What Can Neuroscience Teach Us About Copyright?

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Mark Bartholemew, Copyright and the Creative Process, 97 **Notre Dame L. Rev.** 357 (2021).

Mark Bartholemew of the University at Buffalo School of Law recently published an article in the *Notre Dame Law Review*, *Copyright and the Creative Process,* which offers a fresh perspective on a central question in copyright law—what is "creativity?" Creativity is the thing that copyright law is meant to encourage. Copyright, in other words, is justified as a way of incentivizing creativity. But copyright law's understanding of creativity is notably spare. The U.S. Copyright Act states that a work must be "original" in order to be protected. But the Act does not define originality, or situate it within the broader concept of "creativity." The Supreme Court in its decision in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.* was only a bit more forthcoming. Originality, the *Feist* Court made clear, does not require the sort of novelty that eligibility for patent protection does. Rather, what is required is only independent creation (i.e., that the work originate with the author, rather than being wholly copied from another), and that is "possess[es] some creative spark, no matter how crude, humble or obvious is might be." Id. at 345 (internal quotations omitted).

Feist makes it clear that the standard is not demanding. It does not make clear, however, how to assess in borderline cases whether a work meets that low threshold and is creative enough to be protected. Copyright's reticence on this point is, at minimum, a bit strange. Some have reacted by suggesting that we drop or at least de-emphasize creativity as an entry condition for copyright protection.[1] Others have gone in the opposite direction, suggesting that the creativity standard be raised.[2] But it's difficult to know what to do with copyright's creativity requirement, if anything, until we understand the concept better.

Mark Bartholemew's new article attempts to harness recent advances in neuroscience to inform our understanding of what should count as "creative," and how copyright should make that assessment. Bartholemew begins with a critique of some commonly-held beliefs about creativity's ineffability; beliefs which, he argues, lead us to overlook scientific evidence about the nature of creativity that could better inform copyright law:

> The main reason for the creativity criterion's impoverishment is a belief—indeed, a faith—in the almost magical quality of the creative process. So conceived, the creative process is wholly and necessarily subjective, impervious to description or measurement by objective criteria. A corollary position warns of aesthetic prejudice. Because there are no objective benchmarks available to keep them honest, judges and juries will lend an undesirable bias to any attempt to rigorously evaluate artistic creativity, unfairly favoring some kinds of artworks over others. As a result, creativity is mostly presumed rather than proven in copyright cases.

This understanding of creativity, Bartholemew argues, is outdated. In particular, neuroscience, Bartholemew writes, is beginning to give us insights into what creativity is, and how it happens. For example, neuroscience investigations show us that creativity is usually the result of planning and focus, rather than serendipity or sudden inspiration. And yet, copyright law ignores the creative process and focuses on the work itself, inquiring whether creativity can be found within the four corners of the putatively creative product. Recent evidence also shows that much artistic creativity harnesses and indeed depends on a creator's knowledge of prior work in a particular creative field. And yet copyright, unlike patent, does not inquire into the creativity of a particular work by comparing it to the prior art.[3] Evidence suggests, moreover, that experts in a particular creative field can readily recognize important creative advances in their field. And yet copyright courts do not, for the most part, rely on expert testimony in determining whether copyright's creativity standard has been met.

On all of these points and more, Bartholemew writes, copyright doctrine may be ripe for reappraisal, especially as the science (which the author readily acknowledges is still formative) advances. Bartholemew first deals with the originality "abolitionists." He argues that copyright's minimal creativity requirement is already too low, and that lowering it further would be likely to stifle creativity by burdening follow-on creators who would face even greater barriers to creative re-use than they do presently. The author favors a more robust creativity requirement. But the question is how to execute that.

On that question, Bartholemew identifies several ways that the science could alter how we analyze whether copyright's creativity requirement has been met. In particular, we should be more willing, Bartholemew argues, to investigate artistic motivation as part of assessing whether a work meets copyright's creativity criterion. The author points to Justice (then Judge) Gorsuch's opinion in Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., as a useful example. In determining whether a mathematically-precise computer model of a Toyota car body was "creative," Gorsuch noted that the model was not motivated by artistic considerations or ambitions but rather represented "an attempt accurately to depict real-world, three-dimensional objects as digital images viewable on a computer screen." *Id*. at 1269. Bartholemew approves, stating that "Given what we now know about the centrality of authorial intent to creative output, [the inquiry into intent] should be deployed in all copyright cases where creativity is at issue."

Bartholemew argues, moreover, that copyright courts should inquire not only into authorial intent, but should also situate the creativity assessement in the prior art, as is done in patent law. The science suggests, Bartholemew writes, that creativity in the copyright area depends as intimately as in the patent area on knowledge about and use of relevant prior art—and this is true even in instances where a creative work departs substantially from the field's prior output. The Supreme Court's rejection in Bleistein v. Donaldson Lithographing Co., of "aesthetic discrimination," which, Bartholemew argues, is a big part of what blocks consideration of whether a putatively copyrighted work advances the prior art. Bartholemew counsels that we tack away from *Bleistein*, which has transmuted into the equivalent of a flat ban on qualitative assessment of creativity:

> Even if taste is relative, agreement can coalesce over such topics as what is the appropriate definition of a particular genre of visual art or what are the conventions of a specific musical domain. Research shows that those with expertise in a domain tend to independently agree on their assessment of the creativity of new works in that domain. Even if one thinks that a layperson's judgment of an artwork's beauty is a subjective practice [that] would normally be anathema to the ideal of objective legal standards, elements of evaluation of aesthetic worth can submit to reasoned interrogation, particularly by those with experience and training in the domain.

There is a lot more in Bartholemew's article, which is a lively, informative read. The article's major service to the reader is in the questions it raises about how copyright law should respond to our increasing understanding of the workings of the human mind in general, and of human creativity in particular. Our current knowledge about how human creativity works is nowhere near complete. But already the science calls into question what lawyers think they know about how to encourage new creative work. Those questions will only deepen as the science advances.

1. *See*, *e.g.*, Aaron X. Fellmeth, *Uncreative Intellectual Property Law*, 27 **Tex. Intell. Prop. L.J.** 51, 55 (2019); Brian L. Frye, *Against Creativity*, 11 **N.Y.U. J.L. & Liberty** 426, 427–28 (2017); Dennis S. Karjala, *Copyright and Creativity*, 15 **UCLA Ent. L. Rev.** 169, 171–72 (2008); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 **Vand. J. Ent. & Tech. L.** 817, 848 (2010).
2. *See*, *e.g.*, Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 **Hofstra L. Rev.** 853, 867–79 (2004); Joseph Scott Miller, *Hoisting Originality*, 31 **Cardozo L. Rev.** 451, 485–94 (2009); Gideon Parchomovsky & Alex Stein, *Originality*, 95 **Va. L. Rev.** 1505, 1523–42 (2009).
3. See, however, the forthcoming article by Joe Fishman and Kristelia Garcia, which argues that comparisons with prior art does play a role (somewhat hidden) in much copyright litigation. Joseph Fishman & Kristelia Garcia, *Authoring Prior Art*, 75 **Vand. L. Rev.** ___ (forthcoming 2022), available at SSRN.

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