

## What Belongs in Copyright?\*

### *Keynote Address*

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Good morning. I want to start by thanking the organizers of this conference, the Kernochan Center, and Jane Ginsburg in particular for inviting me here to speak today. I was especially excited to be invited, not only because I attended this law school many years ago, but also because the subject of this conference is, in many ways, a copyright professor's dream. As you may know, law professors love hypotheticals—the more outlandish the better. And here we have an entire conference devoted to considering not just hypotheticals, but real-life cases that stretch the outer boundaries of copyright and force us to confront some of the most basic principles in this area of the law. So to be able to spend an entire day with some very smart people talking about these cases is a real treat.

The title of my talk today is, "What Belongs in Copyright?" When Jane invited me to speak, she asked me to provide a "more Olympian perspective" on the issues of authorship, originality, and fixation that are the subjects of today's conference. And while I don't pretend to have any Zeus-like powers of insight or observation, I do hope to provide at least some general thoughts about the question implied by the title of this conference, namely, what properly belongs within the scope of copyright. In particular, I want to spend some time talking about how copyright law constructs the box that defines what is inside copyright and outside.

I will start by very briefly surveying some of the doctrines that define what can be copyrighted. I will then talk a bit about what theory or set of theories we might look at to help decide these difficult boundary cases, to help decide what belongs in that box. And finally, at the very end I will suggest that underlying all of these doctrines and theories are relatively unexamined aesthetic judgments about what counts as copyrightable subject matter, judgments that we should probably take more expressly into account when deciding when something is copyrightable. My goal in these remarks is not so much to provide any specific answers, but to set the table and provide some general frameworks for the more detailed discussion to come.

So to start, how does copyright law construct the box? What doctrines define the subject matter of copyright? The standard answer, the one that begins every

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introductory copyright law course, is originality and fixation. These are the traditional subject matter doctrines set forth in section 102(a).<sup>1</sup> And of these two it's clear that originality does most of the work. In most copyright courses, we spend a good deal of time going over the early cases that help define originality—*Sarony*,<sup>2</sup> *Bleistein*,<sup>3</sup> *Catalda*,<sup>4</sup> and all the rest, which define originality as independent creation and some modicum of creativity. We follow these cases all the way up to the Supreme Court decision in *Feist*.<sup>5</sup> And all along we emphasize the relatively modest requirements for satisfying originality.

We then typically move on to consider some of the exclusions from copyright set forth in section 102(b) and elsewhere: the exclusions for facts, ideas, methods of operations, and all of the difficult line drawing questions that these doctrines create (e.g., what about so called “created facts,” fictional histories, etc.).<sup>6</sup> We also discuss the useful article doctrine and the limit that functionality places on copyright, policing the boundary between copyright and patent. Together, all of these doctrines, grouped loosely under the heading of originality, undeniably play the primary role in defining what is copyrightable subject matter.

Now, I'm actually not interested so much in talking about these particular doctrines for the purposes of today's talk, in part because Rob Kasunic covered them so well just now, but also because I am more interested in how other doctrines also serve the same function—doctrines that we don't normally think of as playing a significant role in policing copyrightable subject matter, since these are the doctrines that are implicated by many of today's panels.

For example, what about fixation? If originality plays the starring role in setting copyrightable subject matter, fixation is at most a bit player. The typical copyright course doesn't spend much time on fixation and for good reason because it's rarely an issue. Most copyrighted works easily satisfy the fixation requirement. In most cases where someone brings a lawsuit, the copyrighted work has in fact been fixed.

Indeed, the fixation requirement is so easily satisfied that sometimes we have a hard time figuring out why it exists in the first place.

It might be a constitutional requirement, given that the Constitution talks about “Writings,” but that just raises the question: why is it in the Constitution? Perhaps it serves as a rough proxy for deciding when works are commercially valuable, since it is often necessary to fix a work in order to exploit it economically. Some have suggested that fixation serves an evidentiary purpose, since otherwise it would be hard to prove infringement if there were no fixed copies.<sup>7</sup> Still others have suggested that fixation serves notice to third parties about the existence and scope of the copyright claim.<sup>8</sup> Many of these justifications, and I think the ones that are

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1. 17 U.S.C. § 102 (2012).

2. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

3. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1902).

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

5. *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340 (1991).

6. 17 U.S.C. § 102 (2012).

7. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 730–33 (2003).

8. See Lydia Loren, *Fixation as Notice in Copyright Law*, B.U. L. REV. (forthcoming 2016).

probably most persuasive, are grounded in more practical concerns about administrability of the copyright system.

Yet the administrative function of fixation raises the possibility of a disjuncture between practical concerns about administrability and substantive concerns about rewarding and providing incentives for certain forms of creativity. In other words, there may well be cases where the concern about administrability leaves unprotected certain types of creative activity that we would otherwise be interested in protecting. Because, after all, unfixed works can be extremely creative. Take, for example, an improvised jazz solo—or a comedy performance, unfixed dance performances, dramatic performances, extemporaneous speeches or conversations, certain forms of modern or conceptual art that are ephemeral in nature.<sup>9</sup> The fixation requirement has the effect of screening out certain forms of creativity (at least under federal law). Again, in most cases this probably is not a significant problem because most works are fixed, but this may create tricky questions at the boundary, which is what we are most concerned about today. This is one area where there might be a policing function that fixation plays in setting the substantive scope of what can be copyrighted.

So far I have talked about the two traditional doctrines that police copyrightable subject matter. I want to mention two more. First, what is a “work of authorship”? Section 102(a) says that copyright subsists in “works of authorship” and although the Copyright Act does not define what a work of authorship is, it does say that this “include[s]” a list of different types of works, the familiar list that you see in 102(a).<sup>10</sup> Traditionally, “work of authorship” has not served as a meaningful limit on copyrightable subject matter, and this is because most works can probably be fit into one of these categories on the list. Moreover, the statutory language says “include,” which suggests that this list is not exclusive. So, in theory, courts could consider other works that are not on this list and include them in copyrightable subject matter.<sup>11</sup>

At the same time, courts have generally not taken up the invitation to recognize new categories of works, so the doctrine seems to play little or no role in defining copyrightable subject matter. (Although query whether courts have in some instances de facto created new categories. For example, the recent *Batmobile* case in the Ninth Circuit provides an interesting example.<sup>12</sup> Have the courts essentially created a new subject matter category for fictional or literary characters?)

Now this of course could change, and the panels in today’s conference highlight why that might be. There may well be areas of creative endeavor that do not fit cleanly within any of these existing statutory categories. For example, at least one

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9. See Megan Carpenter & Stephen Hetcher, *Function Over Form: Bringing The Fixation Requirement Into The Modern Era*, 82 FORDHAM L. REV. 2221, 2271 (2014).

10. 17 U.S.C. § 102 (2012) (stating that works of authorship include literary works; musical works; dramatic works; pantomimes; choreographic works; pictorial, graphic, and sculptural works; motion pictures; other audiovisual works; sound recordings; and architectural works).

11. For a comprehensive analysis of “works of authorship,” see R. Anthony Reese, *Copyrightable Subject Matter In The “Next Great Copyright Act,”* 29 BERKELEY TECH. L.J. 1489 (2014).

12. *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

European court has recognized a copyright in a perfume.<sup>13</sup> Could U.S. law copyright protect a perfume? It does not fit neatly into any of the existing categories, yet there may well be substantial creativity and investment in creating a new perfume. And of course other fun examples have been offered,<sup>14</sup> some of which will be discussed today: type fonts, yoga poses, recipes,<sup>15</sup> the design of a roller coaster, fireworks displays, invented languages like Klingon, and my personal favorite—a breeder breeding a new species of parakeet.<sup>16</sup> These examples raise potentially tricky questions about how willing courts should be to recognize new categories of works if they can't be fit into an existing category. Are courts the proper venues for recognizing new categories, or should they leave this properly to Congress? If the courts are the proper venue, how should they decide whether a category should be included? This may well be an area for fertile future development.

The last potential doctrine defining copyrightable subject matter that I want to talk briefly about is authorship. Now of course authorship is a tremendously complex issue. The term “author” is not defined anywhere in the Copyright Act. There is a tremendous amount of literature talking about copyright law’s definition of the author and the assumptions underlying it, and Jane Ginsburg, of course, has done more than anyone to advance our understanding of the central role of authorship in the copyright system.<sup>17</sup>

Here today, I’m not so much interested in authorship as determining who among a list of different potential claimants gets the copyright. Instead, I’m more interested in authorship as a doctrine that potentially defines whether a copyright exists in first place. To have a copyrighted work, must there be an author? The text of the Constitution certainly suggests so. What about works for which authorship is ambiguous? Can these be the subject of copyright? This is where we get into questions about computer-generated works,<sup>18</sup> works involving audience participation, works incorporating randomness (e.g. John Cage, Jean Arp),<sup>19</sup> and of course animal-created works like the monkey selfie. Do we need an author for copyright to exist? How does copyright think about authorship and define this, not so much in terms of who gets the copyright, but whether a copyright exists in the first place?

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13. HR, June 16, 2006, LJM AU8940, Kecofa/Lancôme (EC).

14. For many of these examples, see Reese, *supra* note 11.

15. Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007).

16. Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002).

17. See, e.g., Jane Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 COLUM. J. L. & ARTS 11 (2005); Jane Ginsburg, *The Right to Claim Authorship in US Trademarks and Copyright Law*, 41 HOUS. L. REV. 263 (2004); Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

18. Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 5.

19. Durham, *supra* note 16.

Thus in the end, I suggest that in addition to the traditional two doctrines of originality and fixation, we also have works of authorship, and also even the definition of author itself, all serving to define copyrightable subject matter and to police the proper scope of copyright.

To see how these how these doctrines all work together in practice, consider the recent case, *Kelley v. Chicago Park District*.<sup>20</sup> The artist, Chapman Kelley, in 1984 installed an ambitious wildflower display in a park owned by the City of Chicago, in downtown Chicago. The display consisted of two enormous flower beds planted with local wild flowers, bordered by gravel and steel, considered a form of living art, and tended by Kelley and others for many years. By 2004, however, the beds had deteriorated, and the city's goals for the property had changed, and so the city modified the work, dramatically reducing its size. Kelley brought suit under the Visual Artists Rights Act<sup>21</sup> arguing that these changes violated his right in integrity.<sup>22</sup>

The case is a really nice illustration of how all four of these doctrines operate to police subject matter. The district court found no violation. It held that the work was a "painting or sculpture" within the meaning of VARA, but held that it was insufficiently original.<sup>23</sup> The district court thus used the traditional originality doctrine to exclude the work from copyright. The Seventh Circuit on appeal also agreed that there was no violation of VARA, but on different grounds.<sup>24</sup> The court first raised doubts about the trial court's conclusion that the work was a "painting or sculpture," thus invoking "work of authorship" (or, more accurately, a VARA analog to the work of authorship) as a potential limit on subject matter.<sup>25</sup> The court also disagreed with the lower court's conclusion that the work was insufficiently original, instead finding that it satisfied the low originality threshold. However, the court held that the work was nevertheless not protected because it was insufficiently fixed, because of the constantly changing nature of the flowers.<sup>26</sup> Indeed, the court went on to conclude that Kelley was not ultimately the author of the work, because the final display depended on other elements outside of his control, such as nature, the winds, weather, and all the rest. *Kelley* thus provides a nice example of all four of these doctrines being used in one case to police the scope of copyrightable subject matter.

Now of course, all of these doctrines are put under pressure by the boundary cases that are the subject of today's conference. Because these are boundary cases, there will be little doctrinal guidance, either in case law or legislative history. In the *Kelley* case, for example, one could easily imagine the courts having gone the other way on every one of the doctrinal issues raised in that case. So this raises the next question that I want to spend a little time considering: given the substantial

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20. *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

21. 17 U.S.C. § 106A.

22. *Kelley*, 635 F.3d at 291.

23. *Kelley v. Chi. Park Dist.*, 04 Civ. 07715, 2008 WL 4449886, at \*5 (N.D.Ill. Sept. 29, 2008).

24. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011).

25. *Id.* at 302.

26. *Id.* at 303.

uncertainty at the boundary, what set of theories or policies can we look to, to help decide these tricky cases?

One approach that I think would be extremely unhelpful would be to engage in formalistic reasoning, by which I mean trying to figure out what is inherent in the definition of “originality” or “work of authorship” or “authorship” or “creativity.” Of course, since we are all legal realists now, we should be immune from this kind of reasoning. But in practice, it is all too easy to slip into these kinds of essentialist arguments, so this is mostly just a cautionary point, that we need to be particularly careful to resist arguing over “what is creativity” except to the extent that it helps inform some underlying theory or policy.

Another approach would be to look at this question purely instrumentally and ask whether we need incentives for the creation of these kinds of works. To the extent that copyright is about solving the problem of underproduction of certain kinds of works, do these boundary cases indicate a need for copyright to provide incentives? Will we not have enough of these works absent copyright protection? In the monkey selfie case, for example, with respect to questions of authorship, do we need to provide incentives for the creation of these kinds of works?<sup>27</sup> Presumably the monkey doesn’t respond to copyright incentives. But will the photographer respond to incentives? If we don’t protect the work, will this lead to underproduction or under-dissemination of these kinds of works, not just animal selfies but other photos and movies that result from setting up a camera and waiting for things to happen? Similarly, with respect to computer-generated works, do we need to create incentives for the creation of such works, and if so, how should we structure these incentives? This is one set of familiar questions that we might ask, under the instrumental view.

Another approach would be to look at this question from a non-instrumental perspective and ask whether the kind of creative labor at issue should be or deserves to be rewarded. Whether we ground this in Lockean labor theories or Hegelian theories of property as personality, the idea is to ask whether this is the type of creative labor that copyright should reward. So, again, going back to the monkey selfie case: who deserves a reward for the creative labor? Whether the monkey is engaging in creative labor is a tricky question—probably not, at least by our standards. Does the photographer deserve reward for his labor? How much labor was there? How creative was he? Was this purely accidental, as some of the initial reports suggest? What if he had set out the camera on purpose hoping that a monkey would pick it up? Similarly, with respect to computer-generated works, how do we think about creative labor in that context? Is the program laboring in any sense? What about the author of the program? Clearly he or she is engaged in labor, but is it the kind of creative labor we want to reward, or is it more technical in nature? These are the kinds of questions that this perspective would raise.

Now both of these are pretty standard theoretical approaches we might apply to any question of copyright scope, and one could imagine still other theories grounded in the public domain, democratic participation, and all the rest. But what

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27. *Naruto v. Slater*, No. 15-CV-04324, 2016 WL 362231 (N.D.Cal. Jan. 28, 2016).

I do want to suggest here at the very end, in the final part of my remarks, is that underlying both of these frameworks, and many others, is a question that does not get as much attention as it should, namely, from an aesthetic perspective—whether the kinds of works at issue are worth rewarding or incentivizing.

Under an instrumental view, we ask whether incentives are necessary to lead to the production of these kinds of works, but that of course presupposes that we want these kinds of works to be created. And so the fundamental question is: do we? What kinds of works do we want our system of copyright to create? Assuming that incentives would help, which is a non-trivial question, do we want more monkey selfies, computer-generated works, recipes, et cetera. And this is fundamentally a question of value. Looking purely at incentives does not give us a clear answer. After all, one could argue that incentives are necessary to create new and better databases. Yet even if this were true, the Supreme Court in *Feist* has said that this is simply not the realm of copyright.<sup>28</sup> And so we need to decide upon the kind of works we want to incentivize.

Similarly, under the moral rights view, we ask whether there is a moral claim to this kind of creative labor, but again this requires a judgment about the kinds of creative labor that are worth rewarding. What kinds of creative labor? What counts as creativity? We don't reward all kinds of labor, like sweat of the brow or unoriginal labor. Does creating a software program that writes music count? Does leaving a camera unattended in the rainforest count? And this is fundamentally, again, a question of value.

These kinds of questions of course are uncomfortable because the copyright system tries to be as value neutral as possible. Going back to Justice Holmes and *Bleistein*,<sup>29</sup> the courts have insisted that they are not in the position to make these kinds of aesthetic judgments. And for good reason, because such judgments are often extremely subjective. But as others have pointed out, particularly my colleagues Fred Yen, Zahr Said, and others, such judgments are inevitable in many areas of copyright, and certainly the issue of subject matter raises these issues very directly.<sup>30</sup>

Going back to the *Kelley* case, the two courts in this case spent most of their time analyzing all of the various scope-defining doctrines. The doctrinal materials are sufficiently open textured that a court could have come out either way on any of them. What prompted the courts to decide the way they did? Certainly they were informed by the doctrinal categories they were operating under, but I would argue that underlying the court's decision-making is also an unstated but powerful intuition that copyright is just not about this kind of work, that this is just not the kind of creative activity that copyright is meant to protect.

So in deciding these boundary cases we really cannot, I would argue, avoid making the substantive value judgment about what is important. We are going to

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28. *Feist Publ'ns v. Rural Tel. Serv.*, 499 U.S. 340, 341 (1991).

29. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1902).

30. Zahr Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

be forced to make the decision about what kinds of creativity we want to reward or incentivize, and ultimately we cannot avoid the substantive question: what is copyright ultimately about?

So if we have to make these judgments, how might we decide? What could we look to beyond our own subjective viewpoints? One can imagine many different potential sources. We could look to history and custom, but this has obvious downsides since times change. After all, the original Copyright Act only protected books, maps, and charts, and our understanding of copyrightable subject matter has expanded drastically over the years. Relatedly, we could look to the constitutional authorization<sup>31</sup> and ask what kinds of works promote the “progress of science” as originally understood by the framers. We could look to the structure of copyright law for guidance—for example, the list of works in section 102(a)—to help analogize or implicitly define a field of copyrightable subject matter.<sup>32</sup> Thus, for example, we might include fireworks displays as analogous to audio visual works, but exclude new breeds of parakeets as being too far outside the list of works in section 102(a). We could also look outside the legal materials, to opinions of people in the field or to aesthetic or literary theories of merit.<sup>33</sup> For example, in *Kelley*, the court acknowledged that some might consider the flower beds a form of postmodern art, but ultimately rejected the implications of this. These are all different sources for engaging in a more robust discussion about what we in the end value.

Now I do not pretend to have the answer to precisely how courts should engage in this kind of discussion in these close boundary cases. However, I do have two suggestions about how courts might approach this. First, in making these close decisions, I think courts should adopt a perspective not of aesthetic neutrality, which I think is impossible, but aesthetic humility. This would recognize that these kinds of judgments are highly contingent, often influenced by the judge’s own prior experiences or perspective. And in this light, I think judges should be willing to give deference to claims of artistic or other value before dismissing them too quickly.

Second, and relatedly, the courts should also adopt a perspective of empirical humility. Empirically, will expanding protection lead to more creativity? This is often a trickier question than we assume. Also, what will the likely impact be on others in this same community of creativity? Creating new forms of protection potentially changes the status quo, so we need to be very careful about imposing new protection in areas that did not have them before, recognizing that this might disrupt settled expectations and in the end do more harm than good. (The experience in patent law, with its recognition of new subject matters, is in some ways a cautionary tale.) Note that there is also an institutional component to this humility, recognizing the limitations that judges operate under in making these

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31. Christopher J. Buccafusco, *A Theory of Copyright Authorship*, VA. L. REV. (forthcoming 2016).

32. 17 U.S.C. § 102(a).

33. See *supra* note 30.



difficult assessments, and recognizing also that judges may be less able to cabin the scope of these new rights through statutory or specific exceptions, as Congress did when it expanded subject matter to include architectural works, software, and sound recordings.

These are two modest suggestions for how courts might respond to the daunting task of deciding these cases at the outer boundaries of copyright. One expands the subject matter scope by encouraging a broader understanding of creativity. The other limits subject matter by requiring some assurance that, even if we think the work is a type that deserves protection, we are relatively certain that extending copyright will do more good than harm. In the end, both of these are suggestions that attempt to cabin the inherent subjectivity that exists in deciding what I think is ultimately the question presented by this conference: what exactly is in that box? Other than the monkey of course. Thank you very much.