How to define & judge a work?

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I would like to say how honored I am to be invited to your international forum. Copyright have been for me a subject of constant interest since 25 years, as student, as lawyer, as teacher and as researcher. And I would like to share with you a concern about the scope of copyright law. You are maybe aware of what we called in France the battle of contemporary art. France is maybe the only country that claims in the same time the cultural exception, and that is ground of such a battle opposing pro and anti contemporary art. The main subject of dissension is the fact that art is partly financed by public money. This justifies protests against State's choices. Polemic raised a very strong level in 1990's. The story I'm going to tell you know is a consequence in the scope of copyright of this Famous Battle.

Contrary to a critical judgement, judgement of a work, when a legal ruling is involved, is an obligation. Judges are not allowed to refuse to pass sentence when a case is brought before them. They are ordered to do so by law in France. Although I am not totally familiar with the Chinese system, I should imagine that the same applies. For example, when the author of a work accuses someone of infringement, French judges are required to deliver a decision on the prior issue of establishing whether or not a work claimed by an author can be protected by copyright.

Is this obligation to judge a work enshrined in law? Copyright, which determines which works it intends to protect, sets forth a certain number of criteria, deriving from both law and precedent, to define a work. A work, in order to be a work in the legal sense of the term, must have a form, not merely be an idea. It must be original and judges conducting this examination must not as such evaluate work's merit. Legal judgement of a work is therefore performed within a given framework and French law prohibits judges from evaluating a work aesthetically or expressing a judgement of taste.

This raises the issue of how to define a work. Which criteria make it possible for a judge to retain an objective stance with respect to a work? It is not desirable for a judge's aesthetic, political or moral opinions to cloud the objectivity of his judgement. Identification of a work in accordance with objective criteria should make it possible to recognise rights for his author without taking anything but objective considerations of the work into account. You are almost certainly wondering why I am stating the obvious, i.e. a judge must perform an exercise in pure legal qualification and not lapse into critical evaluation. In fact, for a long time, in French law, copyright has not merely been granted to good works, but fortunately, to all works without distinction. A bad or amateur work can qualify for protection. It is possible for it not to be good, or beautiful. This is not a legal issue.

If I am stating the obvious, it is because certain things are not so obvious. For example last years, the protection of contemporary art by copyright was still a topic of much jurist polemic. The terms of the polemic were such as a conceptual work of art is not a work for law, because it is more an idea than a form. Before going further, I would like to examine two issues. Firstly, the nature of the legal judgement of a work. Secondly, identification of a work in the eyes of the law.

On the nature of the legal judgement of a work

Objectivity, or, at least, neutrality, is all the more desirable as a judge, faced with a work, is exposed to a subjective object, which, by definition, is open to interpretation. How is it possible to achieve an objective legal judgement of a work ?

I suggest to make a distinction between a legal judgement and judgement based on taste.

To do so, let's envisage their consequences. Judgement in law is peremptory. It applies to the parties involved and the situation. It determines the legal situation of the work, starting with its legal existence: copyright determines whether or not it can be protected, it defines which people have a legitimate connection with it (who is the author?), which are infringements of the work (copy, forgery…), which people have an illegitimate connection with it (the counterfeiter, the receiver of stolen goods…).

In contrast, a critical judgement proposes an analysis of the work in which everyone is free to have their own opinion and express it. It is an interpretation which can be more or less authoritarian in its expression but which remains non-constricting : the capacity for suggestion can determine the encounter between the audience and the work, but the latter remains free. Another point is that critical judgement is by essence plural, and it is not legally authorised (everyone can give their opinion on a work), while a legal judgement is authorised and unique. And last point is that a judgement of taste is reflective : it is not based on norms that pre-exists, like moral or aesthetic rules, and has merely the pretention of obtaining the assent of all. It proposes, while legal judgement imposes.

Do the two types of judgements, legal judgement and critical judgement, work in the different ways? Can a judge approaching a work put his own taste to one side? Legal judgement of a work applies to works *a priori* norms, criteria. The same criteria to any kind of work. Legal judgement depends on an a priori concept of the thing that he must qualify: in order to be protectable the work must be an original form. Original form is therefore the a priori concept for the application of copyright. How to qualify the original form without expressing judgement of taste? Is it possible to judge works using solely one's reason and not one's sensibility? It demands an effort, as the work addresses us as a person, not only our brain. Therefore a judge of a work is in a position where he has to shut down the part of him which reacts to the work, if he wants to retain his reason, and this is indeed what is expected of him.

How does copyright settle the confrontation between the judge's subjectivity and the work?

Identification of a work in the eyes of the law.

Copyright prohibits a judge from evaluating the merit of a work.

In spite of this, French law says very little on the definition of "a work of the mind", as it calls it, other than that it must be a material expression of an author's conception. Two criteria have been invented by the judges to supplement this definition.

A work can be protected if it is original. Although the judge must not evaluate its merit, he must nevertheless recognise in the work the mark of the author's personality, which defines

its originality. Although this notion has greatly evolved thanks to the inclusion in copyright of applied art, software and databases, and has become more objective, the criterion remains, in French law, contrary to Anglo-Saxon law, subjective. To qualify originality, one must not compare works with others but examine the work *per se* and in its relationship with the author. It will qualify for protection as such as long as it bears the mark of the author's personality (in other words affirmation has become a sort of legal refrain which, when dealing with a nut or a shelf with clocks on it, is more to do with invocation than reality). In our concept of the protection of works, the cause of protection is indeed the author. He is the person on whom the law confers the greatest protection possible in law, moral right, an indestructible bond between the author and his work, perpetual, inalienable, non-transferable… Moral right protects the part of himself that the author puts into the work. Although it has been imposed in the United States through a set of international treaties, it is akin to a graft which finds it hard to take on the tree of copyright, whereby the work is protected, less as the emanation of the author, than as the product of an investment, which bear witness to a pragmatic, mercantile approach to the creative process which is, a priori, far removed from the French personalist concept. Therefore, to sum up, originality, in terms of works, remains subjective and consists in the mark of the author's personality in the work. Our case is more complicated, as the judge must evaluate objectively a subjective criterion: originality. It is the French paradox.

The second criterion for a work to be protectable by copyright is that of form. A work must be more than just an idea, as ideas are freely available. They belong to everyone and no-one in particular. A work must therefore be embodied in a form, an original form.

Refusal to protect ideas is a constant in literary and artistic property, and patent law. The author, like the inventor, cannot appropriate something which belongs to everyone, as the public domain must be preserved.

Idea/form distinction & contemporary art works

According to copyright the public domain is privileged ether on which each and everyone can draw as a source of inspiration. The imperative of preserving it has taken an unexpected turn in recent years with the import of the quarrel over contemporary art, refractory of new forms of art, into the legal debate by certain copyright specialists.

In the name of this rule which therefore serves the aim of social regulation, the old concept of the creative hand, nevertheless widely demolished by the classic doctrine of the academy (17th century), remains for the majority of specialists the only cause of creation in the field of fine arts. According to current copyright theoreticians, fine art is not thought but form, which elevates painting to the rank of mystical know-how, whereby originality, the criterion for protection, somehow passes via the hand without passing via the mind …

This type of pre-academic position[1] reduces the artist to the rank of artisan and produces somewhat worrying doctrinal arguments which need to be examined.

[1] The Académie des Beaux Arts was set up in the 17th century after artists demanded to be considered as thinking people that participate in the liberal arts, rather than as artisans. This participation of Fine Arts in the liberal arts has never been called into question since.

Today, a current (minority) in the legal profession refuses to consider as works for copyright purposes, certain contemporary art works, whether monochrome, conceptual art or ready-made, in the name of the idea/form distinction. These are not works as such, merely ideas, which must be given free rein. Professor Philippe Gaudrat qualifies them, quite frankly, as « *deviations* », which is a moral judgement and not a legal judgement[2]. He states that « *when creation consists merely in a uniformly white or blue surface, in the wrapping of the Pont Neuf, or even in the presentation of a supermarket chair or urinal as an exhibit, one would be tempted to think that it is the art lover, rather than the author, who makes the work* ». This way of turning the theorem of the champion against the artist makes it possible to establish, through a series of amalgamations which challenge the chronology and the history of art, a consequential list of excommunicated individuals: Malevitch, Klein, Christo, Kosuth (if indeed it is even his chair …), Duchamp, who are just about recognisable on it.

Professor Christophe Caron also proposes excluding from copyright ready-made and conceptual works of art. Regarding the case of *Paradis*, a work by Jakob Gautel, written in distressed gold letters above the door of the toilets of the alcoholics dormitory of the Hôpital de Ville Evrard, designed to invoke the hell experienced by this population rendered servile by captivity, and reproduced without authorisation by Bettina Rheims, who, rendering Paradis its literal meaning, placed a nude woman in front of the door, Christophe Caron is indignant: « *(…) must the act of placing a word in an unusual place be qualified as a work of the mind? (…) which amounts to protecting an idea, which may be wonderful, but does not truly offer an original form (…) Indeed, it is possible to object that, in refusing to qualify these forms of behaviour »* (sic) *« as « creations », copyright is ignoring such new works, considered as such by the artistic milieu and the object of commercial transactions. This fracture between copyright and the art world is incontestable, but it is not illegitimate*[3].

I have a confession to make. I acted as the barrister for Paradis. And in the face of such vigorous doctrinal oppositions, I managed to win copyright protection of this work before the court, the appeal court and the suprem court. This shows that judges are open-minded and above all, that the aesthetic judgement of a work has not prevailed over the rigour of legal reasoning. It is very good news for contemporary art, which multiplies new forms of addressing an audience, and which, consequently, demands from us, in the legal profession, that we show proof of our ability to adapt.

As, without underestimating the legal difficulty posed by the protection of monochromes or ready-mades, difficulty which has been the subject of much spilled ink, though fortunately less negative, and which is at the heart of a range of excellent theses[4], what transpires from the above-mentioned comments is a matter of taste : minimalist or conceptual works of art are not works of art, so they must not be for law what there are not in reality. The legal argument is a lack of form. In fact, this as a form of discrimination, bearing in mind the determining importance of copyright in managing the diffusion of a work, notably in terms of moral right and to benefit from one's revenues. Is it not a form of discrimination to choose, in the world of works, recognised as such by the art world, between those which can be protected and those which could not? The Paris appeal court and the supreme court, in the

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[2] Philippe Gaudrat, Réflexions sur la forme des œuvres de l'esprit, Mélanges Françon, Dalloz 1995 p 195

[3] « Droit d'auteur et droits voisins *» Litec 2006 p 50/51*

[4] Judith Ickowicz, Le droit face à la dématérialisation de l'œuvre d'art, 2009, Paris 1, and Nadia Walravens, l'œuvre d'art en droit d'auteur, Economica 2005

Paradis case, have characterised the form of a work (which exists, therefore, whether its detractors like it or not, i.e. the work Paradis is not simply an idea, it has a material form). Courts have declared this form to be original and protected it normally, without giving in to the mini-scandal triggered in the legal press. Very fortunately and wisely, the law refuses to dismiss a work simply because it belongs to a certain genre or form of expression.

The supreme court did not allow itself to be influenced by the comments of Bernard Edelman[5] who criticised the decision of the Paris appeal court which had ruled in favour of Jakob Gautel. He wrote that to protect the work of a conceptual artist (according to him a non-protectable idea), copyright would be entirely subverted, and moreover this is what the artists would want. Subverting the law. No less. The supreme court held fast before this torrent of mud, and ratified the appeal court for having "highlighted that the conceptual approach of the artist, which consists of placing a word in a specific context thereby deviating it from its common meaning, had been formally expressed in an original material form". Form and idea are therefore indissociable. The legal quarrel is over.

The law on copyright was conceived by the revolutionary legislator for the fine arts and literature. It would not be admissible for an entire section of contemporary art to be excluded from it.

[5] Paris Appeal Court, June 28 2006, Dalloz 2006 p 2610, note B.Edelman