

Copyright and Aesthetic Experience

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Despite the increasingly greater importance attributed to copyright due to the rise of the creative class, the experience economy and today's aestheticization of society, the legal definition of a work of authorship remains problematic. Society has changed considerably since the birth of Scandinavian copyright law in the 19th century. This makes the application of law difficult, especially within the aesthetic area. If we no longer know what makes art art, how are the courts to decide what makes a work a work of authorship and when a plagiarism is indeed a plagiarism?

1. Introduction

Copyright means here in Scandinavia that the exclusive rights provided under the copyright laws to the authors of literary and artistic works, the latter term also encompassing musical works. In Norway, copyright is regulated by *Act No. 2 of 12 May 1961 relating to Copyright in Literary, Scientific and Artistic Works, etc.*, also known as The Copyright Act (CA). The act is currently under revision. The Norwegian Ministry of Culture presented in March 2016 a draft to a new act, which largely continues the current CA.¹ The ministry is at the moment (February 2017) preparing a law proposition to the Parliament.

Simply put, copyright bars others from engaging in specific uses of literary and artistic works, e.g. by making them accessible to the public in their original or altered forms. Hence, it seems natural to consider copyright a *right of use*, with positively defined *powers of disposal* for the author. Out of consideration for the public interest, these powers are limited through *statutory exceptions*, which allows, e.g., quotation. So is also the system used in the draft law.

But this is not the perspective we are going for here. Instead, we will focus on some questions attached to the object over which the originator retains exclusive rights of disposal, i.e. *the work of authorship*. In what way does this legal object actually exist, and what is its nature under the current and proposed act? Scandinavian copyright law only protects against the copying of the literary or artistic merit that meets *the threshold of originality*. But, what does this standard really mean

* Stray Vyrje & Co. DA Law firm, Oslo. This is a revised and expanded version of the author's article *Åndsverk og plagiat – noen refleksjoner* (Works of Authorship and Plagiarism: Some Reflections), published in *Jussens Venner*, Universitetsforlaget 2012 p. 69. The article is partly translated into English with assistance from Government Authorized Translator Sol Kjøk, for the National Norwegian Artistic Research Fellowships Programme.

¹ The draft law is published online, see the Ministry's website kud.dep.no.

today? Which arguments shall be attributed relevance and weight? Is it not the ability to evoke *an aesthetic experience* that characterizes most works of authorship?

These questions have never been more pertinent than they are today. After all, the importance of copyright to our current economy cannot be overstated. This is because copyright protects the result of certain types of creative work of the mind. Two important keywords are here *the knowledge society* and *the experience economy*. Add to this what the American economist and social scientist Richard Florida refers to as *the rice of the creative class*²: “If you are a scientist or engineer, an architect or designer, a writer, artist, or musician, or if your creativity is a key factor in your work in business, education, health care, law, or some other profession, you are a member.” As Anne-Britt Gran et al. puts it,³ the capitalist economy has become *aestheticized*.

In many ways, copyright results in a monopolization of the type of creative work of the mind that is expressed in literary or artistic form. But not all forms of such expressions. The creation must pass what is referred to in legal theory and practice as *the threshold of originality*. Not all literary and artistic expressions meet this standard. In this way, there is a difference between the fine arts field and the copyright. In the fine arts field, the only requirement is that the creation, by its nature, is art. For copyright law purposes, there is an additional criterion. The manifestation must also reflect the author’s personality and a creative effort of the mind. The new draft law puts it thus in Section 2-1: “By a work is meant a literary or artistic work of any kind, which is an expression of original and individual creative intellectual activity” (translated from Norwegian).

If that is the case, the originator obtains the exclusive right of disposal not only over the concrete expression she or he has created, but also over differently-expressed variations thereof. Because this is how copyright works. As long as the court can experience a traceable imprint of the source’s level of expressive individuality etc., the creator is entitled to ban use of the imitation. Section 2 of CA puts it thus:

“Subject to the limitations laid down in this Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work [...], be it in the original or an altered form, in translation or adaptation, in another literary or artistic form, or by other technical means” (quoted from English translation available online at lovdata.no).

Hence, copyright law casts a rather wide net. As long as the source meets the threshold of originality and said originality fully or partially recurs in the imitation, the originator is entitled to bar others from producing copies of the imitation and from making it available to the public. But the precondition is that the very literary or artistic properties that meet the originality requirement recur *and are imitated*. This is an important fact to note. The primary purpose of copyright is not to distinguish creative works in the legal sense from non-works, but to

² *The Rice of the Creative Class: And How it’s transforming work, leisure, community and everyday life*, Perseus Book Group 2002.

³ *Kunst og kapital* (Art and Capital), Pax Forlag, Oslo 2005 p. 14.

protect the author against illegal imitative use of her or his creation. As Mogens Koktvedgaard claimed in his epoch-making doctoral thesis⁴, this is one of the major prerequisites for understanding copyright law: “Copyright can and must be described as a special legal protection for certain types of creations, not as a psychological process of empathy” (translated from Danish).

Copyright gives protection against imitation, also to some types of creations that have no aesthetic element, including – here in Norway – maps, technical drawings and computer programs. Hence, copyright protects a number of products of *different identities*. It follows that the legal reality of the protection against imitation also differs correspondent. For instance, it makes no sense to accord to composers and visual artists the same protection against imitation that the Copyright Act offers to writers, inter alia because music and visual art cannot be translated without the work’s expressive identity being totally changed.

The term translation makes here simply not sense. Hence, it is crucial to initially determine what type of creation we have on our hands; how we shall understand it. Does the objectified creation communicate in literary, artistic or musical form? What is the consequence for the application of copyright law if the creation has no aesthetic aspect at all, such as with technical drawings?

We must not let us be misled by statements as: The distinction between the different types of works in the Copyright Act has no practical significance, because they are all governed by the same statutory provisions.⁵ Formally, this is correct. But when it comes to the reality in the copyright protection, there are fundamental differences between the different kinds of works, *because our experience of them is different*. The American philosopher Nelson Goodman calls e.g. attention to a peculiar problem in the philosophy of art: Why is it that a painting can be forged, while a piece of poetry cannot?⁶ Goodman explains this difference by saying that painting is *autographic*, poetry is *allographic*.

2. The Work of Authorship

The notion of the work in the artistic sense is rather similar to the legal. After all, in literature, art and music, there is also a distinction between objectified creations that are artworks and non-artworks. A beautiful sunset, for instance, is not considered a work of art, because it is not created by humans. Also, many find that the artwork depends on something more than its material form is being shaped by a person, and the same holds true for the literary and musical work. The form per se must also express something individual and creative; something that is capable of evoking *a peculiar kind of experience*.

Hence, fine arts, literature and music emphasize some of the same criteria as does copyright law. This similarity is not incidental. After all, copyright law did not emerge in a vacuum. When protection against expressive imitations emerged as a new legal discipline in the 19th century, it was founded on the understanding

⁴ *Immaterialretspostioner* (Positions on Intellectual Property Law), Juristforbundets forlag, København 1965 p. 95.

⁵ See e.g. Ole Andreas Rognstad, *Opphavsrett* (Copyright), Universitetsforlaget 2009 p. 81.

⁶ *Languages of Art*, Hackett Publishing Company, 1976.

of art then en vogue in European cultural life, i.e. *Romanticism*. It was now no longer sufficient for the artwork to be well crafted. The piece must also express something individual and creative; i.e. an expressive trace of its maker. And because the work was considered new and original, it had to be evaluated for its own expressions sake. In this way, Romanticism ushered in the new era in the arts called *Modernism*.

When trying to tease apart the question of what constitutes the object and nature of copyright law, a logical point of departure might thus be the fact that copyright only protects that which is literary or artistically *individual*, which again requires drawing a line between form and content. However, distinguishing between such properties is a complex matter, especially in the fields of music and visual arts (literary works make for easier distinction). But if we nevertheless presuppose such a division, copyright law does not offer protection for generic content. And this is essential. As an extension of Romanticism's demand for originality, only the expression is protected, in the extent to which it reflects the originator's individual creative effort.

It is because of the understanding that the object communicates some kind of creative effort that one legal term for it is *creative product of the mind*. This term is, in fact, rather fitting, because it points to what copyright law aims to protect; literary and artistic creations whose manifested forms, as such, are individual and works of the mind. *Individuality* is here a key term. Another is *creative effort of the mind*. The expression must communicate something individual and created which is conveyed through its manifestation and elicits a special kind of experience – which is poetically by the poetic works, aesthetically by the aesthetics works and intellectual (meaning non-aesthetic) by the intellectual works.

In his article *The Creative Act* (1957), the Dadaist Marcel Duchamp stated that the artwork is characterized by an “art coefficient” of sorts, in that the artist moves from intention to realization through a whole chain of subjective reactions: “His struggle toward the realization is a series of efforts, pains, satisfaction, refusals, decisions, which also cannot and must not be fully self-conscious, at least on the aesthetic plane”.⁷ However, copyright law does not only demand that the author produce an individual, creative effort of the mind. For the originator to obtain protection, this effort must also leave *an expressive imprint* on the creation, like a footprint. This is exactly what separates the creative work in the legal sense from other cultural products. The manifested form as such conveys a human-made expression that appears individual and objectified, and thus capable of eliciting a peculiar experience.

Hence, it is neither the author's effort nor the spectator's role that produces the work in the legal sense, but *that which comes in-between*; that which the Polish philosopher Roman Ingarden called the real aspect of the creation. To quote Ingarden, the work of authorship is a concretization of the originator's intentional activity that appears before the viewer through its manifest form, and thus

⁷ Quoted from *Session on the Creative Act*, Convention of the American Federation of Arts, Houston, Texas, April 1957.

serves as the basis for the constitution of an aesthetic object, through an aesthetic experience. As with Ingarden, we must distinguish between the work and the experience. The work of authorship is what brings about the experience. The experience is gained by absorbing works of authorship, e.g. aesthetically. Experiences cannot be subject to right of disposal. Nor can they be copied.

As mentioned, the Scandinavian Copyright Acts also protects a small number of creations that have no aesthetic element (the term aesthetic encompasses hereinafter also the poetic). While such creations, taken to an extreme, can also be experienced aesthetically (so can most things, if you just make up your mind for it) the originality requirement applies to something different here; to what we might call the intellectual component (meaning: non-aesthetic). This seems to be an apt term, since copyright belongs to the domain of intellectual property rights. However, it is actually rather misleading. The great majority of works of authorship are of *an aesthetic* nature. And there is a big difference between this type of sensible experience and an experience of intellectual cognition.

While the aesthetic experience primarily involves our emotions, feelings and moods, the intellectual experience involves our rational nature, thinking and reasoning. Describing copyright as an aesthetic proprietary right could therefore often be more suitable. But there is no tradition for this. On the contrary, the ongoing European harmonization of the legal term work of authorship seems to bring into focus the non-aesthetic cognition. If we look into the decision from The European Court of Justice C-145/10 (Painer), there is no reference to the photography's aesthetics. See e.g. the Courts starting point for discussion in paragraph 87:

“As regards, first, the question whether realistic photographs, particularly portrait photographs, enjoy copyright protection under Article 6 of Directive 93/98, it is important to point out that the Court has already decided, in Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 35, that copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation.”

The Court could perhaps have been more explicit about the distinction between the different kinds of works. And the same goes for the present draft law here in Norway. Neither this takes into account the important difference that e.g. exists between our experience of a technical (non-aesthetic) and artistic (aesthetic) drawing. As Jon Bing puts it, technical drawings have in reality not the same copyright protection against imitations as artistic drawings:⁸ “If one obtains lawful access to a technical work-drawing of a chair, one can build the chair without representing any infringement of the copyright in the work step solution” (translated from Norwegian).

However, whether the work communicates poetically, artistically or musically, or whether it is only created to bring about a non-aesthetic experience, the application of law is primarily based on the expressions *manifest form*. To borrow

⁸ *Opphavsrett og EDB* (Copyright and EDP), Universitetsforlaget 1985 (p. 36).

terminology from Ingarden, the creative product of the mind is a “true gestalt, with its own intrinsic characteristics”. The wording is taken from an article by Else Marie Halvorsen⁹. As Halvorsen puts it, Ingarden’s teaching springs from the artwork:

“It is the qualities existing in the concrete artwork that cause it to distinguish itself from other cultural products. And an artwork is something other than an aesthetic object. It is a *physical* concretization of an artist’s *intentional* activity that manifests itself to the viewer through its concretizations. And it is in the encounter with these concretizations that the receiver can experience and create a new” (translated from the Norwegian).

In many ways, the same understanding is at work in copyright law. Here, too, we are dealing with the concrete product created by the artist; the literary or artistic expression *as such*. It is therefore not so that all literary or artistic expressions can be works of authorship, depending on subjective assessment. On the contrary, copyright law assumes that the creative product’s quality is evident from its manifest form, almost objectively. Ingarden, for his part, also stressed the role of the observer as co-creator. That is not how it works in copyright law. Here, only the originator creates the work. Certainly, different individuals may experience the same expression in various ways. But, within the context of copyright law, this circumstance is often explained by the fact that each person only experiences parts of the same work.

And, this is how it has to be. The courts cannot relate to something that is only contingent on consciousness. Such phenomena cannot be at anyone’s disposal, nor can they be copied. The only thing the courts can deny others the use of, in its original or altered form, is the concrete expression created by the author; *the manifested form*. The legislator puts it thus in Section 1 of CA: “Any person who creates a literary, scientific or artistic work shall have the copyright therein. By such a work is meant [...] a literary, scientific or artistic work of any kind, irrespective of the manner or form of expression.” The law goes on to list several examples of literary and artistic creations that are protected if, but only in the extent to which, their aesthetic or non-aesthetic expression is characterized by the individual intellect of the author. The following list appearing in CA is not intended to be exhaustive:

- 1) writings of all kinds,
- 2) oral lectures,
- 3) works for stage performance, dramatic and musical as well as choreographic and pantomimic; also radio plays,
- 4) musical works, with or without words,
- 5) cinematographic works,
- 6) photographic works,

⁹ *Estetisk erfaring: En fenomenologisk tilnærming i Roman Ingardens perspektiv* (Aesthetic Experience: A Phenomenological Approach in Roman Ingarden’s Perspective), published online in *HIT-skrift* No. 3/2003 by Telemark University College p. 4.

- 7) paintings, drawings, graphic and similar pictorial works,
- 8) sculpture of all kinds,
- 9) architectural works, drawings and models as well as the building itself,
- 10) pictorial woven tissues and articles of artistic handicraft and applied art, the prototype as well as the work itself,
- 11) maps, also drawings and graphic and plastic representations or portrayals of a scientific or technical nature,
- 12) computer programs,
- 13) translations and adaptations of the above-mentioned works.

The term *threshold of originality* has here in Norway gained common usage in legal theory and practice to describe the quality that defines the aesthetic or non-aesthetic work of authorship. It is only when this quality recurs in the alleged copy that a plagiarism exists in the eyes of copyright law. The threshold of originality is therefore the very key concept in Norwegian copyright law. And so it may seem odd that the term is neither used in the current or coming act. But perhaps even more surprising is the fact that the term is not mentioned, nor does it have any direct equivalent, in the field of aesthetics. This discipline also struggles with the question of what makes a work art and, here too, many voices demand some of the same qualities that constitute copyright law's requirement of originality.

3. The Originality Threshold

In many ways, the aesthetic originality requirement sums up an appreciation and valuation similar to the Romantic understanding of art. While the central elements of earlier art were nature and God, the new focus became on the artist. The Norwegian philosopher Lars Fr. H. Svendsen puts it this way:¹⁰

“With the Romantic artist's self-centration, art breaks away from its surroundings. Art is now a matter of subjects (artists) who are to create sovereign expressions of their own subjectivity or personality. And the work is successful only if this expression is *authentic*. Certainly, artistic expression was important to painters already in the Renaissance, but back then, it was not a matter of the artist expressing his *own* inner life. As of the Romantic era, quality can no longer be measured in relation to likeness to an external world; but rather a more internal relationship between the artist and his work” (translated from Norwegian).

The same understanding is at work in Scandinavian copyright law. Here, too, the demand is for an aesthetic or non-aesthetic *quality* springing from the relationship between the originator and his or her creation, as something manifested, individual and created. It is therefore rather misleading to say that copyright law does not require quality.¹¹ In fact, that is exactly what copyright law does,

¹⁰ *Kunst: En begrepsavvikling* (Art: Dissolution of a Concept), Universitetsforlaget, Oslo 2000 p. 18.

¹¹ See Andreas Sætre Hanssen, “Uklar oppklaring om plagiat” (Unclear clarification of plagiarism), published online in *Morgenbladet* 2. September, 2015: Quality is not relevant. The term aesthetic experience is misleading. Copyright has nothing to do with aesthetics.

through its originality requirement. The literary or artistic creation must manifest an expression that, as such, enables a certain type of experience, at least among experts in the field.

But that being said, many aspects of the experience have no legal relevance. And this is why the theory often states that the Scandinavian Copyright laws do not seek for quality. When something that is unpractical, misleading or ugly may also be a work of authorship, it seems a logical assumption that copyright law does not demand quality. But it is probably more accurate to say that the crucial point is whether the expression elicits *a peculiar form of experience*. Something unpractical, misleading or ugly can also have that effect. The aesthetic originality requirement aims e.g. at something that imparts knowledge or insight of a peculiar kind; *something that moves us*. “The very fact that it leaves you unmoved is in itself an indisputable criterion for bad art”, writes the Norwegian philosopher Kjell S. Johannessen (translated from Norwegian).¹² The same holds true for the musical originality requirement. We should also here be able to expect a return in terms of experience.

It can sometimes be difficult to determine whether the originality requirement has been met. Even though the concept has been widely elaborated within the aesthetic area, *aesthetic experience* is still not an easy concept to put into practice. Even harder is it to assess the extent of said originality, which cannot be avoided if a question of plagiarism arises. Still, neither the originality requirement nor the plagiarism issue can be settled without making the aesthetic creations subjects to an *aesthetic considering*, which again requires having the right attitude, etc. For instance, it is crucial to remain open to the possibility that the expressions may have value in and of themselves, irrespective of what they might convey or be used for. Typical of the aesthetic attitude of mind is a relaxed and sympathetic attention to and absorption in any given object solely for the sake of its expressive qualities.

As per the Norwegian Supreme Court’s tentative clarification on the matter of *Huldra*, an outdoor dance performance, *Norsk Retstidende* 2007, p. 1329 (NIR 2003 p. 206), the aesthetic product of the mind must be the result of an individual creative effort, and said result must possess originality. For greater clarity, the Court might have added that as per the law, the work of authorship must communicate *in a literary or artistic manner*, thus also specifying the type requirement. It might also be better to say *individual* rather than original, since the norm is subjective. The crucial thing is not that the originator produces something that constitutes an objective new expression, but that she or he shapes something of their own, with the capacity to move us and elicit a certain type of experience.

Nevertheless, many claim that copyright law has no object because it only confers on the originator the exclusive right to certain courses of action. In this perspective, the focus is not on the work in the legal sense, but on what the author has the exclusive right to do therewith; i.e. his or her powers of disposal.

¹² *Estetisk erfaring og kunst som erkjennelseskilde* (Aesthetic Experience and Art as a Source of Insight), published online in *Journal of Nordic Aesthetics* 2002 p. 117.

If so, the crucial provision is Section 2 of CA, which defines the originator's economic right of use: "Subject to the limitations laid down in this Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work by producing permanent or temporary copies thereof and by making it available to the public..."

However, if we, for practical purposes, maintain that copyright law does have an object (an understanding that is also reflected in the headline of Chapter 1 of CA: "The Object and Substance of the Copyright"), problems typically do not arise *until said object is subject to imitative use*. Prior to that, the discussion only deals with whether the object conveys the creator's intention, whether it is in tune with the trends of the time, whether it can be labeled beautiful or ugly, good or bad art, etc. But once the originator claims that his or her expression has been copied, the evaluation changes. The question then becomes whether the author should be protected against such re-use of the work, or whether she or he must tolerate it. And *this* is the main question regarding copyright; whether the creator in each individual case should be assisted by the courts in sanctioning others from recycling a similar expression.

It is obvious that the interpretation of the Scandinavian copyright laws must reflect and take into consideration the postwar development in literature, art and music. Thus, the interpretation of the Scandinavian copyright laws should be in evolution. But to what extent has such an evaluation really taken place? Does today's legal map still match the terrain? Let us take a look at, for example, the lawfulness of Andy Warhol's versions of Edvard Munch's *The Scream* (1893), *Madonna* (1894–95), *Self Portrait with Skeleton Arm* (1895) and *Eva Mudocci* (1903).

It is obvious that the owners of Warhol's silkscreen prints have used them in ways that, according to a traditional understanding of Scandinavian copyright, infringes on the Munch heirs' right of disposal. This is e.g. the case whenever Warhol's images are exhibited in public (Munch's work fell in the public domain on January 1st, 2015). But after Postmodernism, must we not consider Warhol's interpretations acceptable from a copyright perspective? One ardent opponent of Warhol's appropriations is the Norwegian art historian Paul Grøtvedt. In connection with the *Munch by Warhol* exhibit at Haugar Vestfold Museum in 2010, he referred to Warhol's images as anti-artistic and copies:¹³

"The fact that we are looking at pure forgeries and veritable copyright violations does not seem to faze the art experts. Andy Warhol is a big name in the international art trade, and there is a lot of money involved here" (translated from the Norwegian).

Still, most people find that Warhol's interpretations are – and must be – permissible. Professor Grøtvedt's caustic criticism has been accused for being reactionary. Nevertheless, he may have a point from a traditional copyright perspective. After all, the Copyright Act focus primary on what we may call *the object-related*; the

¹³ Quoted from the newspaper article *Munch-kopier* (Munch Copies), published online at tb.no on May 31, 2010.

material aspect of the artwork as an independent gestalt with inherent characteristics (Halvorsen, op. cit.).

To a great extent, this understanding was pushed out by *Postmodernism*, according to which the artistic element depends on the institutional; that which at any time is considered to be art within the Art Institution. Hence, there are many indications that a difference exists not only between postmodern works and those which have been defined by copyright law as works of authorship, but also between postmodern appropriations and works which have been defined by copyright professionals as plagiarism. There is no need to hide the fact that Postmodernism has created challenges for copyright law. Primarily, this has to do with the movement's rebellion against individuality and originality, but also with its focus on non-aesthetic elements, like language and context.

From this postmodern perspective, Warhol's appropriations are not plagiarism. If only considering their intellectual content, Warhol's images can be seen as artistically autonomous, inasmuch as they thereby elicit a completely different experience and insight than do Munch's works. However, from a traditional copyright perspective, the last-mentioned understanding falls short. Descriptive and intellectual aspects falls under the understanding that the Norwegian Copyright Act reserves for *non-aesthetic works*. Because here, the threshold of originality is not primary linked to the expression as such, but more to the expressions underlying ideas; to what the expression describes. Hence, the plagiarism assessment is quite different if the item in question is e.g. a fine art drawing. In that case, it is not the underlying idea that is protected, but its visual expression. The Copyright Act does still not accept a blurring of this distinction through a postmodern focus solely on the concept behind the artwork.

4. Plagiarism

The question whether a creation meets the threshold of originality cannot be determined without a context. First of all, the decision must be made *in the context of a plagiarism incident*. As already emphasized; it is the alleged re-use of the expression that gives the author the necessary legal interest in asking the courts to rule on whether his or her creation is protected. Without such alleged use of the work, the question is not relevant. Whether the creation is protected against hypothetical use is not something the courts need to decide. Here, as in other cases, the plaintiff must document a genuine need to have his or her claim settled vis-a-vis the defendant.¹⁴

Hence, some cases may have an aspect of absurdity, such as the Norwegian appeal case *Ambassador, Norsk Retstidende* 2013, p. 822. Here the Supreme Court concluded that the appellant did have copyright protection for its prefab home model *without* also ruling on whether this copyright had been violated. But that was the way it had to be since the Court of Appeal had only deliberated

¹⁴ See *Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes* (The Dispute Act) section 1-3 (2): "The claimant must show a genuine need to have the claim determined against the defendant. This shall be determined based on a total assessment of the relevance of the claim and the parties' connection to the claim." The act is published online at lovdata.no.

whether the prefab home model was a work of authorship, and decided that it was not. Hence, the Supreme Court had no choice but to rule on the originality requirement issue only, isolated from its plagiarism context. Since the Supreme Court arrived at a different conclusion from the Court of Appeal, the ruling of the lower court was reversed. The case had therefore to be heard again in the Court of Appeal, which in connection with its second hearing considered the plaintiffs copyright violated.¹⁵

However, the Danish architect Hans J Wegner did not benefit much from the Norwegian Supreme Court's (still important) *Worktable* decision, *Norsk Retstidende* 1962, p. 964. Certainly, the architect's combined sewing and coffee table was granted copyright protection on flattering grounds. But according to the Supreme Court, the table's protection against imitation was so narrow that Wegner could not deter Alfred Sand's furniture factory from manufacturing and marketing an imitative worktable product, called *Bjørg*. The Supreme Court found that the *Bjørg* worktable deliberately was so similar to Wegner's that there was a risk of confusing one for the other. However, the manufacturer had not been able to copy the *refinedness* of Wegner's material execution; the aesthetic X-factor that made Wegner's table pass the threshold of originality. In this regard, the Supreme Court concurred with the expert witness testimony given by the deceased art historian and legal professional Arne Brenna: "Wegner's table is an artful piece of design, while *Bjørg* is a robust utilitarian workbench lacking this sophistication. Wegner's table is at a completely different artistic level" (translated from Norwegian).

Not surprisingly, the Supreme Court concluded that both the prefab home model and worktable was creative products of the mind (i.e., protected by copyright). This is because the great majority of artistic products have *some* unique and creative imprint. And if so, their aesthetic is protected against pure duplication. The same passes for products which intrinsically are literary and musical. Also they are generally marked by some originality, even if little. Naturally, purely conceptual creations are in a different position, because such works have no meaningful manifest form. For minimalist works, the individual imprint may deliberately be more or less absent. But otherwise, it does not seem to take much for the courts to conclude that literary, artistic and musical expressions carry a trace of some originality, and thus – in the ultimate consequence – are works of authorship.

However, pure duplication is not common. Nor is it always possible. The imitator typically makes *various alterations* to the original's material form, which raises the question whether we are looking at a different expression. Also this can call for subtle evaluations. The French painter Henri Matisse, for one, maintained that his drawings could not be reproduced in a different format without losing their identity:

¹⁵ LF-2013-109223 (Frostating), published online at lovdata.no.

“An artist who wants to transpose a composition from one canvas to another larger one must conceive it anew in order to preserve its expression; he must alter its character and not just square it up onto the larger canvas.”¹⁶

While the assessment of identity is not conducted as strictly within copyright law (because that is hardly not the case), Matisse’s statement illustrates the difficult evaluation the courts are facing when plagiarism is alleged. Still using painting as our example; does not *any* alteration result in a different expression? Danish art and science theorist Søren Kjørup writes as follows: “As long as we keep perceiving painting the way we do, i.e. as long as our art institution remains the way it is, an original painting and its copy can never be considered two copies of one and the same artwork, but must always be viewed as two different works” (translated from Danish).¹⁷

The Norwegian Copyright Act does not provide any guidance for the plagiarism assessment beyond what appears in Section 4 of CA: “The author may not object to other persons using his scientific, literary or artistic work in such a manner that new and independent works are created.” The law does not say anything more specific about what it takes for the result to be considered *entirely* new and independent. That is perhaps not so surprising. After all, the assessment must be based on concrete cases. But the legislator might have said something about what overarching guidelines should govern this assessment? For instance, that for aesthetic works, the evaluation depends on overall comparisons of their expressions’ intrinsic characteristics as such; based on prevailing art comprehension; how we today perceive literature, art and music within the art field?

In marginal cases, such comparisons must be undertaken by *competent experts*. Quoting Ingarden again, the beauty of a musical work is only fathomable to listeners who know what it takes to absorb and understand the work, and who are capable of having a corresponding emotional response (Halvorsen, op. cit.). Perhaps the legislature should also have clarified that only the more or less *deliberate* imitation is affected, meaning that the work in question must deliberately have been used as a pattern or model? This is also an important clarification. Copyright law offers no protection against independent creation.

If nothing else, guidelines could have been provided in the preliminary legislative work, which currently says little about how to perform a plagiarism assessment. And the same applies to the present draft and current Norwegian case law. Most of the time, the courts content themselves with applying the correct terms. In such cases, the court’s reasoning is not very informative. For one, it does not make much sense to cite, as grounds for plagiarism, “copying of the protected work’s originality” without also explaining exactly *what* satisfied the originality requirement and *in what way* said originality recurs in the copy. However, putting

¹⁶ The quote is from the artist’s text *Notes d’un peintre* published in *La Grande Revue*, Paris, 25. December 1908 (as translated into English by Jack Flam in *Matisse on Art*, University of California Press 1995 p. 38).

¹⁷ *Kunstens filosofi – en indføring i æstetik* (The Philosophy of Art: An Introduction to Aesthetics), Roskilde Universitetsforlag, Fredriksberg 2000 p. 69.

this into words is not an easy task. So, if the courts are to explain the reasoning for the plagiarism assessment, they should consult with experts. It is indisputable that a plagiarism analysis requires expert understanding, partly in connection with the similarity assessment, but also in connection with the ensuing verbalization.

Here we are faced with the following paradox: Despite the growing importance attributed to copyright in today's society, the relationship between the aesthetic and legal understandings of the creative works remains unclear. As mentioned in the opening, the understanding of art has changed since the Scandinavian copyright acts came about in the late 1800s. Hence, many have raised the question whether the map still matches the terrain. After all, the copyright acts are not intended to deal with works whose periods of protection are long expired. Given that the European period of protection is 70 years, copyright law today only deals with works created by authors who survived World War II. It is hardly an exaggeration to say that some of these artworks and how they are perceived differ markedly from art that was created before the war ended. Before that time, *Minimalism*, *Pop Art* and *Conceptualism* had yet to emerge.

Preben von der Lippe, Senior Advisor to Arts Council Norway, has therefore advocated for renewing the demarcation between present-day art and copyright.¹⁸ As von der Lippe writes, the understanding of art's role, and of what art and aesthetics are, has changed considerably:

“Art and the understanding of art are marked by the questioning of the art object, the art institution and the art experience. An important feature in this scenario appears to be that the focus of art has shifted from the notion of an objectified *artwork* to situations where the work is realized as *an event*. This leads to difficulties in identifying and objectifying what is art. This shift has consequences for several players in the cultural field.” (translated from Norwegian)

The issue raised by von der Lippe is important. We have no use for a copyright law written for yesterday's understanding of art. Nor is this the way the Scandinavian copyright acts are meant to be practiced. On the contrary, the legislators have introduced concepts that are suited to capture the development within the arts. Hence, the limitation does not reside in the law, but in those who are to apply it; lawyers and judges. Also law professors must share the responsibility for the unclarity that has arisen. It is almost as they believe that copyright law exists and can be practiced in a vacuum. That is not how it is. The Norwegian Copyright Act is often referred to as the Constitution for cultural activities. And by this we mean *present-day* cultural activities.

¹⁸ The idea was launched in the project note *Kunstens objektivering og pengestrømmene – manifestasjoner av det estetiske i kunstens verk og virkninger* (The Objectifications of Art and the Money Flows: Manifestations of the Aesthetic in Works of Art and Their Effects, 2003), with the subtitle: *Are cultural policies and copyright management in tune with the changes in the artwork's status?* The note is available online. Also available with an English translation provided by the National Norwegian Artistic Research Fellowships Programme.

5. Reflections

Norwegian visual artist Per Kleiva's painting *Miles* (2010) was for some years ago described by Gallery Brandstrup as a completely new work when it was shown publicly. However, fans of photography and jazz quickly recognized the image from the cover of Miles Davis's *Tutu* album (1986), which Kleiva openly admitted that he used as a source. "But I am not doing this to copy, but to develop an idea further," said Kleiva. And if he was right in claiming that his painting has its very own expressive identity, it is not illegal to display it publicly.

Because copyright does not protect ideas, anybody is free to paint Davis' expressive face in black & white and in close-up. But that being said, the very way in which such an aesthetic idea is given material form, may be protected against being used as a model. And one might ask whether Kleiva's version is perhaps a bit too close to the American photographer Irving Penn's aesthetic expression? Many people may find that Kleiva was not simply inspired by the source (both images are available online), this because the aesthetics of his painting may very well elicit a similar aesthetic experience to that of the photograph. But we would not know whether this type of similarity, entails copyright infringement until Penn's heirs claim plagiarism. And there are no indications that they will do so.

The legal assessment does not only depend on resemblance. The reason *why* the aesthetics are similar must also be considered. For instance, Kleiva could not be accused of plagiarizing Penn's photography if he had never seen the cover of Miles Davis's album. After all, you cannot plagiarize something of which you have no knowledge. Nobel laureate Knut Hamsun persistently denied having read Fyodor Dostoyevsky when literary similarities were discovered between Hamsun's short story *Hazard* (1889) and Dostoyevsky's novel *The Gambler* (1866). If Hamsun had been right in his objection, which is not likely the case, the plagiarism accusation would have been groundless.

While it is not very practical, identical independent creations cannot be ruled out. That being said, one might of course argue that artistic expressions that originate completely independently of one another, lack the requisite originality of the original creator. Copyright plagiarism does not require intent. It is sufficient that the imitator had prior knowledge of the model, i.e. that she or he had read, seen or heard the relevant work. If the imitator subsequently forgets all about it, it is at her or his own risk. *Unconscious imitations* are also subject to the law. This problem is rather practical. After all, it does not take much for writers, artists and composers to accidentally blend prior experiences of others' works with their own intentional activity, and so the risk of plagiarism arises.

The performer of the plagiarism assessment must therefore not only consider the manifestations to be compared, but also *be knowledgeable about their provenance*; including who their creators are, when and where they were produced, through which acts of creation, the known techniques of the time, its style and fashion, etc. Thus, the plagiarism assessment is both indirect and direct. For instance, you cannot tell by simply looking at a painting whether it is a work of authorship. You need to know something more, about techniques, traditions, symbolism, perception, etc.

Without the above mentioned accompanying knowledge, the law cannot be applied. As professor Grøtvedt stated in the plagiarism case *Skiglede* (The Joy of Skiing), raised by the Norwegian sculptor Annasif Døhlen against Candy Design, *Retten's Gang* 2006 p. 1302, things are not always just what they seem in the art world. The news frequently report on artwork that turns out to be forgery, plagiarism or literally monkey business. In his satirical novel *Søppel*¹⁹, Norwegian art historian Tommy Sørbø moves a junked slurry truck into the fine art sphere, where it is immediately read as an expression of masculinity with clear homo-erotic undertones and references to heavy manufacturing industry and the romanticism of ruins. Outside the art world, the slurry truck is just trash.

The performer of the assessment must also take into account *the expressions' distinctive characters*. For instance, it makes no sense to compare Kleiva's artistic paraphrasing to a literary translation. Visual and literal creations convey meaning in different ways.²⁰ As the German artist Kurt Schwitters summarized it: What an image expresses cannot be said with words, just like what a word expresses cannot be painted. Therefore, it is not obvious that *ekphrasis* can entail infringement. E.g., very few people will find that the Norwegian poet Olav H. Hauge's poem *Til eit Astrup-bilete* (To a Painting by Astrup, 1961) violated Nikolai Astrup's painting *Vårmatt i hagen* (Spring Night in the Garden, 1909).

We understand that it cannot be up to the lawyers to decide whether the alleged imitation conveys some of the same inherent originality as the source does. They lack both experience and expertise in this matter. This holds particularly true for the evaluation of expressions converging towards the performing arts. In fact, the Scandinavian Copyright Act draws an important distinction between artworks and performances. Performing artists have here in Scandinavia no copyright protection against imitation. Performing artists only have protection *for their own performances*, as such. Whether the creation is categorized as artwork or performance is therefore crucial to the plagiarism assessment. This is yet another decision that is often hard to make. For instance, the Norwegian performance artist KjARTan Slettemark often referred to himself as art (work). And maybe he was that. But he was not a work of authorship. In that respect, it might seem more apt to compare his strange appearance to a readymade.²¹

The legal practitioner's primary task is to facilitate the plagiarism assessment to allow the experts to exercise their judgment *within the boundaries of the Copyright Act*. The experts cannot be given full freedom. In fact, copyright laws set some important limits to make sure discretion is exercised within legislative boundaries. One example of how things can go awry when the legal practitioners err in summing up the facts for the experts, is the decision (statement) by the

¹⁹ (Trash), Schibsted Forlagene, Oslo 2007.

²⁰ See Helge Ridderstrøms article *Mening i verbale tekster, bilder og musikk – hva består forskjellene og likhetene i?* (Meaning in verbal texts, photos and music: What constitutes the differences and similarities?), published online.

²¹ See Irina Eidsvold Tøien *Skapende, utøvende kunstnere* (Creative, Performing artists), Universitetsforlaget 2016. Can performers alternatively seek protection for their interpretation of the work (as an adaptation), as a copyrightable work?

earlier expert panel on works of authorship in the Norwegian *Beef Burger* case from 1998.²² Here, the majority of the panel found that meat supplier Gilde's humorous advertisement featuring an infantile drawing of a hamburger was a violation of the Munch heirs' copyright. Because the drawing borrowed some features from Munch's image, albeit altered in form and placement, the experts determined that it reproduced a sufficient number of expressive elements to constitute a copy.

The minority, which included the jurists on the panel, disagreed. In the minority opinion, the Gilde drawing did not convey the characteristic and individual qualities of Munch's aesthetic. The Ministry of Culture expressed its doubt, but refrained from taking a position. Because in the Ministry's opinion, the Gilde drawing did not infringe on general cultural interests pursuant to CA Section 48:

“Irrespective of whether the term of protection has expired or not, the Ministry concerned may, if the author is dead, prohibit a literary, scientific or artistic work from being made available to the public in such a way or in such a context as is referred to in the first paragraph. A similar prohibition may also be imposed by the Ministry at the request of a living author if the work in question is not protected in the realm.”

But since the Ministry decided to sidestep the plagiarism assessment, it probably should have steered clear of the matter altogether. Because there are many indications that the doubt expressed by the Ministry stemmed from a similarity assessment that went way too far. If one follows – as did the expert members of the panel – the reasoning that the infantile advertising drawing violated Munch's *The Scream* (1893), the copyright protection becomes almost conceptual. That is not what it is meant to be. The exclusive right only protects the *concrete expressions* of the artistic creations. All generic, idea-based and conceptual aspects must be left out here. These are work properties that are free for grabs in the aesthetic field (but conversely, they are attributed greater weight for non-aesthetic works like maps, technical drawings and computer programs, etc.).

As mentioned above, present-day plagiarism assessment cannot disregard the fact that there is currently much greater artistic acceptance for using works by others as points of departure for comments and responses. A great portion of postmodern art does not aspire to be original in the previously understood sense. For instance, Andy Warhol wanted to be a machine, which among other things entailed that he would do nothing more than press a button when taking photographs. The U.S. artist Sherrie Levine openly acknowledges that her photographs are based on bold reuse of others' work. Nevertheless, Levine's artistic project is not to copy, but to comment. Thus, her photos are not considered plagiarism in the art field. But as actual objects, there is not much original about Levine's images. From a traditional copyright perspective, it seems logical to consider them copies. There is nothing individual or creative about Warhol's photographs

²² *Nordiskt Immateriellt Rättskydd* 1999, p. 241 with illustrations.

either. Because even though snapshots can also be works of authorship, it does require something more than just pressing a button.

As Arne Engelstad puts it²³, we are currently seeing an explosion of adaptations, both in terms of frequency and variation, which again has to do with postmodern thought: “Walls are falling and boundaries are crossed, between genres, between artistic disciplines, between professional areas and sciences – and between media expressions” (translated from Norwegian). But what is actually an adaptation? The CA puts it thus in Section 4:

“Any person who translates or adapts a literary, scientific or artistic work or converts it into another literary or artistic form shall have the copyright in the work in that form, but may not dispose of it in such a manner as to infringe the copyright in the original work.”

Hence, the work of authorship is protected against imitation to an extent far beyond its manifested expression. It follows that the work of authorship is often referred to as something immaterial. The idea is that the work is something more than what has been manifested by the author; something abstract and hypostatized, etc. (hypostatization means to ascribe material existence to abstract notions). However, such an understanding is not quite adequate. After all, there is no immaterial work. The only thing that exists, is *the concrete expression* that the originator created, aesthetically or intellectually. Rather than relating to an idea, we must relate to the creator’s manifestation thereof.

This understanding differs from that of Plato, who believed that the perceptible world is just a shadowy reflection of the real. Hence, the Greek philosopher did not think much of visual art. For Plato, the visual arts operate at the very lowest level of the cognitive process. Its objects are the results of inspiration, not of knowledge. It follows that the result is both irrational and imitative. The artwork is only a copy of a copy. Svendsen (op. cit., p. 13) uses Warhol’s image *Campbell Soup Can 1* (1968) as an example: “Plato would consider the real soup can an imitation of the idea of a soup can, and Warhol’s image thus becomes an imitation of an imitation” (translated from Norwegian).

The British artist Damien Hirst counts among those who still subscribe to this understanding of art. When criticized for having copied his own work *Mother and Child Divided* (1993), Hirst answered that the copy was no less original than the model, since both only serve to communicate the work’s concept. For Hirst, it is not the original piece owned by the Norwegian Astrup Fearnley Museum that constitutes the work, but the concept behind it. If we follow this logic, the original work is also a copy.

But this conceptual understanding has no place in copyright law. Because manifestations like Hirst’s duplicate carry the same inherent characteristics as the original, his artistic *self-plagiarism* is problematic. Whether Hirst’s public exhibition of the copy constitutes a violation of the Astrup Fearnley Museum’s rights depends on what kind of rights the museum acquired. The basic premise is here

²³ *Fra bok til film – om adaptasjoner av litterære tekster* (From Book to Film: On the Adaptations of Literary Texts), J. W. Cappelens Forlag, Oslo 2007 p. 14.

in Norway that the author retains all rights of disposal when selling the original work, cf. CA Section 39: "Assignment of a copy shall not include assignment of the copyright or any part thereof, even if it is the original that is assigned." If this were the case also for Hirst, and indications are it may be so, not only was he free to publicly display the copy. Hirst may also produce more.

The need for self-plagiarism may arise e.g. if the original is destroyed. Svendsen (op. cit., p. 32) mentions the German conceptual artist Joseph Beuys's installation *Fat Corner* (1974), which melted against a radiator. Beuys therefore made a new version, but this second one was also destroyed. This happened because a cleaning person tidying up Beuys's studio after the artist's death mistook the lump of fat for garbage. Hence, the lump went into the trash, resulting in a successful suit for damages brought by the heirs against the cleaning company. True, this case was not a matter of copyright. Nevertheless, the example illustrates the following point concerning copyright: Even though the last remaining copy of Beuys's installation was lost, the author's right remained. The theory of ideas is thus not *completely* alien to copyright. This because the protection remains in force even if the only manifestation of the work is lost. However, in cases like these, one might ask whether the work only continues its existence and protection as a *literary* (descriptive) work.²⁴

6. Current Challenges

The Scandinavian Copyright Act does not employ the term *plagiarism*, but it has gradually gained common usage in the legal field and in society at large to denote various uses of protected works and performances that, for some reason or another, are considered unlawful or improper. The term is not only used for copyright issues. Other areas in which plagiarism also appears are design, press- and science ethics, competition law, patent and trademark law, etc. Hence, the term plagiarism is rather imprecise. Nevertheless, it is being used within copyright, partially because it is well-established, but also because there is few better options. Moreover, the term has the advantage of traditionally not only pointing to the manifestations' similarities, but also to the underlying effort, to the reason why they are similar and to the imitator's use of the work, etc.

Since copyright only protects the aesthetic aspects of most literary, artistic and musical creations, the work of authorship must be *experienced aesthetically*. Approaching an aesthetic creation in an intellectual way is as misguided as approaching an intellectual creation aesthetically. Halvorsen (op. cit.) puts it this way:

"It is crucial to be aware of the difference between a cognitive perception of a real object and the aesthetic experience of an aesthetic object. Characteristic of the cognitive process is to accurately adapt the cognitive results to the products under observation, while omitting irrelevant factors. The central element of the aesthetic experience is rather to

²⁴ For related questions, see Mats Dahlström, "Fejkat: Verksförfälskning och digitalisering" (Faked: Forgery and Digitalization), available online.

supplement the object with details that elevate the aesthetic expression” (translated from Norwegian).

This does not mean that we cannot learn anything from the aesthetic work. Of course, we can. An illuminating example is the following statement by the Austrian-British philosopher Ludwig Wittgenstein, quoted by Johannessen (op. cit.): “People nowadays think that scientists exist to instruct them, poets, musicians, etc. to give them pleasure. The idea that *these have something to teach them* – that does not occur to them.”²⁵ We must never forget that the experience elicited by the aesthetic work is of a completely different nature than the non-aesthetic one. Johannessen writes about a form of tacit knowledge that cannot be expressed verbally.

In this way, the relationship between copyright and freedom of speech can raise certain questions. Of course, the Copyright Act assumes that knowledge is free. But this refers to what we can call the generic and explicit knowledge, which is derived from the work of authorship. However, the aesthetic works communicate also *another* kind of knowledge, which is artistic, individual and tacit. And such thus kind of important knowledge cannot be communicated without an aesthetic expression. In this way, the relationship between the aesthetic part of copyright and the freedom of speech is more problematic. Because, as Wittgenstein said it, we must not forget that we also have something to learn *from the aesthetic expression, as such*. The author’s exclusive right to dispose of a literary or artistic work by producing permanent or temporary copies thereof and by making it available to the public, be it in the original or an altered form, is therefore not completely unproblematic in the light of the European Convention on Human Rights, Article 10.

The Swedish art historian Göran Ståhle writes about five modern Swedish painters and their paraphrasings of works by others.²⁶ *Paraphrasing* is often described as a free rendition of someone else’s work, which may seem a contradiction in terms, since no true reproduction can be executed in free form. From a copyright perspective, paraphrasing is allowed, since it does not copy the original’s aesthetic expression. Copyright law also allows *the pastiche*. The visual arts are full of stylistic copies. One example is the *Munch Adaptations* by the Norwegian visual artist Unni Askeland, first shown publicly in Bergen Kunsthall in 2002. According to the critics, these adaptations do not add anything new. But all the same, they are not copies. For creating new works in the styles of others is allowed. E.g., the Norwegian author Knut Faldbakken’s novel *Glahn* (1985) is seen by many as a pastiche on Hamsun. But thus far, nobody has accused Faldbakken of plagiarism.

Elmyr de Hory, considered by many the greatest art forger of all times, only painted works in the styles of the great masters. Since the faker did not copy actual works, he did not violate copyright law. What made his pastiches unlawful, was the fact that they were sold off as genuine. With his great talent, de Hory

²⁵ As translated by Peter Winch in *Culture and Value*, The University of Chicago Press, 1980, p. 36.

²⁶ *Förvandlingens konst* (The Art of Transformation), Carlssons Bokförlag, Stockholm 1992.

was complicit in the sale of more than a thousand *forgeries*, including of Matisse, Modigliani, Braque, Dufy and Picasso. The story is told by museum curator Johannes Rød along with many other examples of art forgeries over the last century.²⁷ During that period, the understanding of what constitutes the identity of an artwork changed considerably. In his book *Et kunstverk – kunstkritikk på tvers*,²⁸ Grøtvedt writes about the “aesthetics of the breakdown”, which is his term for the art philosophical reflection and artistic practice that started with the *avant-garde* in the mid-1800s and ended with *the institutional art theory* of the 1960s, according to which anything can be construed as an artistic phenomenon.

In tandem with this development, the legal understanding of the artwork has changed significantly. For one, the legal understanding of the creative work has been expanded to include forms of expression that require special rules. The latest branch on the tree is that the notion of a work of authorship in Scandinavian copyright law also encompasses photography, databases and software. Copyright protection thus becomes *fragmented*, since different rules must apply to different types of work, in particular the exceptions clauses. In this way, copyright law loses much of its unity. For that reason, it is important to keep in mind that the uniform treatment of literary, artistic and musical works in the Scandinavian Copyright Acts is only motivated by practical considerations. The same holds true for the uniform treatment of aesthetic and non-aesthetic works, as well as of fine and applied arts, etc. But this uniform treatment has its drawbacks, e.g. the fact that it easily leads to confusion. For one, it is not uncommon for lawyers and judges to ignore the obvious fact that by their very nature, literary, artistic and musical expressions communicate differently.

This uniform treatment under the law also makes the copyright protection *relative*, since the plagiarism assessment must be practiced differently for various types of work. For instance, the applied arts have narrower protection than the fine arts. Certainly, solid reasons can be given for this special treatment, but the consequence thereof is that the applied arts must tolerate closer imitations than, e.g., the decorative arts. The Norwegian Supreme Court’s ruling in the above mentioned *Worktable* case (op. cit.) is illustrative here.

Parallely, countries that ostensibly share unitary legislation practice *national differences*. For one, it is not a given that creations that are considered works of authorship in Denmark or Sweden count as the same here in Norway. While the principal convention in this field, *The Berne Convention for the Protection of Literary and Artistic Works*, lists minimal requirements for the member states’ legislations, it is still left to the individual countries to decide in each case what to consider works of authorship and plagiarisms. Neither the Court’s decisions in the above mentioned cases C-5/08 (Infopaq) and C-145/10 (Painer) will change this. It will still be up to the national courts to determine when the disputed expression is the plaintiff’s own aesthetic or intellectual creation. Consequently, differences

²⁷ *Kunst som forfalskning, forfalskning som kunst* (Art as Forgery, Forgery as Art), Gyldendal Norsk Forlag, Oslo 2000.

²⁸ (A Work of Art: Art Criticism Crosswise), Fritt Forlag 2008.

will still arise, also between the courts within the different states. The aesthetic experience is in fact, when it comes to reality, not easy to harmonize.

7. The Aesthetic Experience

Because the properties of the work that are to be accorded copyright protection must be of literary or artistic nature in the sense that these terms are understood in copyright law, the very first task for the applicator of the law is to decide whether the alleged imitation copies properties of the original that, *by their nature*, are protected.

This evaluation can sometimes be difficult. For one, what is it that makes literature literary and art artistic? In 2005, in a matter concerning tax liability, the Oslo District Court was asked to rule on whether regular striptease has an artistic element. The government's argument was that, by its very nature, striptease has no artistic element, and so the night club *Den Blue Engel* was liable for taxes on box-office revenue. However, the court did not find in the government's favor. In the court's opinion, striptease can be both aesthetic and artistic, since the audience at times experiences "incredibly beautiful artists who move gracefully in tune with the music with sensual movements and a gradual disrobing that provide many restaurant patrons with a very good experience" (translated from Norwegian).²⁹

As per case law, plagiarism only exists if the very properties that satisfied the originality requirement are copied. The part of this requirement that focuses on *individuality* is probably the easiest. For most people understand what it means that the original's material form must carry a trace of its maker. More difficult is the part that requires that the original must be characterized by a *creative effort of the mind*. What does that really mean today? The boundary between the aesthetic and the non-aesthetic is relatively clear. But how do we draw the line between the aesthetic with and without intellectual content and qualitative heft? The fine arts also distinguish the insignificant from the qualitative. The difference resides in whether the work's material form elicits an aesthetic experience. These two notions count among the most important within present-day philosophical aesthetics, but are nevertheless not used in copyright law. This is not because the distinction between empty and qualitative aesthetic is irrelevant. Rather, the reason is more likely that there is no tradition in copyright law for drawing on philosophical aesthetics. And that is actually rather surprising. Also copyright law is based on artistic assessment.

It therefore seems logical to compare the experience of the work for copyright concerns to the particular type of experience that occurs when interacting with art. As Johannessen writes about the experience of art (op. cit.), there is more to it than a mere tickling of the senses. Otherwise, we could easily have lived without art: "In that case, a delicious meal, an excellent vintage wine or a nice roll in the hay would have blown art completely out of the water" (translated

²⁹ TOSLO-2007-121611 (Oslo), published online at lovdata.no. See also the decision from the appeal court RG-2009-1060 (Borgarting).

from Norwegian). As Johannessen writes, intrinsic to our dealings with art is the notion that the works are supposed to move us in one way or another:

“They can please and delight us (the classical experience of beauty); they can offend us (break taboos of various kinds); they can incite us to act (political art); they can provide food for thought (shine a light on problems – Ibsen); they can (potentially) give us new insight by holding as ’twere, the mirror up to nature; to show virtue her own feature, scorn her own image, and the very age and body of time his form and pressure” (*Hamlet*, 3.2.1).

But does not the same hold true for copyright law? Does not this also require *something more* than a mere tickling of the senses? An aesthetic that is not empty, but satisfies certain quality demands? And is not this exactly what characterises the plagiarism as defined by copyright law; that the imitations intrinsic properties allow third parties to have *an aesthetic experience* quite similar to the one elicited by the original? A measure of the same quality that, quoting Halvorsen (op. cit.), arouses us, excites us, and generates attention, and which we pursue with a desire to grasp and hold? There are many indications on that this is true. For the preliminary notes to the Norwegian Copyright Act put it thus: The work of authorship aims to serve the human need for understanding or beauty. Hence, copyright law also focuses on that which is aesthetically or intellectually qualitative.

It is therefore important that the person conducting the plagiarism assessment approaches the alleged copy and the alleged original in the right way. To borrow from the philosopher Immanuel Kant, one must put one’s own desire and interests aside in order to experience the objects *in a disinterested way*. As Kjørup says, the movers hauling a heavy sculpture to the third floor of a museum certainly experience its mass, but not the work’s aesthetics (op. cit., p. 43). This is because of the fact that the latter requires focusing on the sculpture’s form for the sake of the form’s *own inherent qualities*, which again is easier to do with objects that are autonomous and purposeless than with functional ones.

Usable objects are, indeed, designed to be used. Hence, aesthetics become secondary. This is part of the reason why design and crafts have had difficulties in gaining recognition as art and works of authorship. Not only does their functionality hamper the creator’s ability to leave his or her personal imprint, but also the spectator’s experience of the creation as fine art. The situation is markedly different for creations such as poetry, music and visual arts. For these are creations that are given material form to be experienced for their individual aesthetic, not for the knowledge they convey or what they can be used for. In *Philosophy*, edited by David Papineau, it is summed up as follows:³⁰

“A true artist is not trying to evoke some desire on the part of the observer – not, as Schopenhauer puts it, trying to create some fruit so temptingly depicted that you would want to eat it – but rather trying simply to present the naked beauty of the object.”

³⁰ Oxford University Press 2009 p. 173.

Many craftsman designers have therefore turned away from the utilitarian. One example is the readymade *Dinnertime* (1974) by the Norwegian craftsman designer Konrad Melhus, which consists of a crystal drinking glass outfitted with a golden fork as the stem. Because the two functional objects are combined in a way that render both useless, our attention is drawn to the aesthetic of the piece as a whole. In this way, the objects are transformed from crafts to fine art and to a work of authorship. Professor Jorunn Veiteberg explains this creation as follows: “Trained both as a goldsmith and a sculptor, Melhus is critical of jewelers’ lack of artistic ambition, and *Dinnertime* is a send-up of their work as providers of status symbols for the bourgeoisie” (translated from Norwegian).³¹

Hence, it is important to *facilitate the circumstances* to allow for the experience of the expression per se. The manifestations on which the assessment is based must do justice to the objects. It is not a given that the manifestations do the originals justice if, e.g. colors or format are changed. “If I take a sheet of paper of a given size, my drawing will have a necessary relationship to its format,” Matisse claimed (as translated by Jack Flam, op. cit.). Matisse simply would not have created the same drawing in a different format, e.g. rectangular instead of square.

This factor is often not given its due importance in copyright law. Lawyers and judges do not always base their plagiarism assessment on a direct and complete – *aesthetic* – experience of the creations being evaluated. E.g., it is not uncommon to settle for using photographs when assessing architecture and crafts (without conducting a site inspection). In such cases, it does not take much for the aesthetic evaluation to go wrong. Moreover, the court often contents itself with (only) a verbal description of the musical or visual aesthetics. There is not much guidance in a copyright ruling if you cannot experience the visual or musical manifestation as such. As already mentioned, ekphrasis is not sufficient. We may therefore rightfully ask how come presentations in copyright matters does not come with more, and better, illustrations.

³¹ *Kunsthåndverk* (Crafts), Pax Forlag, Oslo 2005 p. 23.