



Radically Rethinking Copyright in the Arts: A Philosophical Approach by James O. Young

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BOOK REVIEW

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A book review of James O. Young, *Radically Rethinking Copyright in the Arts: A Philosophical Approach*. New York: Routledge, 2021, 184 pp. ISBN 978-0-367-52183-7.

In *Radically Rethinking Copyright in the Arts: A Philosophical Approach*, James Young considers a timely question: are copyright laws morally justifiable? In the post-pandemic world, issues of intellectual property (IP) protection have become a main concern of our global society. Proprietary rights on creations of human intellect are caught between the Scylla of allowing knowledge circulation and the Charybdis of protecting authors' interests. Striking a balance between those two opposing goals is a key difficulty that all systems of IP must face.

Young brings the conceptual resources typical of aesthetics and philosophy of art to bear on matters of justification of copyright. In this sense, this book continues the trajectory that began with the author's work on the ethics of cultural appropriation, as he explicitly recognizes (p. ix). There, Young made his debut in the field of *applied aesthetics*, as one might call that philosophical subdiscipline investigating issues at the intersection between the creative, ethical, and political domains. Here, finance and economics are added to the mix. Young's interest in real-life applications of results in philosophical aesthetics shows the everyday relevance of his area of expertise, which often goes unnoticed.

As the title signals, Young's take on copyright is reformative. In effect, the book is an overall defence of the following thesis: 'current copyright laws cannot be justified' (p. i). His critical stance against dominant regimes of copyright protection sets Young apart from mainstream views in Anglo-American aesthetics.¹ His perspective is in continuity

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1 K. E. Gover, *Art and Authority: Moral Rights and Meaning in Contemporary Visual Art* (Oxford: Oxford University Press, 2018); Darren Hudson Hick, *Artistic License: The Philosophical Problems of Copyright and Appropriation* (Chicago: University of Chicago Press, 2017).

with those of IP sceptics.² One should notice that Young offers a qualified rejection of current copyright laws. In this sense, his account is not merely destructive; it also possesses a positive side. By exposing the limits of copyright, he also shows where the application of certain restrictions in appropriating art may cause harm to an author. His recommendations for legal reform are neatly summarized in the Conclusion, which offers a useful synopsis of the book's practical achievements.

Chapter 1 is a gut-wrenching excursus on the failures of copyright. Here, Young sets the stage for his attack against current IP protection by showing the desolate cultural landscape where increasingly stricter regulations have left us. Contrary to common opinion, dominant copyright regimes do not serve the interests of creative individuals but rather those of corporations. IP laws have been instrumental in transferring capital from artists' pockets into those of greedy financial groups. Young provides a plethora of empirical evidence in favour of his claim. He also adds that copyright does not promote creativity, as ideologues of IP protection often claim. After the emergence of modern systems of copyright, a contraction in the numbers of both artworks produced and people involved in the arts historically occurred.

Chapter 2 steers away from the 'genealogical' approach that has guided the book so far, and turns to hard-core metaphysics of art. The shift is necessary, Young suggests, in order to develop a non-consequentialist argument against copyright. In effect, those who sees copyright as a natural right to one's intellectual property would not care about the outcomes of IP protection. To persuade that crowd, his strategy is to appeal to ideas about what works of art are and how they are created in order to show that 'current intellectual property regimes, as they apply to the arts, are unjustifiable' (p. 14). Young's optimism about the normative force of his metaphysics, let me hasten to add, is exaggerated. Throughout the book, arguments are often finally justified by appealing to the 'Millian Principle of Fair Use' (p. 100), based on Mill's classic harm principle: no harm, no foul. This in turn makes metaphysical discussions somewhat redundant.

Young opts for a sparing materialist ontology of art, dividing works of art into three ontological categories: concrete individuals, abstract pattern-types, and concrete pattern-types. The first two categories are rather straightforward: artworks such as paintings and sculptures are concrete individuals, whereas particulars such as sonatas or novels are abstract pattern-types. The notion of concrete pattern-types is less intuitive. It refers to artworks that are multiply instantiable, like abstract pattern-types, but, unlike those, they also require the existence of something concrete in order to exist. Photographs and engravings are typical examples of works in this category.

Young's ontology has implications that are relevant for his discussion of copyright. First, according to his view, parts of artworks are spatio-temporal sections of those particulars. When thinking of cases of concrete individuals or concrete pattern-types, the claim is straightforward. Abstract pattern-types require more attention: for Young, they have parts insofar as their tokens have parts. Young's materialism excludes features such as characters, style, designs, plots, and so on from being parts of an artwork. He calls those 'artistic elements' and their ontological distinction from an artwork's parts will ground Young's rejection of views that consider those elements to be copyrightable.

2 Andrea Baldini, 'Copyright Skepticism and Street Art: A Contrasting Opinion', in *Copyright in Street Art and Graffiti: A Country-by-Country Legal Analysis*, ed. Enrico Bonadio (Cambridge: Cambridge University Press, 2019), 315–31.

Chapter 3 constitutes the philosophical core of the book. Here, Young brings his ontology to bear on matters of IP protection, and provides a rather comprehensive account of his reformatory take on copyright in the arts. The remaining chapters introduce further details. Young's primary concern is the ownership of intangible pattern-types, which are associated with all kinds of art. As a consequence of his materialism, artists cannot own such types. In his view, 'to own something is to have the right to use it as one wills and to exclude others from the use of it' (p. 43), of course with some reasonable limitations. Therefore, ownable entities must be able to enter into causal relations. But only physical objects are causally efficacious, excluding abstract entities such as pattern-types from being potentially owned.

The ontological dismissal of pattern-types ownership does not entail that copyright should be abolished. Young draws on Millian ethics to justify IP restrictions. When envisioning pattern-types, artists produce 'the capacity to create objects that are tokens' (p. 51) of those types. Unauthorized copies and replicas of pattern-types harm artists insofar as their ability to earn a living by selling and economically exploiting their works would be significantly restricted. In a market economy, this restriction is morally objectionable. In this sense, Young joins the ranks of legal scholars who hold that copyright is not about owning some entity but rather about having 'the right to disseminate a work' (p. 45).

Young turns then to the limits of copyright. First, he addresses matters of the temporal duration of the distribution monopoly. In his view, perpetual exclusive rights of dissemination harm the public by restricting creativity. Young brings empirical evidence showing that longer copyright terms do not reward artists but rather their heirs. In striking a balance between a creator's rights and those of the public, the book suggests the following proposal for the expiration of distribution monopolies in the arts: 'twenty years after the completion of a work of art or on the death of the work's creator, whichever comes first' (p. 76).

The book introduces other limitations to IP protection in the arts that appear even more radical. The most relevant holds that copyright cannot be transferred to either individuals or corporations. 'The act of transferring copyright extinguishes copyright' (p. 66). The claim follows from recognizing that, once they sell their copyright, artists have received all the profits that they possibly can from their creations. Unauthorized copies cannot harm the artists anymore, and therefore distribution monopolies cannot be justified. This legal proviso is crucial, according to Young, to counteract rising inequality, and the huge margins of profit that big corporations earn by exploiting artists and their work.

Chapter 4 turns to the hot topic of token appropriation. Legal controversies involving appropriation artists such as Jeff Koons and Richard Prince have been turning points in matters of copyright protection, and Young reassesses them in a refreshing way. He claims that token appropriation is never morally objectionable, and therefore it should be permissible under every justifiable legislation of copyright protection. In defending this claim, he offers two arguments, one ontological and the other normative. Ontologically, appropriation artists intervene on tokens of previous works, not on works themselves. Most modern legal systems allow for 'the first sale doctrine or [...] the principle of exhaustion' (p. 91). This doctrine stipulates that, once sold, a token of a copyrighted work can be disposed of as the buyer wishes. In manipulating tokens, appropriation artists merely exercise their first sale right.

The normative argument defending appropriation in the arts against strict copyright regulations is deferred to Chapter 5. Here, Young considers appropriations of parts of pattern-types. Though complete appropriation of patterns is uncontroversially impermissible in his view, partial borrowing is more complex. If ontological considerations suggest that artistic uses of commonplace patterns – that is, patterns that are ‘not unique to the work’ (p. 104) such as *scènes à faire*, patterns in nature such as a landscape, and musical sequences as in sampling – ought not to violate copyright, other instances call for normative considerations.

As anticipated, Young provides a simple criterion for deciding controversial cases of partial appropriation of pattern-types: the Millian Principle of Fair Use. In general, all uses that do not harm the author of the original work are fair. The creation of derivative works, in this sense, should be prohibited by copyright laws only if they cause – primarily, if not exclusively – economic harm to what Young calls the ‘primary artist’ (p. 39). Empirical considerations show that derivative works that at a first glance appear to harm artists – and therefore ought to be banned – do not do so. This is the case, for instance, of fan fiction, which appears to increase the popularity of a given work, thus benefiting rather than harming the primary artist. The book then defends copyright legislation that is more permissive than current jurisprudence.

I heartfully welcome Young’s critical stance against copyright. There is much to agree with when looking at his arguments and conclusions. This is not to say, I hasten to add, that there are no conceptual tensions or argumentative difficulties in this book. If his commonsensical approach to matters of IP protection offers often clear answers to controversial issues, it also seems to ignore at times nuances that should not be overlooked.

First, surprisingly enough, Young completely ignores recent developments in the arts that raise important legal but also philosophical concerns in terms of IP protection. There is no discussion of AI art, performance art, conceptual art, and street art. These are practices of great interest for the IP community. AI art, for instance, challenges Young’s core assumption that ‘[n]atural persons are the only creators of works of art’ (p. 69). Problems with performance art are notorious, and its examples escape Young’s materialist ontology. And, yet, Marina Abramović’s attempts to create precedents for protecting the copyright of performance art would require attention. One could say the same about conceptual art.

Street art is arguably the main protagonist of recent copyright litigation in the arts, and discussions of its legal protection are popular topics of inter- and cross-disciplinary discussion. Street artists’ salient and recurrent unauthorized use of urban surface as the medium for their creations directly calls into question Young’s theory of intellectual property. When considering, for instance, the ownership of a painting, he grounds ownership in the process of creation: ‘If I paint a picture, using canvas and pigments that belong to me, I own the painting’ (p. 53). Young never considers the possibility that artists create works by using things that do not belong to them. This is often the case for street artists, who often paint on surfaces that belong to others, with spray cans that have been stolen.

His argument seems to imply that, for the peculiar circumstances of creation, works of street art are not protected by copyright. This conclusion seems in line with Young’s relaxed approach to copyright. However, this would open the door to the corporate appropriation of street art. Street artists such as REVOK and Dash Snow have been involved in high-profile cases against the unauthorized appropriation of their works

or parts of their works by multimillion-dollar companies including H&M, Cavalli, and McDonald's. Is Young ready to side with corporations on this? This appears in explicit contradiction with one of the ethical goals of the book.

Young could introduce a solution ad hoc, appealing, for instance, to cultural rights to protect street art from corporate appropriation – an approach that, for instance, I endorse. This decision would mirror what Young does in putting some limitations to token appropriation. When discussing the Chapmans' *Insult to Injury* (2004), he argues that, by modifying their copy of Goya's *Disasters of War*, the two brothers have done something morally objectionable. This is so insofar as their token appropriation has destroyed a cultural property of outstanding universal value, as UNESCO would describe it. As with most ad hoc solutions, it seems very unsatisfactory. Authorized discourse in heritage preservation defends views that are much more restrictive in terms of the appropriation of tangible and, more importantly, intangible heritage that Young seems willing to concede. Such an appeal to cultural values would require a more detailed justification than we find in the book.

On the other side of the spectrum, Young also appears too brash in his attack against the corporate world. Again, there is perhaps no other aesthetician who shares his distaste for corporations more than I do, but I also find his unqualified proposal against corporate ownership of copyright too radical. There are cases when the transfer of copyright to a company seems perfectly justified. Imagine that I open an art gallery, and I commission the creation of my gallery's logo from an artist. The logo is a distinctive aspect of my company's visual identity, and its exclusive use is central to my activity. Under most jurisdictions, the artist and I would sign a contract stating that, given the payment of a certain sum, the copyright of the logo is transferred to my company. This allows me as the gallery's owner to protect my interests and those of people working with me by preventing another gallery – or some other business – from using my logo fraudulently. In Young's ideal world, I would not be able to do this. And, I suspect, that is a world where no reasonable person would pay an artist to create a logo. Would this benefit artists and the public? The answer seems to be a clear 'no' in both cases. In a market economy, artists' possibilities of employment would diminish, while the public would have to give up hope and just get used to ugly logos.

In spite of these possible disagreements, the questions that Young raises in his texts, the assumptions that he forcefully challenges, and the lines of research that he suggests are signs of great philosophical writing and theorizing. This book is a very welcome addition to the discussion of the philosophical foundations of copyright. It is a contribution that scholars or practitioners of IP protection – not only in the arts but also in other domains of human creativity – ought not to miss.

COMPETING INTERESTS

The author has no competing interests to declare.

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