

Authorship, Attribution, and Audience

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Date : December 7, 2015

- Kirsty Robertson, [The Art of the Copy: Labor, Originality, and Value in the Contemporary Art Market](#), in **Putting Intellectual Property in Its Place** 158-80 (Laura J. Murray et al. eds. 2014).
- Lionel Bently & Laura Biron, [Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, If Anything, Is to Be Done?](#), in **The Work of Authorship** 237-76 (Mireille van Eechoud ed. 2014).

When the architect Philip Johnson was late in remitting payment for a sculpture he had purchased from the artist Robert Morris, Morris did not, apparently withhold the sculpture itself. Rather, he created an [addendum](#), a note that read as follows:

The undersigned, Robert Morris, being the maker of the metal construction entitled Litanies, described in the annexed Exhibit A, hereby withdraws from said construction all aesthetic quality and content and declares that from the date hereof said construction has no such quality and content.

Johnson purchased the document, and the deed — whatever it was — was done. The sculpture and the document are now both part of the collection of the Museum of Modern Art in New York.

Whether Morris's act was the result of true pique or only a bit of cheekiness is unclear. But it gives rise to a set of familiar and still debated questions: Was the "metal construction" no longer art because its "maker" no longer wished to stand by its aesthetic qualities? And, if so, does that mean that the sculpture no longer had an artist but had merely a manufacturer? Does authorship (and, throughout, I will use the term to encompass all modes of creative production) require at least artistic conceptualization? Or is skillful craftsmanship sufficient, so long as the relevant community perceives aesthetic value in the work?

Two recent book chapters give thoughtful consideration to these issues.

The first, by [Kirsty Robertson](#) in the collection [Putting Intellectual Property in Its Place](#), discusses the Chinese suburb of Dafen, known officially as the "Dafen Oil Painting Village." The town produces 60 percent of the world's oil painting replicas (about five million per year), primarily Old Masters and modernist works in the public domain, although some works are replicas of paintings by living artists and others are of modern subjects "in the style of" famous artists. Between 8,000 and 10,000 artists work in Dafen, "with many of them producing twenty to thirty copies of paintings per day." (P. 158.)

Consider only the replicas of public domain works, putting aside any questions of copyright infringement. Are the Dafen artists to be considered authors, or are they merely highly skilled technicians, no more creative than a photocopier? The answer, as Robertson perceptively describes, depends in large part on the cultural lens through which one views authorship. The Western commentary on the Dafen artists that tends to devalue their work as mere copying emanates from much the same interpretive community as that which heralds Richard Prince's work as innovative.

Indeed, as Robertson writes, some Western commentators view the Dafen artists with sympathy, forced to sublimate their creative impulses in favor of mass production. (Never mind the fact that the Dafen paintings are anything but mass produced.) By contrast, notes Robertson, the Dafen artists themselves see each painting as highly original and individualized despite the goal of having it very closely resemble a prior work. Thus, notes Robertson, this sets up “a distinction between content and labor, with Western commentators tending to position authenticity in the content and Chinese workers and commentators positioning it in the act of painting” (P. 164.) Authorship for the former arises from concept; authorship for the latter arises from execution.

U.S. copyright law, however, continues to struggle with these concepts. Because it is tied to a view that equates authorship with originality, and copyrightability to a protected work “fixed in a tangible medium of expression,” the law on its face is sometimes too rigid when it is applied to artistic or social practices that diverge from this model. (Robertson herself demonstrates how difficult it is to avoid employing the typical discourse when she defends the Dafen artists against characterizations of their work as “fake paintings” by noting “there is no attempt at all to pretend that they are *original*.” (P. 165.) (emphasis mine)) So Judge Leval, in *Fisher v. Klein*, 6 USPQ2d 1795 (S.D.N.Y. 1990), focuses the authorship question on conceptualization and authority in relevant cases, describing a sculptor

who might sit in a chair, never moving and never touching the materials, perhaps in part because he might be paralyzed or simply because the materials might be large and heavy. There are sculptors nowadays who work in huge materials, I-beams, storage tanks, things like that, that are welded together where the sculptor’s contribution is rendered entirely by the giving of instructions to workmen to put a member in a certain position and bolt it to another member and so forth. I think it is clear without question that such participation ... is recognized as authorship under the copyright law even if the author never places his hand on the material

and the Second Circuit determines that the dramaturge Lynn Thomson was not an author of the musical *Rent* because the playwright Jonathan Larson did not intend her to be one, consistently listing himself as the sole author of the script.

Whether copyright law should take more account of such social and artistic practices is the subject of [Lionel Bently](#) and [Laura Biron](#)’s “Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, If Anything, Is to be Done?,” their contribution to the edited volume *The Work of Authorship*. Bently and Biron’s work thoughtfully explores the way that the concept of authorship in U.S. and U.K. copyright law is “out of sync” with social practice in various creative communities.

Bently and Biron focus on three areas of creative output to illustrate their point: scientific publications, conceptual art, and the editing of literary works. Scientific publications, unlike publications in many other academic fields, typically involve a significant number of named authors. (There are even here some outliers, such as a 1993 [article](#) in the *New England Journal of Medicine* that was attributed to 976 authors.) This phenomenon, as Bently and Biron note, reflects the nature of scientific research, the norms of academia in those fields, and the requirements of grant funding, tenure and promotion review, and other systems of recognizing work. Thus, attribution in the sciences may be based on a wider array of contributions to the work than is typical of written work in other disciplines, including study design, data analysis, and the writing up of results. (Indeed, despite Posner’s “prose envelope” in *Gaiman v. McFarlane*, one typically expects a co-author to a law review article to have contributed at least part of the written expression.)

By contrast, attribution norms in the conceptual art world and in literary editing call for the elimination of the identity of contributors. Sol LeWitt is identified as the author of his wall drawings, despite the fact

that his contribution was limited to the instructions to be executed by others; and notable literary editor Maxwell Perkins did not see his name on the front of *Look Homeward, Angel* despite the fact that his selection and arrangement of material in the drafts contributed heavily to the literary success of Thomas Wolfe's novel.

None of these arrangements are necessarily seen as unusual or, perhaps, even unfair, although one must acknowledge the power dynamics at play in at least some of these situations (as did Mary LaFrance in her [analysis](#) of *Thomson v. Larson*). But it would be a mistake to assume that they always reflect the truth of creation, as opposed to custom, norms, or contract. Attribution is a signaling device first and foremost, and so it may not always be aligned with copyright's author (the holder of legal rights), with the individual who put pen to paper, or with the community's view of the author. The author [Robert Galbraith](#), at the first minute of his existence, had both created nothing and created everything that J.K. Rowling had already written.

Thus, Bently and Biron are correct, in my view, when they conclude that statements of authorship must be recognized for their limitations, and that there is likely to be a fundamental disconnect between these signals and copyright law. As they note, "the legal system requires the identification of authorship as a mechanism for achieving certain functions, most obviously as regarding the initial allocation of copyright . . . However, traditionally, the British and US legal systems have not treated the legal definition of authorship as determining of attribution practices" (P. 256.) The challenge, perhaps, is in assuming that there *should* be any alignment between the attribution on a particular artistic expression and the name of the person entitled to enforce the legal rights attached to that work, simply because the two functions share, in some instances, the title "author."

So, as the subtitle asks: What, if anything, is to be done? Here, Bently and Biron are less specific and more preliminary, although understandably so. After evaluating and ultimately rejecting other proposals in the literature, they argue for a more flexible, dynamic, and "open-textured" concept of authorship that can be deployed variably depending on the context and over time as social norms in an industry develop. Ultimately, they argue for a separate attribution right that "could be extended to all relevant contributors to the making of a work (or perhaps to any intellectual endeavor)" (P. 267.) This will, they hope, both reflect claims of authorship arising out of social norms and provide an outlet for those who would otherwise use copyright law to vindicate those claims in the public arena.

Can such a project, promising though it is, operate distinct from questions of originality, audience, power, and authenticity? Will it merely reflect norms or also reinforce or even create them? This remains to be seen. For now, as Robertson notes, the artists of Dafen will carry on, creating "fake" art that "hide[s] the labor of their making" so as not "to unravel the premise that the idea makes the art not the work." (P. 174-75.)

Cite as: Laura Heymann, *Authorship, Attribution, and Audience*, JOTWELL (Dec. 7, 2015) (reviewing Kirsty Robertson, *The Art of the Copy: Labor, Originality, and Value in the Contemporary Art Market*, in **Putting Intellectual Property in Its Place** 158-80 (Laura J. Murray et al. eds. 2014) and Lionel Bently & Laura Biron, *Discontinuities Between Legal Conceptions of Authorship and Social Practices: What, If Anything, Is to Be Done?*, in **The Work of Authorship** 237-76 (Mireille van Eechoud ed. 2014)), <https://ip.jotwell.com/authorship-attribution-and-audience/>.