Darren Hudson Hick, and Reinhold Schmücker (eds.). The Aesthetics and Ethics of Copying. Bloomsbury, 2016, xx + 408 pp., b&w illus.

Copying occupies a central place in many areas of the philosophy of art including forgery, aesthetic value, pastiche and homage, the metaphysics of repeatable artworks, intellectual property, and the ethics of artistic production. So a volume on copying and the philosophy of art is welcome. The volume contains nineteen chapters divided into four parts (The Copying Animal: Exploring the Cultural Value of Copying; What is a Copy? Conceptual Perspectives; The Copying Artist: Aesthetic and Ethical Challenges; Freedom for All? Towards an Ethics of Copying for the Digital Age) with a final essay, ‘In Defense of Disco Edits’, comprising a Coda.

Before discussing some of the individual contributions, a few words on the volume as a whole. Despite being a volume on a seemingly narrow topic, this volume covers a lot of ground, as might be expected once we start to list the areas of the philosophy of art that copying is pertinent to. The editors have assembled not only a number of well-known and not so well-known analytic philosophers (which in itself is to be applauded), but also philosophers from outside the analytic tradition, sociologists, lawyers, and scholars of media and communication. Despite this broad coalition of authors, the volume as a whole cannot be recommended. Some of the chapters are, to me at least, incomprehensible, whereas others are no more than a list of case studies, albeit interesting ones. One further shortcoming of the volume is that although several chapters discuss closely related topics, there is no dialogue between the chapters. The volume would have been improved by some such intra-volume discussion.

Given the number of chapters and the variety of topics covered, a synoptic overview of the volume would be unwieldy. This, and the fact that some of the chapters seem to me to not be worth discussing, as well as my own interests, have led me to concentrate my detailed remarks on copies, forgery, and intellectual property.

Maria Reicher asks the ontological question what type of thing is a copyrightable work? Reicher takes copyright discourse as constraining the ontology of works, as presumably we should in the absence of further argument. Because such works appear to be repeatable, objective, created, and public, Reicher concludes that copyrightable works are created abstract types. Although I have argued for this myself, it is worth noting that some theorists seeks to explain away this talk, favouring a Platonic conception of works for largely theoretical reasons, whereas others seek to accommodate the apparent data within a nominalist framework. Reicher notes that whereas some degree of originality is required (by law) for something to be a *copyrightable* work, this is not required for the existence of a work (a created abstract type) per se, and so copyrightable works are a proper subset of works, rather than being a distinctive kind of thing in their own right.

In her contribution, Amrei Bahr seeks to elucidate the notion of a copy. Bahr claims that ‘copy’ in English is ambiguous between something that is genuine instance of a work, and something that resulted from a copying process is not a genuine instance of the relevant work. Bahr’s supports her claim by nothing that we do appear to use ‘copy’ in these ways. For instance, we may say that x is a copy (genuine instance) of *Perfume* and that y is not a real Vermeer, only a copy. This is too quick, however. For it could be that ‘copy’ only has Bahr’s second meaning (something that is a product of copying) and that the contrast in our way of speaking about the instance of *Perfume* and the ersatz Vermeer is not traceable to any ambiguity, but rather to a metaphysical difference between novels and paintings. Novels, but not paintings, one might think, are proliferated by copying and so any copy of an instance of *Perfume* is thereby an instance of *Perfume*, whereas anything that is a copy of a Vermeer is thereby not an instance of that painting. But even if that metaphysical picture is correct, Bahr’s claim of ambiguity looks justified. First, there is the cross-linguistic evidence she provides – in German the distinction is marked linguistically. Second, although paradigmatic instances of novels are produced by copying, it seems that they need not be, for surely an instance of a novel could be produced by following a set of instructions – take the first letter in ‘Iowa’, the second from ‘Indiana’, etc.

So, not all instances of works (copies1) need be products of copying (copies2). But that ‘copy’ is ambiguous does not show that Bahr’s account of the ambiguity is correct. In particular, one might doubt that x being a copy2 of y entails that x is not copy1 of y. It seems that in English we signal when a copy2 is not a copy1 by using qualifiers such ‘only’ or ‘mere’. For what it’s worth, the OED appears to agree with me that copies2 can be copies1, but nothing turns on this quibble with Bahr.

Focusing on concrete copies of other concreta, Bahr initially proposes the following individually necessary and jointly sufficient conditions:

1. y is similar to x.
2. y was produced with the intention to be similar to x.

Bahr thinks (1) and (2) are not jointly sufficient because of the following type of example: S intends to create a copy of x but fails to; nevertheless, some y appears that resembles x. In order to remedy the situation, Bahr adds

1. among the causes of the similarity that y bears to x is that the creator of y has intended y’s similarity to x.

But Bahr’s example does not show that (1) and (2) are not jointly sufficient, since (2) is not met: although S had an intention to produce something similar to x, and some y is produced that is similar to x, y is not produced *with* the intention to be similar to x, as Bahr herself seems to recognise (p.88).

Nevertheless, (1) and (2) are not sufficient for y to be a copy of x as the following case shows: S intends to produce something similar to x and succeeds, but not by copying x, rather he succeeds by following a recipe for producing an instance of a work, such as a musical score. Here I am disputing that what Bahr calls ‘design plan based copies’ are really copies2, although they may be copies1. So, not all copies1 need be copies2 (and vice versa, as we have seen). Moreover, this case shows that Bahr’s (1)-(3) are not sufficient for y to be a copy of x, since in the case at hand, y is similar to x as a result of S’s intention.

There is another type of case that I think shows that (1)-(3) are not sufficient for y to be a copy of x and, moreover, shows that (3) is not necessary for y to be a copy of x. Consider the following case from Levinson (1980: 99 n23):[[1]](#footnote-1)

Black and White publish poems containing identical word sequences in the same issue of a poetry review. Suppose I know Black and notice his poem in the review but don't know White and don't notice his poem. Then suppose I decide to copy out Black's poem by hand to send to another friend, but do this while unintentionally looking at the page of the review on which White's poem has been printed.

What has been copied here is an instance of White’s poem and not an instance of Black’s poem, and what Levinson ends up with is a copy2 of White’s but not Black’s poem. Since (1)-(3) are met, but we do not have a copy of Black’s poem, (1)-(3) are not sufficient. Further, because we have a copy2 of White’s poem without the intention to produce something similar to White’s poem (under that description), this intention was not necessary.

I think that what these considerations show is that we have to understand what a copy2 is in terms of the operation of copying: y is a copy of x iff y was produced by copying x. Perhaps this does not meet certain reductionist requirements, but why think these requirements can be met?

Now Bahr herself is interested in elucidating the notion of a *mere* copy, a copy2 of that is not a copy1 of the relevant work. But as our copy2 of White’s poem is a copy1 of White’s poem (although, see Levinson who demurs), what we have is not a mere copy. In order to rule out products of copying that are genuine instances, Bahr adds a fourth necessary condition:

1. the creator of y is not authorized to produce instances of the relevant work, w, that x is an instance of.

(4) explains why Levinson’s copy2 of White’s poem is not a mere copy2, since Levinson, along with everyone else, is, vacuously, authorized to produce instances of White’s poem – no authorization is required to produce an instance of a poem.

I doubt that (4) is a necessary condition of y being a mere copy2 of w, however, since there are other ways to block genuine instancehood. For example, Levinson’s hypothetical artform quasi-paintings can be produced only with certain materials, so copies2, even authorized copies2, that are produced by other materials will not be copies1. I think the best we can do is say that y is a mere copy2 of x iff y is a copy2 of x but not a copy1 of x, and that there may be myriad ways for a copy2 to fail to be a copy1, including lack of authorization.

Massimiliano Carrara’s chapter also engages in conceptual analysis, but this time not of the notion of *a copy* but of the related notion of *a forgery*. One might think that these two notions are intimately related in that any forgery is a copy2 of some work. This is the view that Carrara attributes to Ryle on the basis of the following passage:

A country which had no coinage would offer no scope to counterfeiters. There would be nothing for them to manufacture or pass counterfeits of. They could, if they wished, manufacture and give away decorated discs of brass or lead, which the public might be pleased to get. But these would not be false coins. There can be false coins only where there are coins made of the proper materials by the proper authorities Ryle (1954: 94 quoted in Carrara).

Note, though, that Ryle does not mention copying in this passage. Ryle is not here committed to the view that Carrara attributes to him, but only to the weaker claim that in order for x to be a forgery, there must be some genuine instances. In any case, both of view attributed to Ryle are false, because of what Levinson calls ‘inventive forgeries’ such as Van Meegeren’s Vermeers as Carrara (p.101) notes. Some forgeries are not copies, a point.

Next, Carrara consider’s Goodman’s account of forgery, a view that I think is close to Ryle’s actual view

1. y is a forgery of x iff y is an object falsely purporting to have the history of production required for the original x.

Carrara rejects (5) for two reasons. First, for x to be Alexander the Great’s armour, x need have no particular history of production, it need only have been owned or worn by Alexander. Nevertheless, there can be forged versions of Alexander’s armour. Second, attribution errors do not suffice for forgery: if a critic mistakenly claims a Giotto is a Cimabue, no forgery has occurred.

In the light of these problems, Carrara (p.110) tentatively offers his own account:

1. x is a forgery iff x has been intentionally produced to convince someone that x has a historical property that it does not possess

Ultimately, Carrara rejects (6). First, he takes the following to be a counterexample to (6): Pino makes a copy of a Fontana for a study. Pina steals Pino’s painting, and, unbeknown to Pino, sells it as an original Fontana. Carrara notes that according to (6), Pino’s copy is not a forgery and claims that “[t]his much seems wrong”. I disagree. Just because an object has been passed off as something that it is not, does not mean there has been forgery. A forgery is the *product* of an act of forgery. Things that are not forgeries, not the products of the act of forgery, can be falsely passed off, and this is what we should say about Pino’s copy.

Second, Carrara thinks that pirated films are forgeries, but are not intended to deceive. Again, I disagree. In order for y to be a forgery of w, y cannot be a genuine instance of w. But I agree with Hick (p.120) that pirated copies are genuine instances of the film – if you have seen a pirated version of *Star Wars*, you have seen *Star Wars*, whereas if you have seen a copy of the *Mona Lisa*, you have not seen the *Mona Lisa*. So, I think Carrara’s (6) is in better shape than he does.

It is commonplace in discussions of copying and forgery to distinguish between singular and repeatable artworks. Commonly, paintings are given as examples of the former whereas literary works are given as examples of the latter. P.F. Strawson, Currie, and Lamarque have denied that paintings are, or need be, singular works. In his contribution, Darren Hudson Hick asks whether there could there be singular literary works? Hick takes his lead from Sherri Irvin who thinks that an artist’s declarations about the work fixes its boundaries and ontology. Hick appeals to the poets Larry Eigner and E.E. Cummings to show that typography is sometimes important to work identity (p.126), even though we usually think such stylistic features are not integral to literary works. If Eigner and Cummings can make typography essential to a work’s identity, could there not be an artist’s decree that a literary work is singular? Hick argues that art-ontological revolutions require uptake from the artworld. The uptake of a singular literary work is highly unlikely given that repeatability is ‘at the core of our widely shared ontological conception of literature’ (p. 127), but nonetheless this does not make it impossible. So, it seems as if there could be singular literary works.

The final two chapters I discuss focus on intellectual property. In his chapter, James O. Young looks at one author’s use of another author’s fictional characters. Young notes that copyright laws have been taken by the courts to apply to fictional characters, but he argues that fictional characters should not be copyrightable.

Young’s argument appears to be that since copyright laws with respect to fictional characters prevent the reuse of fictional characters in potentially aesthetically valuable works, they do not serve the public interest, so, they should be abolished (p.155). If this is the argument, it appears to over generate (from Young’s perspective) as we could make similar arguments about novels and their chapters or songs. Moreover, as Young admits, intellectual property laws also encourage creation. Should, then, artistic creation yield property rights? No, Young says, since authors don’t create fictional characters ex nihilo, but rather by combining elements in the public domain. But again, we could say the same thing about novels and songs.

Not only does Young think that copyright laws ought not apply to fictional characters in some ethical sense, Young also argues that such laws ought not to apply (or do not apply) to fictional characters in a legal sense. This is because copyright laws make reference to works and their parts, not to characters, and Young thinks that characters are not themselves works or parts of works.

Young argues that characters are not works since works have at least one instance and characters do not have any instances. One might dispute the first claim on the grounds that there are, or at least could be, unperformed pieces of music that have been scored. However, it is not clear that there is anything that stands to a character as a score does to a piece of music. But what of Young’s claim that characters do not have any instances? This, he takes as obvious.

Let us assume, for the moment, that characters are not works. Might they not be parts of works and so legitimately be covered by copyright law? Young claims (p. 160) that where there is an instance of a work there is an instance of its parts, but that where we have an instance of a novel we do not have an instance of its characters, since characters do not have instances.

Now, although the US Copyright Act gives a list of types of copyrightable work that omits mention of fictional characters, it does include “pictorial, graphic, and sculptural works”. But once we reflect on pictorial fictions, such as *The Simpsons*, we might doubt Young’s claim that fictional characters do not have instances: what is a particular drawing of Homer Simpson, if not an instance of the character *Homer Simpson*? If we concede that characters have instances, much of Young’s legal argument loses its force. There is more to be said here, of course, but I think there is no quick route from ontological reflections to Young’s claims that fictional characters ought not, in some legal sense, be covered by copyright law.

Although he thinks that characters ought not to be copyrightable, Young does acknowledge that fictional characters are an author’s intellectual property and so the author should be protected to some degree. If copyright is not the correct vehicle, how about trademark? Again trademarks restrict artistic creation. But again, that creativity is restricted does not, by itself, mean that characters should not be trademarked. Still, Young argues persuasively that trademarking is not appropriate in the case of characters: the purpose of a trademark is to assure the public about the origin of what they are purchasing. But there doesn’t seem to be any deception regarding origin in the case of fictional characters

Young argues that the appropriate for of intellectual property protection in the case of characters are patents. This does make sense given that characters are re-used in stories just like other patentable items (incidentally, what does it mean to say that characters are re-used in stories, if this does not mean that characters are parts of stories?). Patents protect rewards for creators and allow creators to develop their creations as they like, it is important that patents lapse and the creations become public for future innovation. This is why Young thinks patents are appropriate for characters. But this seems just to be a matter of degree, since copyright lapses too. Although not convinced by Young’s initial argument that characters should not be copyrightable, I think his argument by analogy with other patented items has force.

In his essay, David Oels asks whether nonfiction should be covered by copyright laws? He notes that as things stand, nonfiction is not covered by copyright law, since one cannot and should not be able to claim a monopoly on the reporting of putative facts. And this is true even when the re-use of such factual reports occurs within fiction, as was apparently the case with Dan Brown’s use of Baigent and Leigh’s *Holy Blood, Holy Grail* in *The Da Vinci Code*.

Although one could justify the exclusion of non-fiction from copyright on political grounds, non-fiction is also excluded by considering the purpose of copyright – to protect and encourage creativity – since there is no creativity in merely reporting facts. But, as Oels notes, at least popular factual books do not limit themselves to the *mere* reporting of facts, since they exhibit creativity and style in the way in which they report the facts. This, then, opens the door to copyright protection. That this has not in fact happened can be explained by the fact that protection by copyright would lead to millions in damages owed and that this seems disproportionate to the amount of creativity exhibited. So, Baigent and Leigh received nothing. Oels argues, however, that this is a false dilemma. An alternative would be to allow for modest recompense in such cases.

Despite some shortfalls in the volume, I enjoyed reading it and learned a lot from many of the chapters, including some not covered by this review. And I think that anyone interested in the issues will profit from engaging from the book. Still, like many edited collections, it contained some contributions that were woefully below standard.

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1. All references to Levinson are to his ‘Autographic and Allographic Art Revisited’. *Philosophical Studies* 38: 367-383, 1980. Reprinted in his *Music, Metaphysics & Art: Essays in Philosophical Aesthetics*. Oxford: OUP, 2011. [↑](#footnote-ref-1)