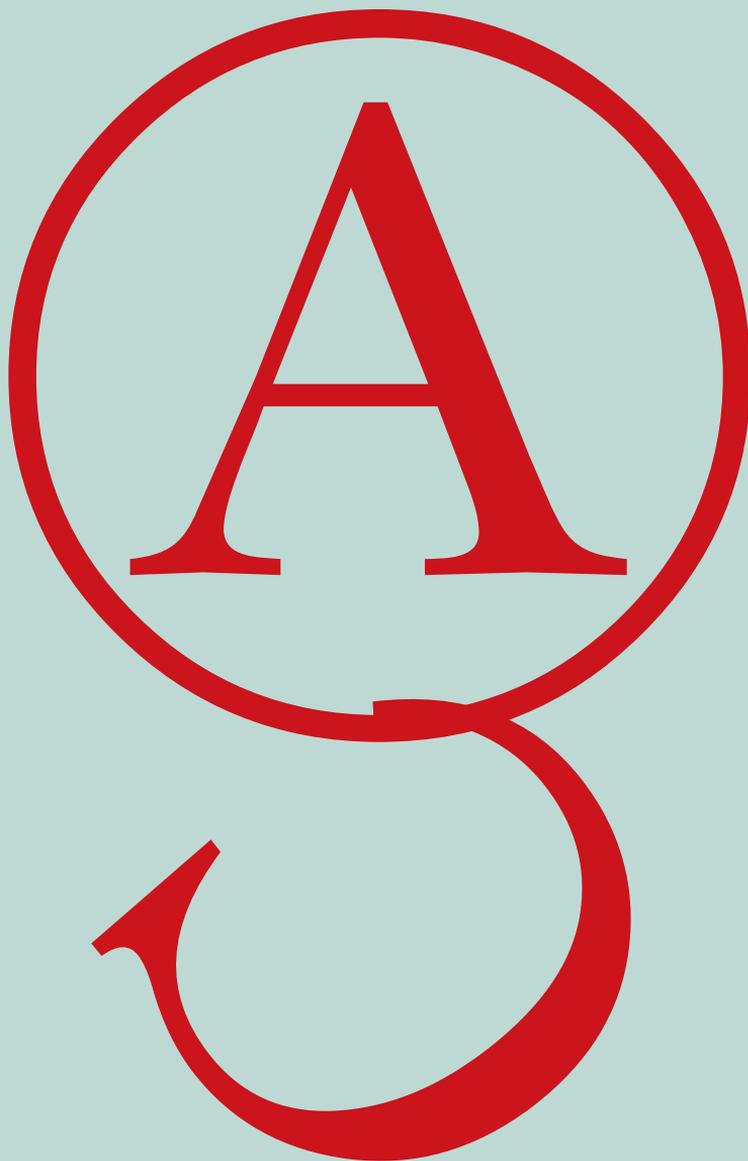


Edited by Mireille van Eechoud

The Work of Authorship



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Romantic authorship in copyright law and the uses of aesthetics

Erlend Lavik

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

(Seán Burke, 2008, p. 8)

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

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

Part I

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

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

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

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

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

A much challenged influence

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

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

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

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

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

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

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

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

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

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

‘Influence’ as historical explanation

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

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

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

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

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

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

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

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

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

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

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

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

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

In his conversations with Eckermann, Goethe said that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The constructedness of authorship

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

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

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

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

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

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

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

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

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

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

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

A lack of interpretive constraints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A more panoramic lens

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

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

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

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

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

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

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

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

Part II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Post-structuralism's strategic ambivalence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Avant-garde theory

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

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

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

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

A pragmatist perspective

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

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

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

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

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

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

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

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

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

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

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

Lessons

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

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

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

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

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

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

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

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

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

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

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

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

Aesthetic evaluation in law: pastiche and parody

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Stauffer too acknowledges this when she writes:

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

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

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

From theories to practical skills

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

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

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

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

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

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

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

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

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

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

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

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

Notes

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

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

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

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