyright, either because legal copyright did not exist at the time of the works' creation, or because their copyrights have since expired and the works have fallen into the public domain. The duration of copyright is a topic I shall investigate in the next chapter, but for the moment

²⁴ Livingston, Paisley (2003). "Nested Art" *Journal of Aesthetics and Art Criticism* (61:3), pp. 233-245. Livingston's article is certainly worthy of greater analysis, and while I have chosen these cases because Livingston's subject matter and my own intersect at various points, such points of intersection are incidental to our respective programs.

I am concerned simply with the copyrightability of works, and infringement of such, on the basis of the conditions outlined in this chapter.

Case 1 The Johannes Vermeer painting usually called *A Lady Seated at the Virginal* (ca. 1675) depicts a painting hanging on the wall behind the main subject. The model for this picture-within-the-picture was Dirck van Baburen's *The Procuress* (1622).²⁵

Unfortunately for Vermeer, *A Lady Seated at the Virginal* serves as a rather straightforward case of infringement as I have outlined it. While Vermeer's representation of *The Procuress* is not an entirely accurate one—it does not include the extreme top or right of the image created by van Baburen, and is rendered in a more simplified style—the overall figures, their shapes, positions, expressions, and so forth, are for the most part the same as those found in van Baburen's original. The strong historical links seem clear. With this said, however, as Vermeer's reproduction of the painting serves only as a background element to his larger work (albeit a predominant one), and is rendered in a more simplified style than the original, *A Lady Seated at the Virginal* is clearly a derivative work in the sense I outlined above. As such, while Vermeer's work infringes on van Baburen's, these elements aside, Vermeer's painting is itself copyrightable.

Case 2 Alva Studios created a small-scale reproduction of Auguste Rodin's *Hand of God*. Robert Wininger later made similar reproductions,

²⁵ Livingston's Case #3. See Livingston (2003), pp. 233-234.

purportedly from the Rodin original possessed by the Metropolitan Museum of Art. Alva contended that Wunninger infringed its copyright.²⁶

Rodin's *Hand of God* is a 37" tall marble sculpture with probably four instances produced by him and his studio. Alva's reproductions are, conversely, 7" in height, and composed of marble resin. Unlike other works created by Rodin, there is little reason to think that Rodin failed to select either a particular material or a particular scale for *Hand of God*. As such, Alva's reproductions are most likely derivative works, infringing the overall form of Rodin's original, but introducing new material and scale.²⁷

Given this, a reproduction of Alva's reproduction could infringe Alva's copyright only if the new work is of the same scale and/or material as Alva's. If it reproduces only the overall form, it will not infringe Alva's copyright (for Alva has no claim to the form), but will nevertheless infringe Rodin's copyright. If, however, an individual makes a reproduction based on Rodin's original alone (i.e. without reference to Alva's), as Wunninger claims to have done, even if the resulting work is of the same scale and material as Alva's, Alva has no claim of copyright infringement. For while the new work will have atomic similarity to Alva's, with regard to scale and material, it will have no strong historical link operating between the works. That is, Alva will not possess a copyright over that form in that scale and size, *per se*, but only over that form in that scale and size *as created by Alva*.

²⁶ Discussed in Chapter One (*Alva Studios, Inc. v. Wunninger*, 177 F. Supp. 265 (SDNY 1959)).

²⁷ Note that, even had Rodin failed to select a particular scale and particular material as elements of *Hand of God* (as seems to have been the case with *The Thinker*, discussed in earlier chapters), it may nevertheless be the case that Alva *had* selected a particular scale and particular material. In such a case, Alva would still have created a derivative work.

Case 3 Paul Klee's painting, *Die Zwitschermachine* (1922), has been the subject of at least three musical compositions by twentieth-century composers: Gunther Schuller's "The Twittering Machine," from his *Seven Studies on Themes of Paul Klee* (1959); Giselher Klebe's *Die Zwitschermachine* (1950); and Peter Maxwell Davies's "The Twittering Machine" from his *Five Klee Pictures* (1959-1962).²⁸

Klee's painting, almost childlike in its whimsical, simple style, depicts four stick-figure birds,²⁹ perched upon the warped axle of a crank, all suspended over what appears to be a stage. Each bird's mouth emits a strange tongue or, perhaps, song, depending on how one chooses to interpret Klee's doodle, helping to individuate the creatures.

In her article, "A Concert of Paintings: 'Musical Ekphrasis' in the Twentieth Century" (2001), Siglind Bruhn provides an interesting analysis of Klee's painting and of the compositions by Schuller, Klebe, and Davies.³⁰ As Bruhn describes them, the compositions of Schuller and Davies each proceed through various rhythmic twitterings, characteristic of bird calls, as if produced through the acceleration and deceleration of the turning of Klee's crank. However, this seems to be the extent to which the respective compositions are connected to Klee's painting: in neither case does there seem to be any atomic similarity, nor any strong historical links, operating between any particular

²⁸ Livingston's Case #11. See Livingston (2003), p. 234.

²⁹ H.W. Janson describes them as "sham birds [that] look like fishermen's lures, as if they might entrap real birds." See Janson, H.W. (1969) *History of Art*, Revised Edition, p. 532

³⁰ Bruhn, Siglind (2001). "A Concert of Paintings: 'Musical Ekphrasis' in the Twentieth Century" in *Poetics Today* (22:3), pp. 551-605.

properties of composition and painting. Klebe's *Die Zwitschermaschine*, however, does present an interesting case.

Where Klebe distinguishes himself is in focusing on the individuality of the birds, as they are rotated on the axle to musical effect.³¹ Bruhn describes Klebe's composition as a "four-part character sketch,"³² with each of four symphonic movements portraying the voices of Klee's birds, from left to right on the axle. Where the first bird stands erect with a tongue/song resembling an exclamation mark, the first movement is "assertive and self-assured."³³ Where the second bird from the left is the only one looking down, the second movement of Klebe's composition "portrays the dejected, literally crestfallen posture of the second bird."³⁴ According to Bruhn, the third movement reflects the eeriness and madness of the third bird, and the fourth "raw aggression" in a compressed section, mirroring the barbed tongue/song and stature of the final bird.³⁵

Given this analysis, it might foreseeably be argued that the fourth movement in Klebe's composition is short, just as the fourth bird in Klee's painting is short, and moreover, that the former is short *because* the latter is short—thus establishing the atomic similarity and strong historical links required of my account of infringement. Likewise, it may be argued that Klebe's first movement is assertive and self-assured because Klee's first bird is assertive and self-assured, and so on down the line. However, it seems abundantly clear that the shortness of Klebe's movement is a shortness of duration, where the shortness of Klee's bird is one of stature. Although analogous, such properties are clearly not the *same* property held in common between the works, and this is what my

³¹ *Ibid.*, 593-597.

³² *Ibid.*, 597.

³³ *Ibid.*

³⁴ *Ibid.*, 598.

³⁵ *Ibid.*

account of infringement requires. That said, the properties of Klebe's first movement and Klee's first bird presents more of a challenge, as assertiveness and self-assuredness are not so easily analyzed as shortness. However what seems immediately apparent is that Klebe's movement and Klee's bird are not assertive and self-assured *in the same way*. I can imagine an argument contending that assertiveness and self-assuredness are higher-order aesthetic properties not to be identified with the lower-order properties giving rise to them and, as such, the assertiveness and self-assuredness of the birds on the one hand, and the movement on the other, are in fact the same aesthetic property. However, given the complexity of argument required to settle the issue, I will do no more here than state that I believe such an argument *could* be made, but for the sake of this project continue to remain agnostic towards such properties.

Case 4 Kansas-based Rural Telephone Service Co. publishes local residential telephone directories. In 1983, Feist Publications (now owned by Yellow Book USA) produced a series of larger area-wide directories, in which were included a large number of listings from the Rural directories. When Rural filed suit against Feist, Feist conceded having copied the listings from Rural's directories, but contested their copyrightability.³⁶

Feist's claim was that Rural's directories consisted entirely of facts and a method of organization that Rural could not claim to have created (alphabetization). As facts do not

³⁶ Discussed in Chapter One (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)).

owe their origin to authors, nor does alphabetization, the court found in the case of *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991) that Rural's publications were not protected under copyright: if a work expresses no creativity on the part of its author, then that work is unprotected by copyright. Without copyright, there is nothing to infringe. This much is reflected in my own approach to the matter. However, what goes largely undiscussed in the legal literature surrounding this case is that, in addition to the factual entries copied, Feist also reproduced four fictitious entries meant to ferret out infringers.³⁷

Although a fictitious listing of name, street address, and telephone number may not, as such, constitute a *character* to be copyrighted, a fictitious name, address, and telephone number seem together to represent the requisite creative selection and arrangement needed for a copyright in an otherwise non-copyrightable work.³⁸ As Feist included such listings in their area-wide directories, their doing so does in fact appear to constitute infringement.

Case 5 In 1962, author A.A. Hoehling published *Who Destroyed the Hindenburg?*, a novelized account of the zeppelin's destruction at the hands of saboteur Eric Spehl. In 1972, Michael MacDonald Mooney published *The Hindenburg*, a more literary work explicating the same

³⁷ Such fictitious entries are known as Mountweazels, named for Lillian Virginia Mountweazel, the subject of a fictitious entry found in the *New Columbia Encyclopedia* (1975 edition).

³⁸ Note that, like individual words, discussed in footnote 2 above, while names are specifically excluded from U.S. copyright protection by the Code of Federal Regulations (37 C.F.R. §202.1), there seems no clear, non-*ad hoc* reason why this should be the case.

sabotage theory. Mooney's book served as the basis of the screenplay to the Universal film, *The Hindenburg* (1975).³⁹

The court found in *A.A. Hoehling v. Universal City Studios, Inc.* (1980) that, although Hoehling's work was sufficiently creative to qualify for copyright protection, what Mooney and Universal had copied were either facts, or otherwise non-copyrightable elements.

Certainly, as in Case 4, the facts expressed in an otherwise copyrightable work are themselves unprotectable. What *is* protectable, however, is what one *does* with the facts—that is, *how* the facts are represented or expressed. The presiding judge noted that, had Mooney or Universal reproduced any part of Hoehling's account verbatim, they would have infringed Hoehling's work. Without doing so, however, the court found they were blameless. What the court overlooks, however, is that the arrangement of particular words in a particular order is not all that a novelized account adds to the facts presented. As discussed in Chapter Two, a literary work (even a novelized account of purported facts) contains not only scenes and events and their chronology, but also a *plot*, which reduces to none of these. That is, where scenes, events, and chronologies are factual matters, a plot is not. A plot consists in how the scenes, events, and their chronology are represented or expressed in the work: how the storytelling rearranges events of the chronology; which events are included, and which left out; how scenes are structured and arranged to connect with others; and how scenes or events are lengthened or protracted to

³⁹ Discussed in Chapter One (*A.A. Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)).

bring about rhythm, tension, and other effects. As such, had Mooney or Universal copied the plot (or elements thereof), they would have likewise infringed Hoehling's copyright.

CHAPTER SEVEN

The *Right* of Copyright

Introduction

As I stated in Chapter One, the goal of this project has been to develop a comprehensive, coherent, and consistent account of the ontology of authored works—the objects of copyright—upon which could be built an ethical account of the *right* of copyright. In the preceding chapters, I have outlined the atomic, causal, abstract, and categorial dimensions of authored works, and, on their basis, provided accounts of the copyrightability of works and the infringement of these copyrights.

In this chapter, I will first consider the dominant theories of the right of copyright, and show why these approaches falter, for reasons both internal and external to those theories. Having shown what the right to copyright *cannot* be, I will then sketch a theory of the right of copyright that accords with the nature of authored works and their creation, and further overcomes the impediments that face the leading theories. Finally, I will consider two limitations to current U.S. copyright law—“fair use” and the expiration of copyright—to determine if, and to what degree, these limitations will apply also to my theory of copyright.

What Kind of a Right is Copyright?

Approaches to grounding the “right” of copyright come in a variety of forms, but the two most prominent contenders, both historically and theoretically, have been the framing of copyright as a natural right, and the framing of it as a positive instrumental right.¹

Copyright as a Natural Right: Locke’s Theory of Acquisition

Outlined in his *Second Treatise on Government* (1698), Locke’s natural-rights approach to property—called by some his *theory of acquisition* or *theory of appropriation*—is a familiar one: essentially, given that one owns oneself, one has a right to one’s property insofar as it is the product of one’s labor:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable

¹ A distant third is the position that intellectual property rights in general, and copyrights in particular, arise from the author’s *personality*. This model of framing intellectual property rights finds its genesis in the work of Georg Wilhelm Friedrich Hegel, particularly *Elements of the Philosophy of Right* (1822). As the position is something of an outlier, however, given space restrictions, I shall put the Hegelian view to the side. For interesting reading on the personality justification of copyright, however, see Hughes, Justin (1988). “The Philosophy of Intellectual Property” 77 *Georgetown Law Journal* 287; and DeLong, James V. (2002). “Defending Intellectual Property” in *Copy Fights: The Future of Intellectual Property in the Information Age* (Adam Thierer and Clyde Wayne Crews Jr., eds.) (Washington, DC: Cato Institute).

Property of the Labourer, no Man but he can have a right to what that is one joined to, at least where there is enough, and as good left in common for others.²

Locke's challenge is to provide an account of how something unowned can in effect become private property. According to Locke, one has a sole right to (and property in) one's own person. The commons—the Earth and its inferior creatures—are owned by no particular person. However, by altering some element of the commons through labor (by “*mixing* one's labor” with it), one lays claim to the result, and so gains a right in it—a claim against all others. This is provided that the laborer has not, in so doing, exhausted the commons of this resource.

Locke's natural right in property might thus be considered a desert. That is, where one has no natural right to the commons, as such, but rather only the liberty to exploit it, one *deserves* a right to the fruits of his labor by virtue of having *earned* that property. The resultant property is thus removed from the commons, and placed outside the reach of others' liberty, just as the man himself is outside the reach of others.

Thus, for example, as a settler in a new land, unowned by anyone, I pick a plot and stake it out, marking it as my own. On Locke's theory, I do not as yet have a natural right to the land, for I have done nothing to it—it remains in its natural state, and thus belongs to the commons. However, upon tilling the land and sowing the fields with seed, I have “mixed my labor” with what was once common to all, and so have claimed a right in it. Moreover, in chopping down trees to build my house, I now own the wood; and in building my home upon the plot of land, it seems, I now own the land it occupies.

² Locke, John (1698). *Two Treatises of Government*, §27.

Locke's theory, however, leaves us with a number of unanswered questions when considering particular cases. In the example just discussed, having tilled the fields and built upon the land, how far does my ownership stretch? It seems clear, on Locke's view, that I own the wood that makes up my house, and the soil I have tilled, but do I likewise own the minerals to be found a meter or a mile beneath my homestead? Do I own the water in the creek that runs through my farm? What if I have changed its course? If, as it enters my farm, I add fluoride to the water in the creek, do I own the water as it emerges *from* my farm (and perhaps as it enters a neighboring farm)? When my fluoridated water enters the sea, do I own that, too?

Robert Nozick raises a similar issue in his acclaimed work, *Anarchy, State, and Utopia* (1974):

If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice? Perhaps the idea, instead, is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created.³

As Nozick points out, however, value-added theories of property face issues of their own. In particular, why should one's ownership extend to the whole object and not just the

³ Nozick, Robert (1974). *Anarchy, State, and Utopia*, p. 175. Wendy J. Gordon argues that Nozick's tomato-juice example does not result in ownership of the ocean because such would violate the "scarcity" proviso, discussed below. See Gordon, Wendy J. (1993). "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" *102 Yale Law Journal* 1533, p. 1565.

value-added aspects? We might further ask, value for whom? Nozick contends that spray-painting a piece of driftwood pink will make it less valuable, but presumably this isn't true for the one who painted it. Chopping down a cluster of trees to build a home will surely make the material more valuable to the homeowner, but not to the nature lover. A value-added theory of property, it seems, will have to account, at least, for differing values, and so will require some sort of value metric, an intimidating project, to be sure.

Even if such a metric might be systematized, however, it seems such an approach will still lead to unpalatable (or, at least, counterintuitive) results. For example, if our intrepid pioneer, limited in his knowledge of farming, tills soil incapable of producing anything but weeds, do we want to say that this valueless land is not (indeed, never was) his? If he builds his house of the wrong sort of wood, which warps, making the house uninhabitable, or collapsing it into a pile of useless rubble, do we want to say that he no longer owns it? I think we do not.⁴

A better result might be found not in a value-added approach, but rather in a “transformative” or “artifactual” approach along the following lines: some item, which was previously unowned, comes to be the property of an individual when that individual, through his labor, *transforms* that item into something it was not before—an artifact. By tilling the field, the pioneer transforms it into a farm. By chopping down trees, and

⁴ Locke himself may have disagreed with this conclusion. He notes, “[H]e who gathered as much of the wild Fruit [...] by placing any of his *Labour* on them, did thereby *acquire a Propriety in them*: But if they perished, in his Possession, without their due use [...] he offended against the common Law of Nature, and was liable to be punished[. T]he same *measures* governed the *Possession of Land* too: [...] If either the Grass of his Inclosure rotted on the Ground or the Fruit of his planting perished without gathering, and laying up, this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.” (Locke (1698), §37-8.) (See also Waldron, Jeremy (1990). “From Authors to Copiers: Individual Rights and Social Values in Intellectual Property” *68 Chicago-Kent Law Review* 841, 856, p. 161). It is uncertain, however, exactly why the “Waste” proviso should eliminate ownership, where such “Waste” has not been *abandoned*. Like the “scarcity” proviso, discussed below, this proviso does not seem to arise from Locke’s central theory of acquisition, but is either added by Locke as a limitation to the theory, motivated by outside considerations, or arises from the scarcity proviso—i.e., that waste needlessly reduces the available commons.

sawing the wood into planks, the pioneer transforms the trees into lumber, and, later, this lumber into a house. Even if the farm fails to produce crops, or the house collapses into useless rubble, it is nevertheless the product of the pioneer's transformative labor, and so belongs to him. However, when Robert Nozick spills his can of tomato juice into the sea, he has not transformed the sea into something new, for the sea can survive such small-scale changes. It is still simply the sea. Certainly such an approach would have to account for thresholds of transformation (once the sea is composed of half-water and half-tomato juice, I think we can consider it something new), and for the metaphysics of vagueness (what is the sea, anyway?), but at least as a skeleton, I believe this approach has merit.⁵

However, regardless of whether we take a value-added, transformative, or other approach to the matter, Locke's theory of acquisition faces another challenge, noted by Locke in the closing clause of the passage quoted above: "at least where there is enough, and as good left in common for others." In citing this restriction, which has come to be known as the "scarcity" proviso, Locke recognizes an inherent limit to his theory. As Nozick interprets the theory, "an object's coming under one person's ownership changes the situation of all others. Whereas previously they were at liberty [...] to use the object, they now no longer are."⁶ In most cases, the change of situation to most people will be essentially a null issue. If I gain ownership in a deposit of oil by mining it, or a deposit of

⁵ And, for the aesthete, it has some particular merit as applied to the realm of art. At least one of the ways that aestheticians have dealt with works such as Marcel Duchamp's *Fountain* (1917) and Man Ray's *Gift* (1921) is to note that *Fountain* is not, strictly speaking, a urinal, nor is *Gift* an iron and a bunch of nails. Rather, each has been transformed into a work of art. This approach, beginning with Arthur Danto's *The Transfiguration of the Commonplace* (1981), and broadened in the various iterations of George Dickie's Institutional Theory of Art, gives us a means to distinguish perceptually identical objects, and to distinguish artifacts from the materials of which they are composed, even where a new artifact is composed of nothing but a pre-existing artifact. However, while *Fountain* seems—at least to the aesthete—the product of transformation, it seems a stretch to think of this transformation as being the result of labor, at least as Locke was thinking of it.

⁶ Nozick (1974), p. 175.

water by building a well, there will still be, in most cases, oil or water available for others to find and use. There is, in Locke's terms, "enough, and as good" left for others. Likewise, our pioneer, by obtaining property in his land by his labor has not negated others doing likewise, though, notably, he *has* restricted the liberty of others to encroach on *his* land. As Nozick interprets the matter, "Locke's proviso [...] is meant to ensure that the situation of others is not worsened."⁷

Laying claim to a minute percentage of the available water in an area does restrict the liberty of others in a minute way, but it does not (at least noticeably) worsen their situation, for while water is always, strictly speaking, in limited supply, it is in most cases not so limited that there is not enough for everyone. Where it does become a problem, however, is when there is *short* supply—either not enough, or just enough, to go around. On a desert island with only one source of water, the appropriation of this well by a single individual would, indeed, worsen the situation of any others inhabiting the island. And, as such, according to the proviso, such an appropriation would be impermissible. The same will be true for our pioneer if he appropriates the only land in the region capable of supporting crops, or chops down the only trees from which dwellings might be built. The scarcity proviso, as such, is not a *problem* for Locke's theory, as some have claimed, but is rather an admitted limitation to it—a limitation that does not arise from the theory itself (as it does not follow from his basic premises), but from overriding considerations.⁸

The same problems that arise for our pioneer also arise when something like Locke's theory of acquisition is applied to the objects of copyright. But the arena of

⁷ *Ibid.*

⁸ Most likely it directly conflicts with Locke's law of nature that *no harm shall be done* to other persons.

copyright provides problems of its own, over and above those that a transformative approach to a theory of acquisition might hope to alleviate. First, taken at face value, a system of copyright grounded on a labor-based theory of property seems to protect only the *physical object* molded by the artisan, for this is the product of his labor, as we normally understand it. Tom W. Bell notes in “Indelicate Imbalancing in Copyright and Patent Law” (2002):

The labor-desert justification of property gives a creator clear title only to the particular tangible item in which he fixes his creativity—not to some intangible wisp of the metaphysical realm. It speaks only to the ownership of atoms, not to the ownership of bits. Locke himself did not try to justify intangible property.⁹

Though Locke does not specifically discuss abstract objects, we might attempt to extend the notion of labor to include *mental* labor, as some have done.¹⁰ However, such an addendum only shifts the problem. For it seems that, if labor is what we value, so long as a copyist spends the labor needed to fabricate an object (mixing his labor—whether mental or physical—with the commons), there is little reason that he should not be free to do so, even if the result is simply a copy of that which is owned by another individual. After all, on a labor-based theory of acquisition, we would not find fault with the pioneer’s neighbor, who builds a farm and homestead identical with that of the pioneer,

⁹ Bell, Tom W. (2002). “Indelicate Imbalancing in Copyright and Patent Law” in *Copy Fights: The Future of Intellectual Property in the Information Age* (Adam Thierer and Clyde Wayne Crews Jr., eds.) (Washington, DC: Cato Institute), 3.

¹⁰ For example, see discussion of *Wheaton v. Peters* (1834), below.

provided he has not removed, nor trespassed upon, any property of the pioneer. As discussed at length in Chapter Three, the properties of abstract objects differ substantially from those of physical objects, and a labor-desert justification of property seems ill-equipped to deal with their ownership.

Further, if labor is what we value, we might imagine that, on a labor-based justification of property, the strength of one's ownership is proportionate to the amount of labor spent: the greater the labor, the stronger the ownership.¹¹ The reasons for this are not difficult to imagine. As a variation on the running case of our intrepid pioneer, consider a case where three brothers set about building a farm (tilling the field, constructing a house, etc.). Two of the brothers work hard from sun-up to sundown; the third putters about, doing a little work, but accomplishing little. When the brothers are finished building the farm, a neighbor offers to buy it from them. If the brothers accept the offer, it seems reasonable that the lazy brother should not receive a share of the payment equal to that of his brothers, for his labor paled in comparison to theirs. That is, his *ownership* is less than that of his brothers.¹² But if ownership is, indeed, proportionate to labor spent, then in at least some circumstances, a labor-based theory of property would seem to extend *greater* protection to the copyist than to the original artist. In cases where what is copied makes up only a small element in some new work—a “derivative work” as discussed last chapter—the labor spent by the copyist will often be greater than that spent by the original artist, at least as regards that element copied. The same may

¹¹ See, for example, Hughes, Justin (1988), p. 326.

¹² Here, as a mirror to Nozick's proposed value-added approach to Locke's theory of acquisition, we might look to a labor theory of value such as that of Adam Smith, who writes, “The real price of every thing, what every thing really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. What every thing is really worth to the man who has acquired it, and who wants to dispose of it or exchange it for something else, is the toil and trouble which it can save to himself, and which it can impose upon other people.” (*Wealth of Nations*, Book I, Chapter V.)

also be true, however, for more straightforward cases of copying. For example, Jackson Pollock's paintings are the result of the seemingly random dripping, tossing, and splashing of paint. While these paintings certainly took Pollock time and effort, the copyist who hopes to create a perfect duplicate of Pollock's *Blue Poles* (1952) will have to spend a greater amount of labor (perhaps physical *and* mental) than did Pollock himself, just as the forger of a signature must spend more labor than the original signator in creating the same signature.

The final (and, I believe, deepest) problem with a labor-based justification for the intellectual property of copyright is that such a justification does not, in fact, seem to align with what we value in the objects of copyright, and why we tend to think they deserve protection. In valuing an authored work—be it painting, a film, a poem, or a boat-hull design—it is not the labor (or at least not *solely* or even *predominantly* the labor) that went into creating the work that we tend to foreground in our valuation. As Levinson notes in *The Pleasures of Aesthetics* (1996), “When all is said and done, in art we primarily appreciate the *product*, viewed in its context of production; we don't primarily appreciate the *activity of production*, as readable from the product.”¹³ I suspect the same is true for categories of authored works that fall outside the ordinary realm of “art,” as well. Certainly, we might be *impressed* with the amount of labor that went into making a work, given the sheer scale of some works, but we might be equally impressed when the amount of labor was minimal, as in a sketch dashed off by Da Vinci or Picasso,

¹³ Levinson, Jerrold (1996). *The Pleasures of Aesthetics*, p. 141. In its original context, Levinson uses this reasoning to rebuff the claims of action-type theorists such as Currie and R.G. Collingwood (for details, see Chapter Four: The Abstract Dimension of Authored Works). Although the action-type theorists might in fact value the labor in fabricating an authored work more than the final product, I believe even they would not forefront labor, strictly speaking, over and above other aspects that make up the “action” of creating a work.

or one of the chalk drawings illegally (and thus speedily) drawn by pop artist Keith Haring in the New York subway system. More than labor, we tend to appreciate ingenuity, vision, sensitivity, and, if we are formalists, unity, intensity, and complexity. Even if we wish to consider mental labor, we tend to be as impressed with (and value as much) a work stemming from a vision that appeared fully-formed in the mind of its creator as that which took months or years of mental wrestling to create. In short, what we tend to value in works is *creativity*. A theory which bases the value of works, and the reason for protecting them, on the labor they involve seems to miss the point. In “The Philosophy of Intellectual Property” (1988), Justin Hughes notes, “The labor theory of property does not work if one subscribes to a pure ‘eureka’ theory of idea.”¹⁴ But, of course, whether the idea expressed in a work appeared in a ‘eureka’ moment, or required years of mental effort to crystallize, it is not the idea that copyright is meant to protect, but the author’s *expression* of that idea. And, while we tend to appreciate a good idea, in an authored work I believe we primarily value how that idea has been ‘brought to life’ in the work, be it a painting, a dance, a sonnet, or a bicycle rack design. And this, I believe, may be *why* we value the efforts of copyists less than that of original creators, even where their labor outstrips that of such creators.

Natural-rights bases to copyright have traditionally tended to hold sway in Europe, and so it should not be entirely surprising that in the early days of American copyright, and even occasionally today, arguments invoking the Lockean approach find

¹⁴ Hughes, Justin (1988), p. 300. Hughes goes on to argue that, regardless of the mental effort required to come up with the idea expressed in the work, the expression of that work requires labor. I see no reason to challenge him on this insight, though, again, I feel it misses the point of why we tend to value the objects of copyright.

their way into legal decisions.¹⁵ In the case of *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.* (1922) (alleging infringement by the defendant of elements of the plaintiff's professional index of jewelry trade-marks), Justice Rogers argues:

The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.¹⁶

Rogers' claim reflects the view of Justice Thomson in the earlier, ground-breaking case of *Wheaton v. Peters* (1834). The details of the case involve Richard Peters and Henry Wheaton, both reporters for the United States Supreme Court, the former having replaced the latter. Peters sought to publish a series of "Condensed Reports" of decisions of the Supreme Court, including condensed versions of reports earlier published by his predecessor, Wheaton. Though Wheaton's legal copyright had expired, he sought to establish a "common law" claim that he owned a copyright in the works infringed as a matter of natural law. Justice Thomson states:

¹⁵ There is also a recognizable contingent of legal thinkers who advocate a Lockean or neo-Lockean approach to copyright and other intellectual property. In particular, see Gordon, Wendy J. (1993); Damstedt, Benjamin G. (2003). "Limiting Locke: A Natural Law Justification for the Fair Use Doctrine" *112 Yale Law Journal* 1179.

¹⁶ *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir. 1922).

The great principle on which the author's rights rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body; and it is difficult to perceive any well founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity and public policy.¹⁷

Unfortunately for Thomson, his argument forms the *dissent* to the court decision, wherein the majority found that a broad “common law” copyright based on a claim of natural rights would result in an undesirable sort of monopoly. As such, Thomson's dissent serves as the elegy to a natural-rights basis to American copyright law. *Wheaton v. Peters* established, at least as far as U.S. courts are concerned, the basic principle of American copyright law that ownership of copyright is the result of statute, and not of any natural right.¹⁸ In particular, copyright arises in American law as a statutory right based on Article 1, Section 8, Clause 8 of the U.S. Constitution, which establishes copyright as an *instrumental* right, a means of achieving an optimal distribution of interests.¹⁹

¹⁷ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 8 L.Ed. 1055 (1834), Justice Thomson dissenting.

¹⁸ Justice Rogers' decision in *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.* contradicted this principle, but established a competing principle that would come to be known as the “sweat of the brow” doctrine or the principle of “industrious collection”. Although enjoying a surprisingly healthy longevity, the “sweat of the brow” doctrine would eventually be soundly declared to contradict the Copyright Act by Justice O'Connor in his decision in the case of *Feist Publications, Inc. v. Rural Telephone Service Co* 499 U.W. 340 (1991)—see Chapter One for further discussion on this case.

¹⁹ It should be noted that with its joining the international Berne Convention, the U.S. was forced to recognize certain “moral rights” of authors in its copyright law. Article 6bis of the Berne Convention provides: “Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” These rights, however, are treated in U.S. law as detached from the basis of copyright itself, and are further recognized only with regard to works of “visual art,” defined by the Visual

Copyright as an Instrumental Right: The U.S. Constitution

As outlined in Chapter One, the right of copyright officially arises in U.S. law from the passage of the U.S. Constitution that has come to be known as the “intellectual property clause” or the “copyright clause”:

The Congress shall have power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

There has been, in the history of interpreting this passage, much quibbling over the precise language used by James Madison, who introduced the clause into the Constitution. In particular, it has been generally noted that “useful Arts” refers not to painting, literature, and the like, but to more technologically-oriented endeavors—in other words, to science. Conversely, “Science” in this passage is regularly taken to refer to our more contemporary notion of the arts. That is, we associate “Inventors” in this passage with “Discoveries” and the “useful Arts”, and “Authors” with “Writings”²⁰ and “Science”. The domain of the former became the basis of U.S. patent law, and latter of U.S. copyright law. However, it should be noted, even given the peculiarities of eighteenth-century English, “Science” has never referred to the arts in particular—indeed,

Artists Rights Act of 1990 (encoded in the Copyright Act as §106A with definitions in §101) as including paintings, drawings, prints, sculptures, and photographs, existing in a single copy or a limited edition of 200 signed and numbered copies or fewer, and of these, protecting only works of “recognized stature.”

²⁰ The term “Writings” has been given very liberal breadth in the history of U.S. copyright law. Originally, it included only protection for books, maps, and charts (even then stretching the notion of “Writings”).

even then “science” was contrasted with “art”.²¹ The term “science”, of course, had nearly as many meanings two centuries ago as it has today. It seems most likely that what Madison meant by “Science” was a body of knowledge.²² That is, Constitutionally speaking, the right of copyright possessed by authors exists to promote the progress of mankind’s body of knowledge—or, to put the matter a slightly different way, ‘to expand the marketplace of ideas.’²³

As thus described, a claim over one’s authored works does not arise from a natural right in the work, but is rather a gift that the government bestows on its authors as an incentive to promote society’s pool of knowledge. This thinking behind intellectual property as a socially-mandated, instrumental right is reflected in the writings of Thomas Jefferson. Although Jefferson is writing specifically about patent, his pattern of thought reflects also the traditional thinking behind U.S. copyright:

Stable ownership is the gift of social law, and is given late in the progress of society. [...] Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.²⁴

²¹ The *Oxford English Dictionary* provides this etymological example from 1796: “Kirwan *Elem. Min.* (ed. 2) I. Pref ii. Previous to the year 1780, mineralogy, though tolerably understood by many as an art, could scarce be deemed a Science.”

²² Again from the *OED*: “Cowper *Conversation* 14. As alphabets in ivory employ, Hour after hour, the yet unletter’d boy, Sorting and puzzling with a deal of glee Those seeds of science called his A B C.” (1781)

²³ This particular turn of phrase is used by Donald L. Diefenbach in “The Constitutional and Moral Justifications for Copyright” *Public Affairs Quarterly*, Vol. 8, No. 3 (July 1994), pp. 225-235.

²⁴ Letter by Thomas Jefferson to Isaac MacPherson, August 13, 1813, reprinted in Jefferson, Thomas (1984). *Writings*, p. 1286.

We want authors to pursue ideas because ideas are themselves, valuable, perhaps both instrumentally and intrinsically (Jefferson focuses on the former), not merely to the author but to society at large. Fewer authors implies fewer ideas. By offering protection to authors as a reward for their work, the state encourages the growth of the marketplace of ideas, thus achieving an optimal distribution of interests.

In his seminal work, *Code: and other laws of cyberspace* (1999), Lawrence Lessig puts the standard view succinctly: “[E]ven if some authors write for free, it is still the case that the law needs some intellectual property rights. If the law did not protect the author at all, there would be fewer authors.”²⁵ And, with fewer authors, one can assume, fewer ideas being contributed to the marketplace. Granted, in principle, existing as they do in the commons, ideas are always available to all, but expressing ideas has an exponential-growth tendency. The creation of some new work makes available not only the ideas of that author, but opens up the possibilities of new ideas stemming from those. In this way providing incentive to create the new work seems clearly in society’s best interests.

Clearly, however, not *all* works protected by copyright expand the marketplace of ideas. Without a requirement of novelty, copyright provides protection for many works that may, in fact, contribute little-to-nothing to the pool of knowledge or ideas available to mankind. That is, not all authored works contribute to this desirable end. Indeed, as stated in the Constitution, copyright is granted to promote the “Progress of Science” *by* securing the exclusive right to authors, that is, not merely to authors whose works do *in fact* promote such progress. Granting such rights only to those who in fact will expand the marketplace of ideas would require not only unusual sensitivity to the nature of

²⁵ Lessig, Lawrence (1999). *Code: and other laws of cyberspace*, p. 133.

authored works (and extensive knowledge of their history), but also an impossible predictive power. This latter, of course, is a regular thorn in the side of act-consequentialist reasoning. Rather, the thinking behind copyright seems to be that, by protecting the sort of product that *tends* to bring about this good, the government serves society's best interests.

But, we might ask, is offering protection to the author *necessary* to promote this activity? That is, without recognition of copyright, would the proliferation of works, and so the growing pool of knowledge and ideas, slow down and eventually dry up? David G. Post argues in "His Napster's Voice" (2002) that the Internet serves as a telling case study of what a copyright-free world would look like:

We know how much creative activity we'd get if there were little or no copyright protection in cyberspace, because there has been, in effect, little or no copyright protection in cyberspace. As the recording industry itself keeps reminding us, copyrights are routinely flouted on the global network, copyright "piracy" is rampant Over There; nobody in his right mind would voluntarily make information available on the global network in the expectation that copyright law will protect that information (and any lawyer who has been advising clients otherwise is probably guilty of malpractice).

So a "copyright-free" cyberspace would look much like what cyberspace looks like today.

And what does it look like? It looks to me like the greatest outpouring of creative activity in a short span of time that the world has ever seen.²⁶

Putting aside the fact that Post mistakes a case of rampant crime as one of *no* crime, his overall point stands: with full knowledge that anything they put on the Internet, if worthwhile, is likely to be copied, plagiarized, and otherwise infringed, people continue to post essays, photographs, art, movies, and countless other works to their websites and those of others. And somehow, without any expectation of protection, this outpouring of works onto the World Wide Web only continues to *increase*. And while infringement is rampant, one would be hard-pressed to claim that here has been any *decrease* in the rate at which works are added to the body of works available to mankind, and thereby ideas to the marketplace.

Of course, the Internet is *not* a copyright-free zone, however much infringers might treat it like one. That said, we can easily look back not so far to the time before works were protected by copyright law. Long before the state offered protection for authored works, such works flourished. Certainly, Chaucer and his contemporaries were not protected by copyright,²⁷ and neither were the works of Shakespeare,²⁸ Bach, or

²⁶ Post, David G. (2002). "His Napster's Voice" in *Copy Fights: The Future of Intellectual Property in the Information Age* (Adam Thierer and Clyde Wayne Crews Jr., eds.) (Washington, DC: Cato Institute), p. 115. Post is certainly correct in saying that a lawyer who advised his client that the information he put on the Internet would be protected by copyright would be guilty of malpractice, but for more reasons that he states: Post and many of his Libertarian compatriots spin their arguments by referring to copyright as a protection for "information" or "ideas". As we know, of course, it is no such thing.

²⁷ Britain's Stationer's Company's printing monopoly—the predecessor to the 1709 Statute of Anne—did not come into effect until 1557, and would not have protected Chaucer, anyway, but only his publisher.

²⁸ The Stationer's Company monopoly and the Statute of Anne protected only published works, not performed ones.

Monteverdi.²⁹ Indeed, musical recordings were not protected in the United States until 1972, but a lack of such protection did not prevent the birth and rise of Rock and Roll in the 1950s and '60s, nor any of its musical successors, despite the dependence on the recording industry, and the availability of reel-to-reel and, later, more inexpensive cassette tape recorders, that allowed for easy copying of vinyl albums.³⁰

Arguing that a Lockean view is commensurable with the view that copyright is an instrumental right, Justin Hughes notes, “In an understanding of labor based on the notion of ‘avoidance,’ labor is defined as an unpleasant activity not desirable in and of itself and even painful to some degree. [... T]he instrumental argument [...] proposes that the unpleasantness of labor should be rewarded with property *because people must be motivated to perform labor.*”³¹ That is, because works require labor to create, and labor is something we wish to avoid if we can, if authors were not motivated by the promise of ‘rights,’ society as a whole would be deprived of new works, and thus to the ideas contained therein. However, this is again clearly not the case, as both pre-copyright history and the growing proliferation of works disseminated on the Internet indicate.

So it seems questionable that granting the right of copyright is necessary to promote the creation of new works, and thus to expand the marketplace of ideas. Though perhaps unnecessary, it may nevertheless be *sufficient* for such ends. However, even this much seems suspect. Tom G. Palmer notes that copyright protection may, at least in some cases, actually *decrease* innovation, rather than increase it. In particular, Palmer cites

²⁹ Continental copyright arises during the period of the French Revolution, prior to which existed monopolies similar to that of the Stationer’s Company in England, again covering only printed books and the like. Certainly, musical and operatic works were not protected.

³⁰ Reel-to-reel tape recorders had been commercially available since the 1940s. Phillips introduced the “compact cassette” in 1963.

³¹ Hughes, Justin (1988), p. 303. Locke himself refers to labor synonymously with “Pains.” See, for example, §34 of *Two Treatises*, Book II.

Shakespeare's rewriting of Thomas Kyd's play, *The Spanish Tragedy*, thus giving us *Hamlet*.³² Had the modern form of U.S. copyright applied to Kyd's play, Shakespeare may have been (legally) prevented from writing what is generally considered to be one of the greatest works of English literature. Indeed, while copyright protection likely bears some relation to the growth of the man's pool of ideas, this relationship is clearly not as simple as a case of necessary and/or sufficient conditions.

Like the Lockean justification for copyright, the view of copyright as an instrumental right (as formulated in U.S. law) seems to neglect recognition for any value of the works themselves. Indeed, it seems reasonable to conjecture, the instrumental right that adheres to authored works does so because of their instrumental value. On such a basis, however, it seems unclear why equal protection should not be offered for the authors of speeches, improvised jazz performances, and, indeed, ordinary conversation, which would equally tend to enrich the marketplace of ideas.³³ What tends to distinguish the class of authored works from other means of conveying information such as ordinary conversation, is that in the former cases, we value the works not only for the ideas they contain or information they provide, but (perhaps primarily) for the ways that they do so. That is, to value an authored work is centrally to value it *as an expression*. *New York Times* contributor Mark Helprin makes the point, "Mozart and Neil Diamond may have

³² Palmer, Tom G. (2002). "Are Patents and Copyrights Morally Justified?" in *Copy Fights: The Future of Intellectual Property in the Information Age* (Adam Thierer and Clyde Wayne Crews Jr., eds.) (Washington, DC: Cato Institute), p. 68; ff.127. Although there are certainly substantial differences between *Hamlet* and *The Spanish Tragedy*, the similarities are probably substantial enough that *Hamlet* would have failed Judge Learned Hand's "pattern" test, discussed in Chapters One and Two.

³³ As noted in earlier chapters, we do often attribute ownership (or at least origin) to the ideas, whether publicized through published papers or simply open conversation. However, the distinction to be made here is between the idea and its expression. Claims over ideas are particularly recognized in issues of plagiarism which, while often related to issues of copyright, do not fall within a legal domain. Nevertheless, this central distinction is often blurred to rhetorical effect in the arguments of copyright libertarians discussed throughout this chapter.

begun with the same idea, but that a work of art is more than an idea is confirmed by the difference between the ‘Soave sia il vento’ and ‘Kentucky Woman.’”³⁴

Responding to views like that of Jefferson, above, Ayn Rand contends, “The government does not ‘grant’ a patent or copyright, in the sense of a gift, privilege, or favor; the government merely *secures* it.”³⁵ Rand professes some strange and often untenable views on intellectual property,³⁶ but her point here seems correct, and indeed reflects the language used in the Constitution. Although its reasoning for doing so may not be sound, we do not question *that* the government secures property rights through the law, be they rights to physical property, or rights to authored works. Siva Vaidhyathan echoes Rand’s view, “[T]he public understanding of property is more fundamental, more exclusive, more natural, and precedes specific policy choices the state may make about its regulation and dispensation.”³⁷ The government’s securing such property rights does not indicate that such rights did not already exist to be secured by the law; rather, the contrary. The views of copyright as a natural right and of copyright as an instrumental right are not in principle mutually exclusive. In general, advocates of the Lockean position tend not to argue that copyright has no instrumental value. And conversely, advocates of the instrumental argument tend not to attack the natural-rights view directly, but instead point to the advantages of the Constitutional approach, particularly the

³⁴ Helprin, Mark. “A Great Idea Lives Forever. Shouldn’t Its Copyright?” *The New York Times* (New York) 20 May 2007. In the world of newspaper publishing, headlines and article titles tend to be written by editors rather than the writers of the articles themselves, thus perhaps explaining the apparent disconnect between this article’s title and the material quoted.

³⁵ Rand, Ayn (1966). “Patents and Copyrights” in *Capitalism: The Unknown Ideal*, p. 126.

³⁶ Strange in that Rand contends intellectual property is the *sine qua non* of property rights generally (*Ibid.*, 125); untenable in that Rand contends copyright protection is protection over ideas (*Ibid.*).

³⁷ Vaidhyathan, Siva (2003). *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*, p. 253.

“balance” struck between authors and the public.³⁸ Indeed, the two views seem largely complementary.³⁹ Unfortunately, however, neither seems capable of making up for the shortcomings of the other. In particular, neither the Lockean nor the Constitutional approach seems to base the right of copyright in what it is we value in the works. Indeed, each view on copyright seems at best incidental to the nature of its objects, their creation, and their creators.

Copyright as a Creative Right: A Variation on Locke

What is missing from both of the views discussed above is a basic reflection of what it is we value in the works we are protecting. What we primarily value is not the labor expended by authors, nor the ideas they communicate, but the *means* by which they communicate them: the choices of words, colors, shapes, sounds, and their arrangement in the works.⁴⁰ As an author, intuitively, what an individual gains a right to is not the product of his *labor*, but rather the product of his *creativity*.

Similar to the “transformative” or “artifactual” approach to Lockean natural rights I proposed earlier this chapter, the rights of the author seem to arise because the work created by the author did not exist prior to his authorial activity. Granted, the basic atomic elements used to construct the work—colors, shapes, sounds, words—existed prior to the work’s creation, but what did not exist was the particular selection and

³⁸ This balance is further sought in the fair use doctrine and limited term of copyright, both of which will be discussed below.

³⁹ This is a view argued for at length by Justin Hughes, discussed above.

⁴⁰ This is not to say that we do *not* value the ideas or labor expended by authors, but that such value is not the primary value of the work *per se*. In the case of two works communicating identical ideas, generally we will consider more valuable the work that does a better job of communicating the idea. This will perhaps be clearest where we have on hand two translations of some work. The “better” translation would seem to be the one that better brings across the author’s ideas (which is not necessarily to say that it does so with more *clarity*).

arrangement of such elements as made by that author. The work created by the author—be it a painting, a symphony, a novel, or an architectural design—will always be composed of unownable elements, but these elements, by the author’s creative activity, have been arranged into something new. What the author has a right to are not the atomic elements used to construct the work, nor necessarily the physical object or objects that embody the work, but the result of that creative construction: his arrangement and selection.

On this basis, let us sketch a variation on the Lockean position appropriate for the objects of copyright: As with the Lockean view, I contend that one has a sole right to, and property in, one’s own person. However, unlike that considered by Locke, the common that concerns us here includes such unowned and/or unownable things as shapes and colors, sounds and words, and also facts and ideas. As with the physical commons, these items are not owned by anyone; rather, they are free for use by anyone who so chooses, and inherently undepletable. By selecting and arranging these unownable elements (the *creative act*), one lays claim to the result (the *authored work*), and so gains a right in it—a claim against all others.

On this basis, the object that the author has a right to is not the physical object that embodies the work, but the abstract object so embodied. Where rights-claims to physical property bar certain uses and not others, the same is true of rights-claims to the objects of copyright. The difference in what uses are prohibited arises from differences in the nature of the respective objects. A pioneer’s right to physical property such as his farmstead does not preclude others from taking aesthetic pleasure in it or studying it from a distance, although both certainly constitute *uses* of his property. Rather, the pioneer’s

right is found in the duty that others not *trespass* upon it, or generally *interfere* with his exclusive right to exploit it *as* physical property—to occupy it and to work or develop it. The central right to an authored work, thus, is parallel, but different: the author’s right is found in the duty that others not interfere with his exclusive right to exploit it as an *abstract* object. Abstract objects, unlike physical objects, are multiply instantiable. Unlike physical property, intellectual property is not something one can trespass upon. Rather, one exploits an abstract object by *instantiating* it, in short, by making a token of the type.

Just as taking aesthetic pleasure in, or studying, another individual’s physical property does not interfere with his exclusive right to occupy it, reading a book or watching a film does not interfere with the copyright owner’s exclusive right to instantiate his creation. And so such activities should not be forbidden (nor, in most cases, would a copyright-owner want them to be). However, several other activities do interfere with the copyright owner’s exclusive right to instantiate his creation, including:

- Outright copying of the work, regardless of the method of doing so: by photocopying or retyping a literary work; by photographing and printing a copy of a pre-existing photograph; by duplicating a videotape, CD, or DVD; or by recreating a painting or sculpture from scratch.
- In cases of dramatic or musical works, performing, or broadcasting a performance of, the work.
- Creating a derivative work that instantiates elements of the original work, such as its plot, characters, melodies, or other such higher-order elements that arise from the selection and arrangement of the author, and are not

reducible to the unownable elements of the commons. This includes such works as film adaptations and novelizations, translations, and sequels to narrative works.

Each of these activities constitutes *infringement*, as outlined last chapter. That is, in each case, the resultant item possesses both (i) atomic similarity to the copyrighted work, and (ii) a strong historical link operating over the property or properties held in common between the two works.⁴¹

Natural rights theorists diverge with regard to which human attributes they contend give rise to rights, though most commonly these include rationality, free will, and autonomy—attributes commonly associated with moral personhood. The nature of creativity is a much-discussed topic, but in this sketch of a theory, I want only to say that the right to the products of one’s creativity, as realized in an authored work, likely arises from man’s rational, autonomous capacity to reform the world around him, and so to create new objects (both physical and abstract). And it is the same capacity that enables man to infringe upon these same rights in others. The same capacity, I suspect, is at play in Locke’s own theory, and so the fact that my approach formally parallels his should not be surprising. The primary difference lies in what sorts of objects this capacity is directed towards, and so to how each right is defined. As my view of copyright as a creative right formally parallels that of the Lockean position, however, it seems in danger of collapsing under the weight of the same problems. As such, let us consider the problems discussed above in turn.

⁴¹ Section 106 of the 1976 Copyright Act lays out six exclusive rights that arise in copyright ownership (see Cohen et al. (2006b), pp. 17-18). The rights I directly derive here from copyright as a creative right cover four of those specified in the Act. The other two rights specified in the Act pertain to sale and rental, and public display, of copyrighted works. As these are rights over the physical objects, and not the work itself, I would not make the claim that such rights arise directly from my basis of copyright.

First, the standard Lockean position, on face value, seems only able to justify rights in a *physical* object. While a right based on creativity would seem to grant rights to certain physical objects, such a right would in fact not be a right to the physical objects, but to the abstract objects that those physical objects embody. That is, by slathering paint onto a canvas, or chiseling a shape from a block of stone, one creates two things: a new physical object and a new abstract object. This is provided the painting or sculpture represents the first token of a new type. The right of copyright covers only that which is embodied. If a Lockean natural rights claim can be justified, however, it may cover the physical object (the painting or the sculpture) that is also created. Creating the abstract object centrally involves creativity; creating the physical object centrally involves labor. The two should not be confused.⁴² However, if the Lockean position is sound, then the artist has distinct rights claims over each.

Now, where we are concerned not with the original author, but with a copyist, an interesting result arises: by copying some pre-existing work, the copyist infringes the right of the author. Since he cannot lay claim to having created the abstract object—the type—he cannot claim a right to it. However, as he spent the labor required to copy the work (whether by using a photocopier, retyping a literary work, repainting a pre-existing painting from scratch, or otherwise), he *can* perhaps (at least on Lockean principles) make a property claim in the physical object embodying the abstract one. The copyist may indeed have a right to the product of his labor (the manuscript, painting, or other work that is the result of his labor), but not to the *work* that it embodies. And so, even if

⁴² Granted, in most cases, one will create the abstract object *by* creating the physical object, or *at the same time as* creating the physical object. However, this does not mean that the creation of one *is* the creation of the other. The difference becomes apparent when we consider the *second* instantiation of the abstract object, which, while involving labor requires no *creativity* as we have been considering it.

the Lockean argument for natural rights in physical property is sound, the right to the products of one's creativity does not displace the right to the products of one's labor. Given the differences in their nature, the abstract, embodied object and the physical, embodying object have different bases to ownership claims, and a right to claim ownership in one does not therefore bring about a right to claim ownership in the other.

The second problem for the standard Lockean position is that it seems to indicate that, so long as a copyist spends the labor needed to fabricate a new object, there is little reason that he should not be free to do so. Since we are dealing now with a right based on creativity, and not labor, the parallel would seem to be: so long as one exhibits the creativity needed to bring into existence a new type, there is little reason that he should not be free to do so. This much seems absolutely correct. My notion of creativity in no way precludes two or more individuals from selecting the same elements from the commons and putting them in the same arrangement (as in my examples of the identical haikus and photographs of the Grand Canyon). All that my view disallows is *copying* the pre-existing work, for doing so does not result in the creation of a new type, but rather in the entokening of a pre-existing type, which is already subject to copyright ownership. Bringing into existence a new physical object is enough to distinguish it from pre-existing physical objects; but the same does not necessarily distinguish any abstract objects embodied in the new physical object from those embodied elsewhere.

Finally, on the standard Lockean position, as I stated, it would be reasonable to contend that the strength of one's ownership claims is proportional to the labor spent on that object. As discussed, this is an undesirable and counterintuitive basis for copyright. Where this is a *problem* for the Lockean position, however, its parallel seems an entirely

welcome upshot for my own. The parallel claim for my view would be that the strength of one's ownership claim over an authored work is proportional to the creativity exhibited by the author.⁴³ Where an individual copies an entire work, his creative contribution is nil, for nothing in the work is the result of his independent selection and arrangement of elements from the commons.⁴⁴ Where he copies and *modifies* the work, however, he can reasonably claim ownership over those aspects that result from his modifications—those elements *he* selected and arranged. Such is the case with derivative works. When a filmmaker adapts a literary work for the screen, he cannot lay claim to having created the story present in the original source, but he can claim ownership of what he introduced into the work—*how* the story would be brought visually to the screen, any modifications made to the story, the adjoining of certain musical selections to certain parts of the story, and so on. The rights the filmmaker has are to these elements alone, as these are the elements that result from his selection and arrangement. The rest belong to the original copyright-owners, and so they will retain a certain degree of copyright in the film adaptation. The same will be true for the academic who publishes an annotated edition of someone else's work, the literary enthusiast who translates another's German text into English, and similarly for other derivative works.

With these problems thus allayed—indeed, in some cases turned from problems into assets for my view—let us turn to what is by many considered to be the most serious problem for the Lockean justification for physical property rights, and see if we can do

⁴³ Creativity, here, should not be taken as equivalent to novelty, or to be aesthetically value-laden. Rather, the creativity exhibited by the author should be taken to be selection and arrangement of properties and/or entities to form some new entity.

⁴⁴ It might be argued that this individual *has* at least selected *something*, viz. the work created by the original author. However, unlike the original author, the copyist is not as such selecting unownable elements for the commons, but something already owned by the original author.

likewise. The problem I speak of is the one that Locke attempts to allay with his “scarcity” proviso: that the acquisition of property by individuals always serves to deplete the commons. The physical commons is, by its very nature, rivalrous. Even if the loss to others is often imperceptible, one’s annexing of property always restricts the liberty of others: where they were previously free to walk upon some portion of land, with another’s annexing of that land, they are now restricted from doing so. Locke introduces his proviso as a restriction to the scope of his theory: that, so long as an individual’s annexing such property does not *harm* others, such a property claim is justified. But, of course, it might be reasonably argued that, at least in some minute way, property acquisition *always* harms others. It does so by restricting their liberty—by restricting some freedom they previously enjoyed.

Some have attempted to argue that copyright and other intellectual property rights do very much the same thing:

Because it [...] gags our voices, ties our hands, and demolishes our presses, the law of copyrights and patents violates the very rights that Locke defended.⁴⁵

* * *

[P]roperty rights in patents and copyright make possible the creation of a scarcity of the products appropriated which could not otherwise be maintained.⁴⁶

* * *

⁴⁵ Bell (2002), p. 4.

⁴⁶ Plant, Arnold (1974). “The Economic Theory Concerning Patents for Inventions” in *Selected Economic Essays and Addresses*, p.56.

[P]atent and copyright monopolies interfere with the freedom of others to use their own bodies or their own justly acquired property in certain ways. [... A] copyright over a musical composition means that others cannot use their mouths to blow air in certain sequences and in certain ways into musical instruments they own without obtaining the permission of the copyright holder.⁴⁷

Unlike the annexing of property from the commons, while the creation and copyrighting of an authored work draws from the public commons, it in no way depletes it. There is *always* “enough, and as good left in common for others.” Benjamin G. Damstedt makes the point:

The most important difference between the common of intangible goods and the common of tangible goods is the nonrivalrous nature of the undeveloped intangible materials in the former. Nonrivalry means that there is infinite allocative capacity of materials contained in the common of intangible goods.⁴⁸

Moreover, following the approach I have sketched, and given our understanding of what an authored work *is*, the public at large has no fewer freedoms following the copyrighting of some work than they had prior to that copyrighting. Put another way, such creations do

⁴⁷ Palmer (2002), pp. 72, 77. In his article, Palmer distinguishes between the restriction of “liberty” and the restriction of “action”, focusing here on how copyright and patent do the latter. For our general understanding of liberty, however, I believe it would include freedom to act in certain ways.

⁴⁸ Damstedt, Benjamin G. (2003), p. 1191.

not make members of the public *worse off* than they were beforehand. They remain free to pillage the commons as much as they were before; they remain free to write precisely the same words in precisely the same order as in the copyrighted work. All that they are restricted from doing is *copying* the work—which they could not have done before the work existed (and so was copyrighted) in the first place. Indeed, the public *gains* the freedom to use the new work in ways not restricted by the right of copyright, such as the freedom to read or view the published work.⁴⁹

There are, undoubtedly, a host of commonplace cases in which some may feel they are permitted to infringe copyright as I have described it, without doing anything wrong. Before moving on, let us consider a couple of these possible exceptions to my theory, so sketched. First, let us consider the case of an individual who has legitimately purchased a copy of another's copyrighted work—a CD, for instance. Wishing to have a copy for his home and a copy to play in his car, he duplicates the CD. It may be argued that the copyist who duplicates a copy of a work already in his possession, and does not sell or give away the duplicate to another individual (who might otherwise purchase a sanctioned copy), does no harm to the copyright owner, and so does nothing wrong. At first glance, this seems a reasonable basis to a claim that the copyist is blameless in his actions.

It may, however, be argued that the illicit copy represents a copy that *could* have been purchased by the copyist, and so the copyist has harmed the copyright owner by infringing the copyright *rather* than purchasing a copy. On such thinking, the money not

⁴⁹ Notably, other objects of intellectual property—particularly those of patent—*do* seem to substantially restrict the freedom of the public in ways that copyright does not. I will return to this issue below, in discussing the expiration of copyright.

paid to the copyright owner is, indeed, a harm, for it is a harm of omission.⁵⁰ However, I would contend that copyright (both in current U.S. law, and as I have reconstructed it) is not, at base, a financially-charged right. Granted, the exclusive right to copyright held by the author may be exploited for financial gain, but this is not the purpose of copyright *per se*, and so claiming the copyist has done anything wrong by depriving the copyright-owner of funds will be incidental to the claim of a wrong done in infringing the copyright itself.

Normally, where the actions of one individual harm another, he is expected to pay restitution to “right the wrong.” However, we still do not want to allow others to harmfully use our property even if they pay for all the damages caused. That is, it seems wrong for another to infringe our property rights, even provided he pays restitution for, and thus negates, all the damages caused to the property. The wrong of infringement seems to be over and above any damages caused.

Let us consider a parallel case in the realm of physical property. Where an individual owns some property, say, a house, and so enjoys the exclusive right to exploit it, I believe we want to say that a trespasser who, having been given permission to do so on *one* occasion, thereafter sneaks into the house each night through an unlocked window and sleeps on the floor, departing each morning before the property-owner is aware, *infringes* the property owner’s right, even if the trespassing causes him no perceptible harm. The wrong perpetrated by the trespasser is not, at base, a harm to the property of the homeowner; rather, I contend, it is a wrong insofar as such action violates his

⁵⁰ Here, it might also be contended that in some cases publishers have built into the price of their products an expectation that users will illicitly share it with others. As well, many countries have built into the price of CDs, cassette tapes, and other copy-ready products a “private copying levy” or “blank media tax” which is then disseminated to those publishers of copyrighted material most commonly infringed using those products. Such levies range from \$0.21 per CD-R/RW disk in Canada to up to \$0.76 per disk in Finland.

exclusive rights. If it constitutes a “harm,” it is one such that it restricts his exclusive privileges to exploit his property. The same, I contend, would be true for the copyist who violates the copyright-owner’s exclusive right to exploit his intellectual property by making a copy of the work where such an action itself seems to cause no damage to the work or to its owner. Possession of a single copy of a work, or even having been given permission to copy the work a single time, does not thereby invest one with the right or privilege to make multiple copies.⁵¹

Our copyist may respond, “But there is no reason I should pay for another copy when I can just make it on my own.” The reply is clear: “While you are making a copy or *instantiating* the work on your own, and so can perhaps lay claim to the product of your labor, such labor does not give you any right over the work being copied.” As discussed above, the copyist may, indeed, lay claim to the physical property he produces (whether a CD, a handwritten copy of a manuscript, or other), for without his labor, the physical object would not exist. What he cannot lay claim to, however, is the abstract object that it embodies, for he is responsible for none of the creativity that brought it into existence.

A second familiar claim to permissive infringement is put deftly by *New York Times* columnist Randy Cohen:

Although copying an entire work is seldom legal, it is sometimes ethical—
for example, if the work is unavailable for purchase (most books ever
published are now out of print); if it is available only in an archaic format

⁵¹ My contention here is nothing new. In the groundbreaking British copyright case of *Donaldson v. Beckett* (2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257 (1774)), counsel for the defense argued, “It was absurd to imagine, that either a sale, a loan, or a gift of a book, carried with it an implied right of multiplying copies.” (Cobbett, William (1813). *The Parliamentary History of England from the Earliest Period 1066 to the Year 1803*, Vol. XVII (London: T.C. Hansard), p. 965)

(a 78-r.p.m. recording, a Betamax tape, a clay tablet); if you already own a copy and want another in a more usable format (less scratchy, fewer coffee stains).⁵²

On its face, Cohen's claim seems appealing. On more than one occasion, I have tried to find a copy of a film for purchase and have been dismayed to learn that the film has not been released in a modern format. Many albums originally released on vinyl, too, are unavailable for sale as CDs or other digital format. Many books go out of print shortly after their release, and can thereafter only be purchased by hunting down a tattered, used copy. And, of course, given limited supply, such out-of-print films, recordings, and books tend to be very highly priced. Given the possibility of doing so, many, like Cohen, feel that making usable copies where such are not otherwise readily available is an obviously permissible act. But, we might ask, should this be considered the case?

If I create a song, and feel that it is important to the work that it should only ever be available in an obsolete format (8-track cassette, for instance), why should this not be my right? Though unwanted by many, other music enthusiasts *prefer* the audible hiss, "clicks," and "pops" that accompany play of vinyl records to the "slick" and "clean" sound of digital audio. And so it is not surprising that some musicians recorded their works with such limitations to the recording media in mind. Indeed, this principle seems in part to have inspired the "lo-fi" movement in contemporary music. To copy such a work into another format seems to directly defy the artist's design for the work, and certainly his exclusive right to instantiate the work. Similarly, as a writer, I may desire that my work only be published in some particular periodical (if it is an article) or binding

⁵² Cohen, Randy. "The Ethicist" *The New York Times Magazine* (New York) 8 October 2006.

(if it is a longer work), feeling that the *context* in which the work is read is integral to the experience of the work,⁵³ or in some predetermined limited printing. Where such is the case, to copy the work into another format, or even in the same format, against my wishes, certainly seems to disrespect me and my work. And it also certainly infringes my copyright (both as laid out in current U.S. law, and in my own theory). Contrary to Cohen's claims, I would thus contend that copying an entire work without the permission of the copyright owner, even in the sorts of cases Cohen considers, is unethical. Where an out-of-print work is still protected by copyright, the copyright owner has the option to re-release it. Where he does not do so, such is his choice, whatever his reasons. In the modern consumer age, we all desire easy access to works. However, such a desire does not reasonably trump the rights of the copyright owner over when, where, and under what conditions his work should be instantiated.⁵⁴

The foregoing two cases, while infringing copyright as I have described it, may nevertheless avoid being labeled "infringements" under current U.S. copyright law, through being deemed instead "fair uses" of the copyrighted works. Fair use is one of the two most prominent limitations to current legal copyright in the United States, the other being the expiration of copyright. In the following two sections, I will take a close look at the fair use doctrine and the expiration of copyright to determine if and to what degree they should apply to my reformulating of copyright theory.

⁵³ We might find parallels in the media of sculpture and architecture. In sculpture, many artists turned to *installations*, whether interior or exterior, toward the fourth quarter of the twentieth century, creating works for specific locales. In architecture, too, many works are specifically intended to be placed in certain settings to reflect, enhance, or otherwise interact with the space around them (the works of Frank Lloyd Wright provide many such examples).

⁵⁴ These two cases are, of course, admittedly likely to be rare. It may be that the author of some work would very much like to release it in more or newer formats, and that it is perhaps either practically or financially infeasible for him to do so. Of course, there is nothing to restrict the author himself from giving the public permission to make copies. The point is simply that they cannot do so without his authority.

Fair Use

On the copyright page (usually the reverse of the title page) of almost any book published in the United States, one will find some variation on the following statement:

All rights reserved. Printed in the United States of America. No part of this book may be reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles and reviews.

As we learn from the “fair use” doctrine, however, such a statement well oversteps the bounds of legal copyright. While the Copyright Act allows for quotations in critical articles and reviews (at least in some situations), it also allows for copying in a wide range of other circumstances. In case law, fair use protects copying in a wide variety of contexts, including copying of entire works for archival purposes, quotation of passages (both short and long) for purposes of criticism and commentary, and substantial copying for the purposes of parody.

Arising directly from an 1841 court case,⁵⁵ the fair use doctrine establishes within the 1976 Copyright Act particular guidelines according to which certain copying without permission of a copyrighted work does *not* constitute infringement. Fair use is perhaps the most discussed and least understood aspect of U.S. copyright law, in each case because the fair use guidelines are notoriously loose, leaving wide range for interpretation on the part of the author, the public, and the judiciary. This has led at least

⁵⁵ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841)

one court to call the fair use doctrine “the most troublesome in the whole of copyright.”⁵⁶

Titled “Limitations on exclusive rights: fair use,” section 107 of the Copyright Act reads:

Notwithstanding the provisions of sections 106 and 106A [which outline the rights included under copyright ownership], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in a particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁵⁷

⁵⁶ *Dellar v. Samuel Goldwyn, Inc.*, 104 F2d 661, 662 (2d Cir. 1939).

⁵⁷ Copyright Act of 1976, §107, reproduced in Cohen et al. (2006b), pp. 19-20.

To begin, it should be noted, the fair use doctrine does not *exclusively* restrict the domain of fair use to criticism, comment, news reporting, teaching, scholarship, and research. Rather, *any* use that falls within the vague boundaries of the doctrine will be considered “fair”. The boundaries of the doctrine *are* frustratingly vague, however. Nothing in the doctrine, so defined, specifies whether all four factors outlined enjoy equal weight in consideration,⁵⁸ nor whether they are conceptually exclusive of one another as considered in any particular case. Moreover, the wording of each factor, particularly the second, is itself in places extremely obtuse, with none of such intuitively important terms as “purpose,” “character,” and “nature” having been defined in the Copyright Act. The terms themselves give us (the authors, the general public, and the judiciary) at best a very rough idea of the meaning and intent of these factors.⁵⁹ Amazingly, this seems to have *been* Congress’ intent, reflecting the thinking in legislative history:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.⁶⁰

⁵⁸ Though in at least one case, the fourth factor is taken to be “undoubtedly the single most important element of fair use.” *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1985).

⁵⁹ United States District Judge Pierre N. Leval notes, “Our statute and our judge-made law talk around the subject [of fair use]. They mention factors, but give no standard. And those factors are stated in an opaque and uninformative way. We are told for example to look at the purpose and character of the secondary use and at the nature of the copyrighted work. ‘What about them?,’ you may ask. We are not told. We are told to look at the amount of the taking and the effect on the market. ‘How much is too much?’ We are not told.” (from “Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture,” 36 *J. Copyright Society*, pp. 167-8 (1989).)

⁶⁰ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679.

As such, individual courts have tended to fall back on a variety of normative theories to determine the outcome of particular cases.⁶¹

The *overall* intent of the fair use doctrine seems to be to further the instrumental purpose of copyright as rooted in the history of U.S. copyright law, and, as the above passage indicates, to achieve reasonable equity between authors and the public as regards copyrighted works. Cohen et al. (2006a) state,

Copyright law attempts to strike the optimal balance between providing authors with incentives to create and encouraging dissemination of works and information to the public. To achieve this goal, it also attempts to balance the needs of existing authors for protection with the needs of future authors to use the ideas and other raw materials needed to create.⁶²

The rationale behind fair use seems to be this: although copyright in U.S. law is meant to expand the marketplace of ideas, certain situations of protecting this copyright would in fact circumvent its desired consequence. Justice Blackmun in his dissent to *Sony Corp. v. Universal City Studios* (1984) states,

The monopoly created by copyright [...] rewards the individual author in order to benefit the public. [...] There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very

⁶¹ Cohen et al. (2006a), *Copyright in a Global Information Economy*, Second Edition, p. 526.

⁶² *Ibid.*, p. 561.

‘Progress of Science and useful Arts’ that copyright is intended to promote.⁶³

It is in such situations that the courts turn to the fair use doctrine. And so, where copyright as a whole seems to have been developed in U.S. law as a rule-consequentialist principle, the doctrine of fair-use supersedes the principle, and, as it requires a case-by-case analysis, functions as an act-consequentialist doctrine. Indeed, as fair use can override any or all of the rights of the author under the provisions of the Copyright Act, the right of copyright itself thus operates according to an act-consequentialist principle. That is, as codified in U.S. law, one possesses a right over one’s work *only insofar as* such a right is instrumental to expanding the marketplace of ideas. Where an infringement of the author’s right itself serves to expand the marketplace of ideas (and presumably where enforcement of the right would not), such an act is in fact *not* an infringement; rather, it is a “fair use.”⁶⁴

Although the reasoning behind the fair use seems admirable, the doctrine itself gives rise to several problems, the first being that, as laid out in the Copyright Act, the fair use doctrine does not seem particularly well-suited to achieving its end. That is, as a cobbling together of guidelines, one immediately wonders whether (or, for that matter, why) the doctrine so supports the expansion of the marketplace of ideas. A particularly troublesome sort of work in this regard is parody. The purpose of parody is to lampoon

⁶³ *Sony Corporation of America v. Universal City Studios, Inc.*, Supreme Court of the United States, 1984. 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (Justice Blackmun, dissenting).

⁶⁴ Notably, copyright is not the only intellectual property right with such limitations. Patent, too, is subject to restrictions conceptually similar to fair use. A judicially-created exception rule states that a patent holder has no right against someone whose otherwise infringing use “is for experiments for the sole purpose of gratifying a philosophical taste or curiosity or for instruction and amusement.” (*Gayler v. Wilder*, 51 U.S. (10 How.) 477, 497 (1850))

an existing work by playing off that very work.⁶⁵ It can be, as such, a biting form of criticism. As the author of the work being parodied is very unlikely to give permission to mock his efforts, it seems, parody is the paradigm case that fair use was designed to protect. However, taken at face value, the factors themselves seem to weigh against such a use. Where a parody is commercial in nature (being sold in a book, on an album, or otherwise), this will seem to weigh heavily against the parody being “fair”, given the first factor. Whether or not the parody is commercial, however, parody is often employed as a form of criticism, and, when done well, can be an especially biting one. Not infrequently, its very purpose is to negatively impact the potential market for or perceived value of the copyrighted work. Thus, the fourth factor, too, seems to frequently weigh against parody being a fair use (and all the more so, apparently, the more effective the parody is). The third factor further weighs against parody qualifying as fair use, for the nature of parody *requires* substantial copying to conjure up the work being parodied in the audience’s mind. As such, though parody seems very much in line with the purpose of expanding the marketplace of ideas, the fair use doctrine seems to have great potential to stifle such works.

The second problem that arises for fair use is that, given its inherent vagueness, the fair use doctrine provides us with very little direction in making ethical or legal decisions. That is, since the doctrine, as written, is open to such wide interpretation, the outcome of any legal battle that turns on the doctrine will almost always be in doubt. Although the doctrine itself does not tell us whether the four factors are to be weighed

⁶⁵ It is important that we distinguish “parody” from “satire”. A parody of work *W* pokes fun at *W*, and so often requires copying aspects of *W* to do so. A satire, however, may copy aspects of some work as a way of poking fun at something *else*, or may take as its target something other than pre-existing works, such as a social practice. In other words, where a satirical (but non-parodic) work copies from some pre-existing work, it is not directed at the work being copied, but is rather using that work to other ends.

equally, and independently, one might assume that where the majority of factors weigh against some use, that use will not qualify as fair. However, this has not always been the case.

Let us return to the issue of parody. In the case of *Campbell v. Acuff-Rose Music* (1994),⁶⁶ the court found that rap group 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" was fair, despite its seeming to fail three (if not all four) of the four factors. Its reasoning in this case is a good illustration of the court's breadth of room to interpret the fair use doctrine. Despite the parody's commercial nature, the court found that the parody's purpose (*as* parody) weighed the first factor in its favor. Next, the court argued that since Orbison's work is largely expressive (rather than informational) in nature, the second factor weighed against the parody. The court essentially neutralized the third factor, arguing that since parody requires such substantial copying, that 2 Live Crew's parody does so should not count against it. And, finally, as regards the fourth factor, the court found that "the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it."⁶⁷ That is, in the court's interpretation of the factor as it applies to this case, parody that suppresses sales of the original is allowable, whereas works that, by copying, *usurp* the original in sales infringe and thus are impermissible.

Being familiar with the doctrine, prior to the hearing of the case, the plaintiff most likely felt on secure ground. After all, with the four factors taken at face value, independently, and of equal weight, it seems the facts are very much against the 2 Live Crew parody. Although the purpose of 2 Live Crew's work is certainly parodic, it is also

⁶⁶ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)

⁶⁷ *Ibid.*

commercial. It seems as regards the first factor, there is a draw. At face value, the second factor tells us little. If we take the court's interpretation of its meaning, weighing against copying where the original is "expressive", the second factor weighs against the parody. Taken independently, the third factor also weighs against the parody, for it borrows liberally from the original. Finally, even given the court's distinction between works that usurp and those that suppress, the fourth factor, too, weighs against the parody given its intent to *devalue* the original. If such an apparently straightforward case of "unfair" use (at least by the letter of the doctrine) could be so turned on its head by the court, the doctrine itself seems ill-defined at best, and empty at worst.

Granted, the court's decision in *Campbell v. Acuff-Rose Music* seems to dissolve my earlier complaint that the fair use doctrine does not seem particularly well-suited to achieving its end. But we are left to ask: was it because the doctrine was well-suited to expanding the marketplace of ideas that 2 Live Crew won the case, or because the courts were able to so freely interpret and thus *circumvent* the doctrine that the parody prevailed? It seems the latter: that is, the parody was deemed "fair" *despite*, not *because of*, the fair use doctrine. Here, it may most certainly be argued that, in its decision, the court was adhering not to the *letter* of the doctrine, but to its *spirit*. As such, however, we can ask: if we are more interested in the spirit of the doctrine than the letter of it, to what end do we need the doctrine itself?

Finally, as discussed above, the fair use doctrine turns copyright in U.S. law from a principle of rule-consequentialism to one of act-consequentialism: though the Copyright Act as a whole sets out rules of conduct, the fair use doctrine can be used in any particular case to override these rules. However, as set out in the 1976 Act, the doctrine

does not itself provide clear guidelines for action, and so each act must be considered on its own merits. The overriding problem with this arrangement is that, as discussed in the last section, there is little reason to think that copyright itself is necessary or sufficient to expanding the marketplace of ideas. Adding a limitation to a right that itself seems unnecessary and insufficient to achieving its instrumental purpose is like patching a hole on an already-sunken vessel. Where granting authors copyright appears unnecessary to expanding the marketplace of ideas, it seems that almost *any* use of the work should be deemed “fair”—for though such a use may not itself expand the marketplace, neither will it restrict the original work or author from doing so, for the original work will already be extant, and illicit copying of the work will only serve to further proliferate the ideas contained therein.

Users’ Rights

As mentioned above, the fair use doctrine is perhaps the most widely discussed aspect of U.S. copyright law. In some areas of this literature, there has developed a notion that arising from the fair use doctrine is a class of *users’* rights. Professors L. Ray Patterson and Stanley W. Lindberg argue in *The Nature of Copyright: A Law of Users’ Rights* (1991):

[U]sers have rights that are just as important as those of authors and publishers—and these rights are grounded in the law of copyright. To employ the fair-use provisions of the copyright act is not to abuse the rights of the authors or copyright owner; indeed, the very purpose of

copyright is to advance knowledge and thus benefit the public welfare, which is exactly what fair use—properly employed—does.⁶⁸

In particular, Patterson and Lindberg contend, “The constitutional purpose of copyright—the promotion of learning—requires the right-of-access principle.”⁶⁹ According to Patterson and Lindberg, “[I]ndividuals have a right to use copyrighted materials. Such use is necessary to learning.”⁷⁰ That is, as the instrumental purpose of copyright is to promote learning, for an author to act in such a way that restricts users from doing so is to infringe the *users’ rights*. Particularly irksome for Patterson and Lindberg, then, are copy-protection measures taken by some copyright owners to prevent any and all copying (including copying that would fall under “fair use”). Such copy-protection as software that prevents CDs and DVDs from being copied or even decrypted (called a “trusted system”) is recognized by 1998’s Digital Millennium Copyright Act (DMCA),⁷¹ which makes it a crime to circumvent such copy-protection measures. Discussing the DMCA, David Bollier echoes the claims of Patterson and Lindberg above:

By allowing content owners to “lock up” digital text and assert “perfect control” over its uses, the DMCA effectively empowers companies to eliminate the public’s *fair use rights* in digital works.⁷²

⁶⁸ Patterson, L. Ray and Stanley W. Lindberg (1991). *The Nature of Copyright: A Law of Users’ Rights*, p. 11.

⁶⁹ *Ibid.*, p. 69.

⁷⁰ *Ibid.*, p. 52.

⁷¹ Introduced as Chapter 12 to the 1976 Copyright Act.

⁷² Bollier, David (2002). “Why the Public Domain Matters: The Endangered Wellspring of Creativity, Commerce and Democracy” (Washington, DC: New America Foundation & Public Knowledge), p. 14 (*emphasis added*).

In his magnum opus, *Code*, Lawrence Lessig, too, condemns such copy-protection measures:

[W]hen intellectual property is protected by code [... n]othing requires the owner to grant the *right of fair use*. She might, just as a bookstore allows individuals to browse for free, but she might not. Whether she grants this right depends on whether it profits her. Fair use becomes subject to private gain.

As privatized law, trusted systems regulate in the same domain where copyright law regulates, but unlike copyright law, they do not guarantee the same public use protection.⁷³

Lessig famously goes on to propose a radical restructuring of the copyright system. Others who champion users' rights tend to propose more moderate action, such as the elimination of the DMCA from the Copyright Act. Whether moderate or revisionary, however, what these thinkers hold in common is the belief that, just as copyright owners possess certain rights with regard to their works, so too do the users and potential users of these works.

There are, however, several key problems with these arguments for users' rights. First is a problem with Patterson and Lindberg's claim in particular: the stated purpose of copyright in the U.S. Constitution is the "Progress of Science"—that is, the expansion of the marketplace of ideas. It is *not*, as such, the acquisition of knowledge by particular individuals that copyright is meant to promote, but the building of knowledge, generally.

⁷³ Lessig (1999), p. 135 (*emphasis added*).

Nor does there being a body of knowledge and ideas thereby seem to give rise to *rights* in particular individuals to access that body of knowledge and ideas.

However, even putting aside this misreading of the Constitution, the argument for “right-of-access” and similar models of users’ rights leads to absurd conclusions. Users’ rights, many contend, are the flip-side to authors’ rights in the balance that copyright is designed to afford in U.S. law. Patterson and Lindberg state, “[T]he law of users’ rights is by and large an unwritten law, being a by-product of the limitations on the rights of the author and the publisher as copyright owners.”⁷⁴ The general argument for users’ rights, as such, seems to run something like this:

(P1) Where copyright owners have rights to restrict copying of work *W* under all circumstances except *a*, *b*, and *c*, users have the right to access and copy work *W* in circumstances *a*, *b*, and *c*.

(P2) By restricting the ability of users to access and/or copy work *W* in circumstances *a*, *b*, or *c*, copyright owners thus infringe the rights of users.

(C1) Therefore, copy-protection, which so restricts the ability of users to copy work *W*, infringes the rights of users.

Certainly, (P1)-(C1) is a valid argument: (P2) follows directly from (P1), and (C1) is merely a specific case of that discussed in (P2). However, on reflection, another specific case of that discussed in (P2) would seem to be (C2):

⁷⁴ Patterson and Lindberg (1991), p. 5.

(C2) By not publishing work *W*, the copyright owner restricts the ability of users to access and/or copy work *W*, and therefore infringes the rights of (potential) users.

Clearly, however, (C2) is an absurd conclusion. We do not want to say that by writing, painting, or otherwise creating a work in my home, and deciding not to publish it, I have thereby *infringed* anybody's rights. However, if this conclusion is absurd, and the argument is valid, the problem must lie in the truth of one of the premises. Since (P2), (C1), and (C2) all appear to follow directly from (P1), (P1) seems to be our culprit.

It might be argued that (P1) should be prefaced with "If work *W* has been published, then..." Initially, such an adjustment would seem much more agreeable. That is, where the author offers the work up for public consumption, both he and the public thus gain rights regarding the work. Several problems, however, threaten this happy conclusion. First, there is the issue of what it means to publish some work, the confusion over which, as discussed in Chapter One, was one of the major impetuses for revising the Copyright Act. In the particular case, say, of copy-protected CDs and DVDs, while the music or film that may be played from the disk is published, it is not the music or film that trusted systems are designed to protect—rather, it is the computer coding on the disk that remains locked away from public consumption. And if such coding is not accessible to the public, how are we to call it "published"? Second, we can ask, why should the act of publishing the work serve to (1) give the author rights in the works; and (2) give the public a body of rights pertaining to the work as detailed under the title of fair use? That is, while a story can be told about why the act of *creating* a work is ethically relevant and

can give rise to rights—this is, after all, the story I have been telling—it is unclear why the act of *publishing* a work should be equally ethically relevant, giving rise to rights for either the author or the public.

Moreover, with or without such a preface to (P1), it is difficult to understand how granting one group (authors) a right thus gives parallel rights to another group (users). Putting aside, for the sake of argument, the problems for the fair use doctrine outlined above, the exclusive right of copyright burdens users of the work with a duty not to copy the work except in those circumstances permitted under the auspices of fair use. However, it seems a conceptual misstep from users having a duty to not copy a copyrighted work under all circumstances except *a*, *b*, and *c*, to their thereby having a *right* to copy the copyrighted work in *a*, *b*, and *c* circumstances. Intuitively, following Wesley Newcomb Hohfeld’s conceptual scheme of rights, the users’ “right” is not a claim-right at all, but a mere *liberty* or *privilege*. In Hohfeld’s scheme, a given user, *A*, might be said to have a *privilege* relative to the copyright owner, *B*, with respect to the work, *W*, under *a*, *b*, and *c* circumstances. As such, *A* is at *liberty* relative to *B* with respect to *W* in *a*, *b*, and *c* circumstances: that is, he is free to choose to copy or not to copy the work. But *A*’s liberty does not thus entail any duty on *B*’s part (or that of anyone else) not to interfere with *A*’s actions with respect to *W* in *a*, *b*, or *c* circumstances.⁷⁵ As Frances Kamm puts the matter, “I may be at liberty to look at you, but you have no duty to let me look at you if you may permissibly put up a screen in front of you.”⁷⁶ While limitations on the rights of authors may give rise to certain *privileges* or *liberties* on the part of users, it is a far cry from giving them *rights*. As such, it seems, if one wants to

⁷⁵ See Hohfeld, Wesley Newcomb (1923). *Fundamental Legal Conceptions*.

⁷⁶ Kamm, F.M. (2002). “Rights” in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law*, p. 479.

argue that users have a “right-of-access” and that the copyright holder’s copy-protection systems are thus impermissible, one will have to make the argument on grounds independent from the copyright-owner’s having limitations to his exclusive rights. And, of course, even if one is able to make such an argument, one will still have to contend with the absurd consequence (C2).

The Value of Ideas and a Limit to Copyright

Although I contend that copyright is a right, and a *natural* right at that, I do not thus contend that it may never be overridden—that it is an *absolute* right. Far from it. Certainly, if the only way to save a life is to infringe a copyright, that copyright should be infringed. But such an act is nevertheless an infringement of the copyright-holder’s rights, as I have defined infringement—it is simply a *permissible* infringement. Here, I wish to adopt a conceptual schema provided by Judith Jarvis Thomson in “Some Ruminations on Rights” (1977):

Suppose that someone has a right that such and such shall not be the case. I shall say that we *infringe* a right of his if and only if we bring about that it is the case. I shall say that we *violate* a right of his if and only if *both* we bring about that it is the case *and* we act wrongly in doing so.⁷⁷

As such, we may *infringe* someone’s right without necessarily wronging him. It is only in *violating* a right (something over and above infringement) that we wrong him.

⁷⁷ Thomson, Judith Jarvis (1977). “Some Ruminations on Rights” in *19 Arizona Law Review* 45, p. 47 (*emphasis added*).

Granted, life-and-death scenarios such as that mentioned above are unlikely to commonly arise in copyright cases. However, the list of rights and interests that may conflict with that of copyright is surely a long one. The issue that concerns us is which of these rights and interests is ethically prior to that of copyright, where an action in service of such a right or interest, while infringing copyright, does not amount to a wrongful *violation* of copyright. Here, I wish to consider one such interest in particular.

It seems incontestable that ideas, generally, are valuable, whether such ideas have functional use, are simply informative, or are merely fanciful. And while it may be contended that some idea is more or less valuable than another (for some ideas, it may be said, are simply *bad* ideas), it seems also true that expanding the overall *sphere* of ideas is itself inherently valuable. The greater the marketplace of ideas, the greater our freedom to compare them, and to choose among them, and bringing new ideas into the marketplace requires *expression* of those ideas. Such seems to have been the reasoning behind the constitutional basis of copyright in U.S. law. However, as we have seen, the interest we have in the expression of new ideas cannot reasonably serve as the driving force, ethical grounding, or *purpose* of copyright. This said, I do believe our interest in the expression of new ideas (so as to expand the marketplace of ideas) can reasonably serve to *bind* copyright. It is on such ideas that authors draw in creating authored works. And while an author might truthfully claim to be expressing his own, original idea in his work, such an idea is undoubtedly built upon other, underlying ideas of which he is not the originator. The expansion of the marketplace of ideas is like the growth of a tree: as each new idea becomes available, so too does the possibility of other ideas stemming from it. As the

authors of new works draw from, or build upon, the available pool of ideas, the growth of this pool is even more in their interests than it is for the general public.

Given our general interest in the expansion of the marketplace of ideas, and the particular interest in such held by the class of authors, I contend that where an action will serve to directly expand the marketplace of ideas, to the extent that infringing a copyright is *necessary* to do so, such an act of infringement should be considered permissible. That is, to employ Thomson's terminology, while such an act will *infringe* the copyright of the author, it will not thus *violate* his right. Notice here, however, that the expansion of the marketplace of ideas will come about not with some novel expression of some old idea, for such does not add to the available pool of ideas, but with the expression of new ideas, which does.

I cannot imagine any case where simply making copies of an existing, available work will serve to expand the pool of ideas, for no new ideas will directly arise from such an action that could not have arisen without the act of infringement. And while copying a work onto the Internet without permission might *invite* the expression of new ideas, it does not itself expand the pool of available ideas. On my theory, such an act will always violate the author's copyright. Other cases of infringement that *are* necessary to expand the pool of available ideas, however, are not difficult to imagine. In particular, cases of parody and other criticism, which do not fare well under the fair use doctrine (taken at face value), will be quite permissible under my view. Granting that the criticism of some work adds to the marketplace of ideas, where such criticism *requires* infringing a copyright to properly express the idea contained in the criticism, this infringement will be permissible. That is, quoting from a copyrighted work may be necessary to criticize it.

Where it is necessary, such an act will be permissible. However, where quoting from an existing text is *unnecessary*, and is used, for example, simply to enliven the criticism, such an act will be impermissible. As such, where paraphrasing will do as well as direct quotation, the critic should paraphrase. This principle becomes particularly relevant in cases of parody, though here the line between what is necessary and what is unnecessary infringement will be more difficult to draw.

Outside of the realms of criticism and parody, cases of non-violating infringement will likely be rarer. However, we might consider a case such as Vermeer's *A Lady Seated at the Virginal* (ca. 1675), discussed at the end of last chapter. As the scene of the painting includes a depiction of Dirck van Baburen's painting, *The Procuress*, Vermeer has, on my view, committed an act of infringement. However, it may be argued that depicting *The Procuress* in Vermeer's painting was necessary to expressing the idea that Vermeer wished to express—for instance, that, although Vermeer is not commenting on *The Procuress* directly, its presence in the scene is necessary to set the *mood* of *A Lady Seated at the Virginal*, and that no other work existing at the time would do. It may be argued that the scene of Vermeer's painting is meant to depict a direct *inverse* to that in *The Procuress*, and that the arising conflict is not possible to depict *without* depicting the painting. Certainly, any of these approaches would require further argument, but I believe that in some such way the infringement may be so justified. Some cases of unauthorized derivative works (such as sequels) may be justified similarly, but again, only where the infringement is *necessary* to expressing the new idea. Where the same could be done without infringement, the infringement will represent a violation of the copyright holder's exclusive rights.

Whether some given act of infringement will qualify as permissible will depend on the details of the case. The preceding chapters are filled with cases that fall under my definition of infringement, and which may or may not also qualify as violations of copyright. While fair use doctrine also requires case-by-case analysis, it offers no reasonable means by which one might predict the outcome of any particular case. Conversely, my approach offers a straightforward rule for determining whether some act is permissible. And while it requires detailed case analysis, I believe my approach offers the potential infringer (and infringe) a clear and intuitive guide to determining the permissibility of infringing acts.

Before moving on, it might be contended that, arising as it does from the creative act, and operating over the product of this act, the right I describe would also *prima facie* seem to extend to ownership of *ideas*, which, as I have stated numerous times, standardly fall outside the domain of copyright. Indeed, I suspect something very much like the position I sketch *could* also ground something like a right to ideas. Such would seem to provide an explanatory foundation to our intuitions regarding plagiarism, for instance. However, given the difference in their objects, the implications of a right over ideas, and the limitations to such a right, are very likely to diverge in kind from a right over their particular expressions, authored works. Given the nature of ideas and their instantiation, I suspect a right to ideas faces far more conflicting rights and interests than does a right to their particular expression in authored works. Moreover, where authored works seem best understood within the type/token framework, there seems a much stronger claim to ideas being of the universal/particular sort, and as such not the sorts of entities that any

individual can state a claim to having created, and so to having a right over, at least a right based on creativity.

The Duration and Expiration of Copyright

The clause of the U.S. Constitution from which the law of copyright arises specifies that the exclusive right to copyrighted works should be “for limited Times.” Precisely what this means, however, has been the subject of regular debate, as copyright terms have been expanded with each successive iteration of the Copyright Act. The Copyright Act of 1790 gave authors their exclusive right for a term of 14 years from the date of publication, with the option to renew for an additional 14 years, should the author still be alive. After the expiration of the final term, the work entered the “public domain” and the public was free to copy, alter, and create derivative works based upon it. The Copyright Act of 1909 doubled the duration of copyright to 28 years, likewise from the date of publication, renewable for a second term of 28 years. The creation of the 1976 Act, however, substantially changed the rules. Rather than following the two-term model employed by earlier versions of the Copyright Act, the 1976 Act gave authors the exclusive right over their works for the duration of their lives, plus 50 years. This was the term lobbied for by Mark Twain in 1906 (though he preferred a perpetual copyright), and considered, but rejected, for the 1909 Act.⁷⁸ Rather than Twain’s appeals, the primary influencing factor in Congress’ decision to adopt the life-plus-50-years term for the 1976 Act seems to have been that this was the minimum term required by the Berne Convention for the Protection of Literary and Artistic Works (1886), the dominant international copyright treaty at the

⁷⁸ See Vaidhyathan (2003), p. 79.

time.⁷⁹ Although the United States would not become a signator of the Berne Convention until 1988, it seems Congress wanted to at least allow for the possibility in drafting the 1976 Act. In 1998, Congress passed the Sonny Bono Copyright Extension Act (pejoratively, the “Mickey Mouse Protection Act”), which extended the term of copyright by 20 years to life plus 70 years, following a similar extension adopted by members of the European Union in 1993.⁸⁰

The new extension of copyright duration gave rise to heated debate, with fears among pundits that the Sonny Bono Copyright Extension Act was simply a furtive step toward perpetual copyright, something explicitly disallowed by the Constitution. The issue came to the fore in the case of *Eldred v. Ashcroft* (2003), where the constitutionality of the move was directly challenged.⁸¹ Ultimately, the court found that retroactive extension of the copyright term still satisfied the “limited Times” provision provided that the term, so extended, was not perpetual.

Putting aside the constitutional provision, we might ask, in what way does a limited (as opposed to perpetual) copyright serve the stated goals of copyright in U.S. law? In “The Philosophy of Intellectual Property” (1988), Justin Hughes contends that, “[A]s long as those new ideas [expressed in protected works] become freely available, idea-based progress would continue.”⁸² Hughes is discussing intellectual property in general, and not copyright in particular, but his statement reflects a commonly-held

⁷⁹ See Halpern, Sheldon W. et al. (1992). *Copyright Cases and Materials*, p. 562.

⁸⁰ Rules differ for works “made-for-hire” and other categories where an author is not individually identifiable. Where a work is corporately-owned, or anonymously or pseudonymously created, the copyright owner enjoyed exclusive copyright on the work for 75 years from its creation under the 1976 Act, extended to 95 years from publication or 120 years from creation, with the passing of the Sonny Bono Copyright Term Extension Act of 1998.

⁸¹ *Eldred v. Ashcroft*, 537 U.W. 186 (2003). Interestingly, lead counsel for the plaintiff in the case was Lawrence Lessig, whose work is discussed throughout this chapter.

⁸² Hughes, Justin (1988), p. 324.

position on copyright's public domain: that the free availability of ideas will lead to more ideas (the stated goal of U.S. copyright), and that putting works into the public domain after a limited time frees the ideas expressed therein for all to use. Journalist Robert S. Boynton echoes this view in "The Tyranny of Copyright?" (2004):

Thinkers like Lessig and Zittrain promote a vision of a world in which copyright law gives individual creators the exclusive right to profit from their intellectual property for a brief, *limited* period—thus providing an incentive to create while still allowing successive generations of creators to draw freely on earlier ideas.⁸³

Even with Hughes' and Boynton's claims in mind, we might still ask, how does limiting the duration of copyright so serve "idea-based progress" or the expansion of the marketplace of ideas? After all, copyright does not protect ideas. The public is free to discuss, draw from, and express the ideas contained in a protected work, only provided they do not reproduce the work in doing so. The public, in other words, is free to paraphrase at will. Undoubtedly, the free availability of ideas *does* lead to more ideas, but it is not in any way clear why cutting off the exclusive right to an expression should better engender such ideas, given that the ideas contained in the expression are already free for all to enjoy.

Vaidhyathan contends that, as copyright is meant to serve the public good, and making works available cheaply to the public (by allowing for inexpensive or free reproductions) serves the public good, it is common sense that copyrights should expire.

⁸³ Boynton, Robert S. "The Tyranny of Copyright?" in *The New York Times* (New York) 25 January 2004.

This seems a reasonable position, but it is not the stated purpose of U.S. copyright, nor is it clear why the good gained by cheaply-available works (as opposed to freely-available ideas) serves the public interest in a way that should trump the author's ownership rights. If it did, it seems reasonable that it should *always* do so, and not merely after 70 years following the author's demise. Moreover, as a trip to the local bookstore will show, that a work is in the public domain rarely means it will be "cheaply" available, as publication costs tend to be made up primarily of printing costs, and not of payments to authors.

Another standard argument for the expiration of intellectual property rights, on the constitutional model, is that we want to reward authors for their contributions, but not so much that the reward becomes a detriment to the public at large. As Patterson and Lindberg argue,

Copyright, of course, is itself an encroachment on the public domain, in that it gives the author a limited proprietary control over his or her writings composed of ideas and words—materials taken from the public domain. The encroachment permitted, however, requires a *quid pro quo* and is limited in both scope and time: to be protected, the author must *create* a new work, and that work is protected for a limited time only. The first requirement means that copyright cannot be used to claim ideas or writings already in the public domain; the second means that the work which the author produces eventually goes into the public domain. The

copyright policy thus serves not only to preserve but also to enrich the public domain.⁸⁴

So, the argument runs, the reward we offer authors is limited in part because the reward itself restricts the general public's use of the public domain. We only grant the reward because what we are rewarding eventually helps to *build* the public domain. To *not* limit the duration of copyright, it might be said, then, harms the public at large.

Here, let us consider an argument made by Nozick. In particular, let us return briefly to Nozick's analysis of Locke's proviso, discussed above. While Nozick does not here discuss copyright, he does discuss *patent*, and his reasoning for limiting patent will prove particularly relevant to our discussion of the duration of copyright. Although stemming from the same clause in the Constitution, U.S. patent law operates in several important ways that differentiate it from copyright law. First, unlike copyright, the objects of patent are *functionally defined*. An object is differentiated by other objects insofar as it does a different thing than other patented objects and/or does so in a different way. In other words, if your invention does what mine does in the same way that mine does it, your invention is the *same* as my invention, regardless of whether you invented it completely independently. Second, following from this, to obtain a patent in an invention or discovery, one must establish not only originality, but also *novelty*—that is, the object one wishes to patent must not now, nor have ever been, protected by patent. If there exists (or has existed) another patented object, which does the same thing in the same way as one's own invention, one is barred from patenting it. Finally, where U.S. copyright currently extends several decades after the death of the author, patent extends

⁸⁴ Patterson and Lindberg (1991), p. 50.

only 20 years from the filing of the patent with the Patent Office. With this in mind, let us now turn to Nozick:

An inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors, upon whom the burden of proving independent discovery may rest, should not be excluded from utilizing their own invention as they wish (including selling it to others). [...] Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the invention, for independent discovery.⁸⁵

Nozick's reasoning seems well-grounded. Indefinitely barring others from independently inventing or discovering the same object as one's own invention or discovery seems to place an unreasonable limit on their liberty. That is, with the object having been invented and patented by another, they are no longer free to do what they would previously have been able to do. As such, while giving an exclusive patent to the inventor or discoverer who first brings a new object to the public seems justifiable, so does placing a protracted time limit on the extent of that patent protection.

As with the earlier discussion of Nozick, however, given the nature of the objects of copyright, the justifiable concerns regarding patent do not carry over to its cousin,

⁸⁵ Nozick (1974), p. 182.

copyright, especially given my account of it. As discussed in earlier chapters, since one is not barred from independently creating (and so copyrighting) a work atomically identical to some previously-copyrighted work, and one has access to all of the uncopyrightable bits that are brought together in a copyrighted work, one has no less liberty than one had before the copyrighted work was created. Indeed, as one now has opportunities to *access*, *discuss*, and *comment* on the copyrighted work, one's liberty is expanded by the work that copyright protects.

While there may be an argument to be made that a natural right of copyright should end at the original author's death, there seems ample reason to think that such a right should survive this event. As I have argued, the author's right to the object of copyright arises because of his creative activity, which in turn arises as an exercise of his capacities of autonomy, liberty, rationality, and the like. This said, it might be asked, why should we think that his exercise of these capacities might give rise to anyone else (including his descendents) having such a right. In other words, why should the author be allowed to *transfer* his rights to the object?

Certainly, I suspect, we do not want to say that an author who loses any or all of these capacities and yet remains alive should thus lose the rights to the objects that came about when he still *had* those capacities. While sustaining a right to life, for example, may depend upon sustaining certain capacities (probably those same capacities listed above), it is not these capacities that gave rise to the life so protected. Rather, it is in part the life that gave rise to the capacities. In the case of the objects of copyright, however, if my claim has any weight, it is as a result of such capacities that the object and the right to it came about. And so where it may be contended that sustaining certain capacities is

requisite for sustaining a right to life, the same does not seem obviously true in the case of the right to copyright. The capacities have already done their job.

Returning to the issue of transferability, I have argued that the sort of property to which copyright pertains differs in important ways from that of standard, physical property, and that, as such, so too do the ethics pertaining to it. However, despite these differences, copyright *is* a property right, and so it would not be unexpected that it operate in some ways similar to standard property rights. In particular, as standard property rights are generally regarded as transferable, so too would I expect copyright to be transferable (as, indeed, it is in its current legal applications). The full package of standard property rights usually includes the right to voluntarily waive or renounce one's rights in one's property, and to voluntarily transfer this package of rights to another person or persons.

As with rights to physical property, transfer of rights to intellectual property might occur as the result of a contractual agreement (as between author and publisher), as bequeathed in a will (or when the rights-holder dies intestate), or otherwise. It may be that property rights in intellectual property are non-transferable, whether through sale or otherwise, though I have not encountered any arguments to this effect. However, it seems that were this the case, so too would it be the case for standard property rights—that is, unless it can be shown why the difference in the objects of standard and intellectual property rights should give rise to a difference in their transferability. Absent, then, any reasonable argument for why property rights in general, or, if the above-hypothesized argument could be produced, copyright in particular, should not be transferable, I will contend that they can be passed from individual to individual, and from generation to generation, *ad infinitum*. Moreover, where it seems reasonable that standard property rights

might be suspended, overridden, or revoked under circumstances where available property suffers from scarcity, the same problem does not seem to arise for property in authored works, for the creation and copyrighting of authored works in no way depletes the intellectual commons.

While I can perhaps imagine an argument that natural property rights should not be transferable, and so dissolve with the property-owner's demise, what I cannot imagine is any reasonable argument that claims copyright should expire at any given point between the author's death and never, for to do so would seem to be to pick an arbitrary point on this timeline. Why should copyright expire at a point 50, 60, or 70 years after the author's death, and not at any other? The House Committee Report explains the reasoning behind the original life-plus-50-years term of the 1976 Act:

The present 56 year term is not long enough to insure an author and his dependents the fair economic benefits from the works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own earlier works in which copyright has expired. [...] Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public.⁸⁶

Standard arguments that, at some given point, the author and his descendents should have been amply and fairly rewarded for their efforts seem, first, unjustified. Some work may cease to produce profits in its initial run of publication, while another may continue to viably

⁸⁶ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679. On what basis limitations on the term of copyright are "obviously necessary" is something of a mystery.

produce profits for centuries. How is it we can say that in both cases the authors and their descendents have been fully rewarded at any one common point in time relative to each work's time of creation? As professors of law, Halpern et al., state, "Obviously the length of time a work is protected has a significant bearing on the total earnings that will flow to the author and copyright owner of the work, but this cannot be quantified accurately for any particular work until after the fact."⁸⁷ Second, such arguments seem merely incidental to copyright. As noted earlier in this chapter, there is nothing about copyright as I have described it that is in essence financially-motivated. That an author might so exploit his copyright to make a profit does not imply that copyright is itself at base a financial right. As such, to cut off a copyright on economic grounds is to miss the point of copyright.

Aside from cases where the copyright-holder renounces his rights, the sole reason I can see for limiting the duration of copyright is found in cases where either (i) the last person the copyright has been passed to (either the last in the copyright owner's line of descendents, or the last person the copyright has been transferred to, who himself has no heirs) has died, or (ii) where the copyright owner is unidentifiable. In such cases, there is no person who might be reasonably identified as the rights-holder, either by himself or by the members of the public. That is, there is no individual who might grant, or refuse to grant, permission to copy the relevant work. In all other cases, however, absent any argument that *no* natural rights should be transferable (and so all should dissolve at the death of the rights-holder), or that there is some difference between standard property rights and copyright such that the latter should be extinguished on death and the former not, I contend that the right of copyright exists in perpetuity.

⁸⁷ Halpern et al. (1992), p. 561.

AFTERWORD

Centrally, I have been concerned throughout this project with providing a stable, consistent, and coherent ontological foundation to ground the central program of copyright, including the right of copyright, the conditions of copyrightability, and the conditions of infringement. In the Foreword that began this project, I raised three cases: that of Richard Prince, who became famous by photographing photographs by Jim Krantz; that of Doug Sanford, who photographed e-mails sent by his ex-girlfriend and displayed the photographs in a local gallery; and that of J.K. Rowling, who has filed suit over an encyclopedic work, arguing that it infringes on her rights to the Harry Potter franchise. Having reached the end of our project, let us briefly return to these cases now.

On the conditions provided in the foregoing chapters, two of the three above cases are cases of infringement: that of Prince, and that of Sanford. Each photographer's work does, without permission, reproduce substantially elements of previously-copyrightable works—that is, in each case, the new work is atomically similar to the previously-existing work, with the properties held in common between the works connected by strong historical links. Prince's case closely mirrors a case discussed throughout the preceding chapters, that of Sherrie Levine and Walker Evans, and as with the Levine/Evans case, the Prince/Krantz case seems one of clear infringement. Notably, however, as Sanford's photographs do not perfectly reproduce his ex-girlfriend's e-mails (as they focus on some parts and blur others) and would seem to include properties not found in the e-mails themselves, the photographs would likely qualify as derivative works, and thus deserve copyright protection of their own.

In our remaining case, there seems to be no clear issue of infringement. Although the encyclopedic work will undoubtedly depend heavily on the Harry Potter books and films, assuming the unauthorized encyclopedic work does not directly quote from the copyrighted source material, but rather discusses simply the facts of the work, there is unlikely to arise any issue of atomic similarity. As such, while there will almost certainly be strong historical links connecting the encyclopedia to the original Harry Potter works, without atomic similarity, only half the grounds of an infringement complaint will be satisfied.

Having distinguished the infringing cases from the non-infringing one, the further question to consider is whether, in addition to infringing, Prince and/or Sanford also *violate* the rights of those whose works they infringe. While I conjecture there may be a range of rights and interests that will outweigh the right of copyright, the most likely competing interest in these cases is the one discussed at length in Chapter Seven: the value of ideas themselves. As I have stated, given our general interest in the expansion of the marketplace of ideas, where an action will serve to directly expand the marketplace of ideas, to the extent that infringing a particular copyright is *necessary* to do so, such an act of infringement should be considered permissible and, as such, not a violation.

In neither of our infringing cases is it *immediately* apparent how the infringing act is necessary to expand the marketplace of ideas, although we might consider some possible defenses. It might be argued, for instance, that both Prince and Sanford are *commenting* on the works that they infringe, and that doing so *requires* infringing. However, especially in the case of Prince, it is not clear how producing a visually indiscernible duplicate of the original constitutes commenting on it. At best, I suspect,

one might argue that one of Prince's duplicates operates in much the same manner as repeating back another's statement in a sarcastic tone. Whether this qualifies as commentary would be a matter of some debate. In the case of Sanford, it might be argued, in order to truly express his feelings, it would not do to photograph an e-mail *like* those sent by his girlfriend, but rather that only photographing *those very e-mails* would do. I suspect the line of argument for Sanford will ultimately hold more water than that offered here for Prince. However, for either to be successful would likely require a subtler line of argument than I am able to undertake here.

As the law currently stands, however, it is even more difficult to say whether Prince or Sanford's works infringe copyright, as the doctrine of fair use provides no reasonable heuristic for determining the matter. With this in mind, let us turn now to matters of policy.

Matters of Policy

In the United States, the Copyright Act has seen several official iterations, with each new version incorporating changes meant to reflect advances in technology and other real-world changes, and ideally to alleviate problems arising from earlier versions and from case law enacted between versions.¹ As such, practically speaking, the law allows at least in principle for a wide range of modifications to the central doctrines and concepts of copyright.

¹ Active iterations of the Copyright Act have also been altered, with the most recent additions to the 1974 Act incorporating the details of the Digital Millennium Copyright Act. Such changes, however, have not generally served to fundamentally alter the principles and concepts embodied in the Act, but rather to add additional rules or to expand the domain of copyright.

Certainly the most fundamental modification I argue for in the preceding chapters is the recognition of the nature of authored works, for it is on the basis of such a nature that the law of copyright must be built if it is to be stable and consistent. Many of the central concepts of copyright require only some further explanation and grounding, much of which arises directly from the ontological account I have provided. For example, on our understanding of the basic distinction between ideas and expressions, we can begin to sort out what qualifies under each, and so for protection or non-protection. However, accepting a multidimensional nature of authored works such as I have proposed would require an overhaul of some of the concepts and tests currently employed in the law. For example, where the law makes a principled distinction between “fixed” and “unfixed” works such that only the former may be offered copyright protection, on my view there is no grounding for such a distinction, and maintaining it leads to deeply counterintuitive results. Problems also arise for the concepts of “substantial similarity” and conceptual separability. Regarding substantial similarity, it seems no amount of similarity between works should *ever* alone be enough to substantiate a complaint of infringement, as evidenced in our running cases of the identical haikus and Grand Canyon photographs. Regarding conceptual separability, recall that the law only recognizes copyrightability in “useful articles” in cases where the item’s functional attributes are separable either physically or conceptually from its aesthetic ones. As I have shown, however, the problem with tests for conceptual separability is that absolutely every human artifact would seem to pass such a test: with any set of functional considerations, there seems to be an *infinite* number of ways in which those utilitarian needs might be embodied. As

such, that an item is a “useful article” should not in any way seem to count against its copyrightability.

Regarding my larger program, as tests for copyrightability and infringement have historically been indoctrinated into the law on the basis of particular judicial decisions without reflecting changes to the Copyright Act, it would seem that the law could without great difficulty take up conditions such as those I have provided in Chapter Six. And, as my conditions for copyrightability and infringement much more closely line up with than diverge from much of basic contemporary legal thinking, introducing such conditions would seem to be a relatively painless process.

More difficult to address, however, would be the conclusions reached in Chapter Seven pertaining to the *right* of copyright. First, the U.S. Constitution is explicit that copyright should be of limited duration, a position I have explicitly argued against. Amendments to the Constitution can be enacted by a Congress-proposed bill passing in both houses of representatives by a two-thirds vote, and then ratified by state conventions or legislatures. However, such amendments do not serve to alter the extant wording of the document—only to add to it. Since recognizing copyright as a perpetual right would seem to require altering the current wording of the Constitution proper, such would theoretically require a Constitutional Convention—a much more arduous process, and, at least as of this writing, one not undertaken in the United States since the Constitution was originally written.

Perhaps equally difficult to address, because it relies on unofficial but deeply-entrenched belief, would be my proposal that copyright is at base a natural right. As discussed in detail in Chapter Seven, although the wording of the Constitution does not

contradict the notion that copyright is at base a natural right, legislators since Jefferson have gone out of their way to ensure that it is not recognized as such. So, while recognition of copyright as a natural right would not require any official alteration to the law as written, it faces what is perhaps an even more difficult barrier: the history of popular legislative opinion.

For these reasons, enacting changes to the law based on the conclusions of my arguments would come in a sliding scale of difficulty, legal and otherwise. Granted, many of the conceptual problems I indicate—and solutions I propose—could be addressed on an individual basis. However, to do so would only serve to further buttress a system in danger of collapse. As I hope to have shown, what is ultimately required is a stable foundation based on an understanding of the objects of copyright—authored works—upon which the law of copyright could be soundly secured.

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