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## Do We Need a New Conception of Authorship?

Shyamkrishna Balganesch\*

Thank you to the organizers for having me. I'm delighted to be here. I'm going to take a step away from conceptual art, and go a little bit into history and a little bit into doctrine—and do the usual law professor thing. We law professors like to say that one of the great things about the job is that we get to overrule the Supreme Court ten thousand times a day, but the bad thing about the job is no one cares. And so, I'm going to try and make this such that you care.

Here's the core idea that I want to suggest: that one of the concerns that we have with conceptual art going forward, and with the question of copyrightability, is that copyright law, for a really long time now, has had a nascent and unstated theory of authorship that connects to the way in which we conceptualize the connection between inputs and outputs, agency in the real world, and the nature of the human connection to the work—and that these works of conceptual art are calling that theory into question. And part of the concern is that this test and this conception, being unstated—when we take a step back to try and understand how we might update it or liberate it from these conceptions, we have a hard time wrestling with it, to nail it down. And so, what I want to leave you with is the question of whether it's time to update our traditional conception of authorship.

But to do that, I want to start by saying that we *do* have a traditional conception of authorship hidden in plain sight. Authorship, as we know, is not a doctrine that is well defined in copyright law, but it does a significant amount of analytical and doctrinal work. The idea of authorship is in many ways embedded within other well-worn doctrines of copyrightability: within originality, within fixation in different ways, and very much within copyrightable subject matter. So, it's hiding in plain sight. The rhetoric and the notion of authorship are doing a lot of analytical work in a variety of cases—certainly, I believe, in the way in which the Copyright Office approaches this, at least in my reading of parts of the *Compendium*.

It's diffused in significant portions of the *Compendium*, but I wanted to focus on one part of the *Compendium* where I think the notion of authorship plays a fairly

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significant role in important, intuitive ways that are unstated and not fully expounded, which I want to explore. Karyn Temple has already touched on provision 313.2,<sup>1</sup> which says a few different things that I want to highlight. It says: “To qualify as a work of ‘authorship’ a work must be *created* by a human being.”<sup>2</sup> Also, that “[t]he Office will not register works *produced* by nature, animals, or plants. Likewise, the Office cannot register a work purportedly *created* by divine or supernatural beings”;<sup>3</sup> and “[s]imilarly, the Office will not register works *produced* by a machine or mere mechanical process that operates randomly or automatically without any creative input or *intervention* from a human author.”<sup>4</sup> Now, what I want to emphasize is that there’s nothing self-evident about the verbs used in these provisions, nor the nature of the connection between human agency and the product or the output that is seeking protection that they necessarily characterize. Let me explain.

In every copyright class, the discussion of authorship in some ways begins with the photograph *Oscar Wilde, No. 18*. The case is *Burrow-Giles v. Sarony*,<sup>5</sup> which in many ways was the first time the Supreme Court grappled with the notion of authorship—but through the doctrine of originality and the idea of writings in Article 1, Section 8, clause 8.<sup>6</sup> The Court, through the parties’ pleadings, has a nice, detailed description of what exactly it was that Napoleon Sarony did. He posed Oscar Wilde in front of the camera, selected and arranged the costume, draperies, and other various accessories; arranged to present in a graceful outline, and so on.<sup>7</sup> But what it does not mention is that Napoleon Sarony had a cameraman, standing about twenty-five feet away from him, who actually was operating the early-generation camera machine at the time. So, Napoleon Sarony was not the cameraman. He was orchestrating the entirety of it. And the Court in some ways is aware of this, where it develops the standard of: Okay, who is the author? “[H]e to whom anything owes its origin; [the] originator; [the] maker; [or] one who completes a work.”<sup>8</sup> And, drawing from an English case, the Court says the author is whoever is “the effective cause of” the creation.<sup>9</sup> Hidden in that idea of creation, therefore, is an important causal dimension. Now, I don’t have to say to all of you lawyers who’ve taken tort law, when we talk about proximate cause, and—I know, it brings back nightmares of the first year of law school—but, the open-endedness of the idea suggests that there are a variety of different connections between input and output that can qualify for the conclusion on “cause” that you’re looking for in a given case.

And where does this come up? Karyn already beat me to the punch. Take a look

1. See Karyn A. Temple, *Opening Remarks: Copyrightability in the U.S. Copyright Office*, 43 COLUM. J.L. & ARTS 337, 339 (2020).

2. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2017) (emphasis added).

3. *Id.* (emphasis added).

4. *Id.* (emphasis added).

5. *Burrow-Giles Lithographic Co. v. Sarony*, 4 S.Ct. 279 (1884).

6. U.S. CONST. art. 1, § 8, cl. 8.

7. *Burrow-Giles*, 4 S.Ct. at 279.

8. *Id.* at 281.

9. *Id.* at 283.

at the photograph at issue in the monkey selfie case—our good friend Naruto.<sup>10</sup> On the face of things, if you didn't know the narrative behind it, not much distinguishes that photograph from an actual wildlife photograph that appeared in the *National Geographic* magazine.<sup>11</sup> Equally detailed in terms of capturing the monkey's anatomical features of the face; the monkey's facing the camera smiling in a similar—I would say, in a more expressive—way. And I don't think we would argue that the *National Geographic* photograph has serious authorship concerns or copyrightability concerns in terms of the way in which it was projected and actually produced. But there's something about the Naruto photograph. It doesn't have to do with what is manifest as mute testimony in the photograph itself. It's instead in the narrative of authorship behind the production of the photograph. It's because David Slater, the person who created it—I'm not going to say the person who *authored* it—produced a narrative saying that, “No, it really was produced by the monkey. I went and spent these weeks getting to know Naruto and his family. I befriended him and had him understand how the camera works, and then eventually I hid and let him hit the shutter button.” But the answer underlying the copyrightability question there is a theory about what kind of human connection we deem sufficient for the purposes of our authorship. The answer to why the photograph was not copyrightable as a subject of authorship was because the connection was deemed insufficient as a qualitative matter.

And that, I think, is the key point here. When we think about authorship, there is an important qualitative dimension between input and output, between human agency and the work, that we have to fully grapple with. We have the intuitions that are embedded within copyright doctrine, and the new kinds of works—what Amelia Brankov and Regan Smith talked about<sup>12</sup>—are questioning some of these intuitions. So, we leave aside the ones that are firmly under the domain of originality or fixation. But cases like *Kelley*<sup>13</sup> are really about questioning the connection between human agency and the actual output that is produced and is seeking protection. The problem that we have is, in the absence of a clear doctrine to grapple with authorship, we're doing the work through these other different concepts—originality or fixation.

And so, the question that I have is a suggestion—this is my law professor hat—that perhaps it's time to rethink our traditional conception of authorship. Perhaps it requires, in the *Compendium*, an actual section that says, “What does authorship mean?”—rather than “What is human authorship?” or a diffused conception of authorship that runs through different categories of works. And, if so, then the question is: Should we move away from what I would call an epistemic, or a real-world idea of authorship, which is looking for tangible, external verification of this

10. See *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018); Temple, *supra* note 1.

11. See Liz Langley, *Bet You've Never Heard of This Shy, Colorful Monkey*, NAT'L GEOGRAPHIC (Oct. 8, 2016), <https://perma.cc/2RKN-5M2Z> (Kathy L. Wood, photographer).

12. See generally Amelia K. Brankov, *Does Art Need Copyright After All?*, 43 COLUM. J.L. & ARTS 367 (2020); Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J.L. & ARTS 343 (2020).

13. *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011) (holding that a wildflower garden planted as an art installation “lack[ed] the kind of authorship and stable fixation normally required to support copyright”).

connection? That's what's really doing the work—can you show that there is a tangible connection between the human agent and what comes out at the end, such that it's perhaps capable of being controlled, capable of being replicated into the future, and therefore capable of being protected? Should we move away from that traditional conception and toward one that takes note of the way in which authorship and art are working—something of a far more intentionalist, conceptual domain, liberated from the traditional idea? I'll leave you with that question. I look forward to the conversation. Thank you very much.