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James O. Young

Radically Rethinking Copyright in the Arts: A Philosophical Approach

New York: Routledge 2020

168 pages

US\$124 (hardcover 978-0-367-52183-7)

When was the last time you sang *Happy Birthday to You*? Did you pay Warner Music US\$5000 for the privilege? If you'd had to, would you still have sung it?

Me neither. And as far as James Young is concerned, to do so would be to cave in to intellectual property laws which inhibit creativity, enclose the artistic and intellectual commons, and reward corporate middlemen at the expense of content creators and the general public. In this spellbinding foray into the applied ontology of art, Young argues that the fundamental problem is that intellectual property laws are ontologically illiterate. As he puts it, 'a remarkable amount can be deduced about legitimate copyright simply from reflection on the ontology of artworks' (15), and that is precisely what he sets out to do in a slim volume that packs a hefty wallop.

Ch. 1 begins by showing that intellectual property laws do not satisfy their stated purpose, which is to promote the public good by rewarding artists and incentivizing creativity. Young demonstrates that extended copyright terms have primarily served to enrich corporate middlemen, rather than artists themselves. This has been achieved thanks to low royalties on the one hand (e.g. \$0.09 per track purchased on iTunes goes to the artist vs. \$0.53 for the label; \$0.00029 per play on Spotify goes to the artist vs. \$0.0016 for the label), and high licensing fees on the other (as with *Happy Birthday*). Combined with aggressive corporate litigation, the result has been the systematic enclosure of the public domain, and a marked *decrease* in creativity. Young argues that we should rethink intellectual property law along the lines suggested by Mill's principle of liberty: artists should do as they please, unless and until their actions would harm someone else (15-6).

Courts have typically relied on the distinction between the idea expressed *by* a work and the way it is expressed *in* the work to resolve copyright disputes. In Ch. 2, Young argues that this distinction is unhelpful (32-38), and that courts should instead rely on less controversial distinctions from the ontology of art, such as that between concrete and abstract entities. Concreta like paintings are physically instantiated and have physical parts; abstracta like literature and music, however, are types instantiated by their tokens (e.g. individual books or performances). To these, Young adds the category of works whose pattern can only be specified by reference to a concrete individual: concrete pattern-types such as a negative or digital file, whose existence depends on the initial production of a concrete individual which is then used to generate tokens of the work (23-4).

So armed, Young introduces a powerful—but potentially controversial—new distinction between parts of artworks and 'artistic elements'. Straightforwardly, a work's parts are its spatiotemporal regions, and are instantiated wherever the work is; its artistic elements, by contrast, are the principles and processes which govern the arrangement of its parts (28-9). Artistic elements are not parts of works because they do not exist wherever a work is instantiated (29). Consider *Jurassic Park* (1993): wherever it exists, so too do its scenes, which are parts of each physical print. So, if I have the tape in my hand, I am holding

its scenes; but I am not holding the character of John Hammond, ‘the plot’, or the genre of sci-fi horror. These are abstract objects, and abstracta cannot be parts of a concrete object, so artistic elements are not parts of works (32). They are just ways of organizing the concretum’s parts sci-fi-horror-wise or John-Hammond-wise.

It is fairly straightforward to establish that styles and plots are not parts of works, and to assign them to the new category of ‘artistic elements’. But characters? Readers may balk, since the claim seems counterintuitive: Hammond, after all, seems to belong to *Jurassic Park* in some fundamental way, and only exists because it does. Yet Young is surely right that characters’ identity-conditions indicate they are not parts of the novel—not least because they can show up again in its sequels, or in fanfic. Perhaps we could say, instead, that characters are parts of their *storyworld*, rather than their associated works; that, at least, has the ring of truth to it. The trouble is that it is not clear just what the extent of a storyworld *is* (e.g. is fanfic part of the same storyworld?). Thinking of characters as artistic elements—as ‘ready-made adventure machines’ (133)—has the virtues of simplicity and elegance. And, as Young demonstrates, it also helps to clarify the proper limits of copyright so that artistic and public interests are best served. (Indeed, storyworlds themselves are ready-made adventure machines: just think of the creative potential of settings like Randland, Revelation Space, The Culture, or even just the real world and its history!)

Having established this ontological framework, Young turns his attention to copyright proper in Ch. 3. Copyright, he argues, is not about ‘ownership’ of some pattern-type (a ‘*chose* in possession’); rather, copyright is a right of *dissemination* (‘*chose* in action’) (45). To protect artists’ ability to earn a living from their work, we ought to grant them a monopoly on the dissemination of pattern-types of their work (49). But given the public’s contributions to developing old pattern-types, and its interest in further developing new ones, Young argues that such monopolies ought to be temporary, short, extinguishable, and non-transferrable.

Copyright terms should be temporary because indefinite monopolies on the dissemination of pattern-types and their tokens denies their use to the public. They should also be shorter, since lengthy terms benefit third-party non-creators rather than artists and their descendants. Worse, lengthy copyrights result in the proliferation of orphaned works (works which cannot be used because their copyright holder cannot be determined), further enclosing the public domain (57-8).

If the purpose of copyright is to ensure that artists are fairly compensated for their creative output, then once an artist *has* been fairly compensated, they can no longer be harmed by copies of their work. To continue to charge the public afterwards would be to levy an illegitimate tax (67-8). This suggests that copyright should be non-transferrable. Instead, Young argues that copyright should be subject to ‘buyouts’ (68): by buying out a copyright, corporations and wealthy individuals ensure the copyrighted material’s passage into the public domain, where it can then be freely exploited by them or anyone else without chilling creativity or harming artists or the public interest.

Chapters 4 and 5 concern token- and pattern-appropriation, respectively. Barring theft, token appropriation clearly does not harm artists—indeed, the economics of art, and the first sale doctrine itself, are both predicated on its permissibility (95). Nor should we worry about laws concerning derivative works: derivative works are adaptations, translations, etc. *of works*, not appropriations *of tokens* (95); token appropriation leaves the pattern-type entirely unharmed, and so should be permissible. But some pattern-appropriations, like outright copying or the creation of replicas, may harm artists by impeding their ability to earn a living from their creation (100). Copying *parts* of pattern-types, however, is often

uncontroversially permissible (101)—it would be silly, after all, to object that a musician has copied the notes A, B, C, D, E, F, and G.

On Young's analysis, artistic elements (including characters) are not proper targets of copyright, since they are not pattern-types or their tokens. For the most part, they belong in the public domain, where they can be freely appropriated (although Young does argue that artists deserve some time—twenty years—to fully develop their characters [140]). Where ontology does not suffice to make it clear whether a given pattern-appropriation is permissible, Young suggests we look to his fair-use criterion instead (101): where there's no harm to the primary artist's interests, there's no foul.

This discussion of copyright and appropriation has interesting knock-on effects for cultural appropriation, some of which Young explores at the end of Ch. 6. For instance, one consequence of Young's analysis is that Indigenous styles and motifs cannot be copyrighted or owned, since they are artistic elements: no single culture develops an artistic element alone, so none deserves a monopoly on its use (153). The better question to ask, argues Young, is whether a *pattern-type* or *part* of one has been appropriated (148). Content- and subject-appropriation, then, would seem to be perfectly permissible, provided nobody's interests are harmed. Whether non-Indigenous people *should* engage in such appropriation is another question entirely, one which Young has explored elsewhere.

Radically Rethinking Copyright is a rich exercise in applied ontology. It is guided by clear, simple desiderata, marshals a compelling raft of cases from across the arts, and offers common-philosophical-sense solutions to copyright's many problems. No knowledge of copyright law, metaphysics, or the philosophy of art is presumed, and the arguments are engaging and easy to follow. I have no doubt the book will prove an exciting classroom companion as well as a stimulating resource for philosophers of art; I can only hope the same is true for the legal community. Some will no doubt quibble over the details of Young's prescriptions, but none can doubt the value of bringing the might of ontology to bear on such problems in the first place. Perhaps we ought to do it more often!

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