

BOOK REVIEW

## Art and Modern Copyright

by Elena Cooper. Cambridge: Cambridge University Press, 2018, 304 pp (£85.00). ISBN: 978-1-10-717972-1.

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In October 2018, headlines around the world proclaimed Banksy's latest hoax perpetrated on the art world. At a Sotheby's auction, buyers and spectators were reportedly shocked as the hammer fell on 'Girl with a red balloon' and the work itself slowly passed through a shredder secreted in the frame. While commentators speculated on whether the event itself was 'fake news' and had ever occurred, copyright lawyers observed to themselves that the destruction of the painting would not have breached any copyright or moral rights provisions so long as Banksy was responsible for this destruction and still owned the copyright. Some wondered what the new purchaser thought, while prominent art curators and gallery owners advised that it was likely that the work's partial destruction would have actually increased its value.

The interest of the general public is not often captured by the machinations and elusive economics of the art market, although part of the particular appeal of Banksy is his reach across the wealthy buyers of his moveable works into the popular market through his more usual canvas of immoveable structures. His work has frequently bamboozled copyright law and art collectors, because of its reliance on the material form and intrinsic relationship to the fixed structures upon which it appears. This tension between the material and the immaterial bedevils all aspects of copyright law, but is particularly pointed when it comes to works of art. For Immanuel Kant, the nature of works of art as things (*opera*) meant that it could be no wrong to copy them for sale to the public.<sup>1</sup> Yet this philosophical position was not shared by artists of the nineteenth century, nor by those who bought and sold their works.

The relationship between artists, collectors, the public and the law are thoroughly excavated by Elena Cooper in *Art and Modern Copyright: The Contested Image*. Cooper's work provides the first book-length history of British copyright law and art in the nineteenth and early twentieth centuries. Drawing on extensive archival work and a rich body of legal decisions, treatises and parliamentary materials, Cooper ably demonstrates her central claim that a consideration of how copyright law and art interacted in this period brings new and valuable insights to our understanding of the law's modern development. Importantly, the development of the formal law is set alongside the way it was understood and practised by not only painters, engravers and photographers, but also dealers, collectors, galleries, printsellers, celebrities and artistic societies and associations. In doing so it treats copyright law as a cultural phenomenon that both impacts upon and is impacted by individuals and institutions who engage with it.

The book covers the period from 1850 to 1911, encompassing the period that Bently and Sherman identified as marking the emergence of modern copyright law.<sup>2</sup> It elaborates its thesis across four themes, each identifying a specific 'interest group': authors; collectors; 'sitters' or subjects of portraits by painting or photography; and, the public. The first substantive chapter, Chapter 2, covers the period

<sup>1</sup> I Kant 'On the wrongfulness of unauthorized publication of books' in I Kant *Practical Philosophy* (ed and transl Mary J Gregor) (Cambridge: Cambridge University Press, 1997).

<sup>2</sup> B Sherman and L Bently *The Making of Modern Copyright Law* (Cambridge: Cambridge University Press, 1999).

from 1850 to 1862. Here, Cooper describes the background and formation of the Fine Arts Copyright Act 1862 by focusing on the debates surrounding inclusion of photography as an object of protection. This perspective highlights conflicting ideas surrounding whether copyright should protect only creative labour or whether it could also protect mechanical or mental labour. While art historians have argued that the idea that photography might be a creative activity emerged in the 1860s, Cooper demonstrates that the debates over artistic copyright meant that this notion was actually first raised in the 1850s, when arguments supporting photography's inclusion in the artistic copyright Bills were based upon the creative activities and outputs of photographers.

Cooper argues that the debates over the inclusion of photography in the 1862 Copyright Act demonstrated that ideas about art and aesthetics played an important role in the legal treatment of art, but that by the end of the century this was no longer the case, a story told in Chapter 3. Where the 1862 Act protected photography on the same basis as paintings and drawings, by the time of the passing of the Imperial Copyright Act 1911, photographs were 'downgraded' to the same position as sound recordings (then described as 'record, perforated rolls and other contrivances by means of which a work may be mechanically performed or delivered'<sup>3</sup>). Intriguingly, this was so despite the fact that in the art world it was by then generally accepted that photographs were works of fine art. Cooper traces how this 'disjunction' between art and law developed through decisions of the upper courts in infringement proceedings as well as through proposals for legislative reform. In relation to the latter, emphasis is placed upon the roles of the Royal Academy (arguing that photography was not aesthetically equivalent to painting) and the Photographic Copyright Union (arguing first that it was, then later turning to focus on commercial value). The 'dual bases' for copyright protection of mechanical and creative labour are presented as problems for copyright and indicative of changing attitudes towards artists as copyright 'authors'.

Implicit in this story, although less developed, is the changing nature of the copyright work as courts and legislators sought to identify its boundaries for the purposes of commodification. The artistic work as commodity moves to centre stage in the next chapter (Chapter 4), which traces attempts to use copyright law as a tool for regulating the relationship between artists and collectors, and reconcile the intangible rights associated with copyright with rights to the physical work itself. The issue that Cooper focuses on here is the ability of the owner of a painting (a 'collector') to prevent artists from having copies made by an engraver, or by making copies themselves – usually through repeating the work in subsequent paintings. This practice interfered with the work's 'uniqueness', something that the art market was increasingly coming to value. Cooper traces the fate of various attempts to amend the 1862 Act throughout the nineteenth century to improve the position of collectors. She suggests that by the opening decades of the twentieth century, the notion that copyright could be used to regulate artists had largely dissipated. The Imperial Copyright Act of 1911 no longer reflected the concerns of collectors except in one remaining clause; s 7 of the 1862 Act, which was not repealed in 1911, prohibited any person from 'fraudulently' signing or affixing their name to a painting, drawing or photograph, as well as dealing with such fraudulently signed works. Cooper argues that while this section is sometimes characterised as a proto-moral right to be identified as author, its history reveals its true purpose was to cement the link between the artist and the original work, thereby protecting the value of the material object for the collector.

In Chapter 5 Cooper turns to flesh out another element that further complicated the tension between material and immaterial interests in artistic copyright law: the place of the human subject in painted and photographic portraits. Here she explores the ways that tensions between privacy and publicity interests of the sitter, and the commercial interests of the artist, were played out in statutory debates as well as commercial transactions and litigation. This account reveals that the legal protection of personality emerged earlier in the UK than has generally been understood, tracing this story through the popularity of *cartes-de-visites*, celebrity portraits and the role of the magistrates' courts in the 1860s and 1870s. Again, the place of photography is crucial to the narrative. A factor anchoring

<sup>3</sup>Imperial Copyright Act 1911, s 1(2)(d).

understandings of the relationship between portraitists and their subjects was the impossibility of taking a photograph or painting a portrait without the subject's consent. In such circumstances, the owner of the 'face' depicted could plausibly be characterised as the owner of the image produced. This changed at the end of the nineteenth century with the launch of the hand-held camera, the rise of the photographic press and the growing influence of discourses that emphasised the creativity of the photographer. Together, these factors eroded the importance of the role of the portrait's subject in the copyright regime, and their ability to use that regime to protect their privacy or commercialise their image.

Chapter 6 examines the final theme considered in the book – the role played by considerations of 'public interest' in legislative drafting and judicial decisions. Here Cooper seeks to draw out the differences in the way these bodies negotiated the individual claims of artists, and the communal, or public, interests in encouraging the creation and dissemination of, as well as access to, works of art, as compared to the negotiations made in the case of literary works. Cooper points out that these different accommodations were largely papered over in the Imperial Copyright Act 1911, which sought to apply general principles to all copyright subject matters.

*Art and Modern Copyright* fills an important lacuna for copyright history, addressing as it does the distinct challenges that art raised for copyright law and uncovering the very different accommodations in relation to the tensions inherent in copyright law between monopoly rights and public benefit. It draws out the important roles played by artists in negotiating these tensions and the complicating factors introduced by the nature of the art work as a physical item, valued for its uniqueness, as well as the potential for works depicting people to be used for publicity purposes while raising questions of personal privacy. Cooper deftly describes the interactions between these elements, and their impact upon the development of copyright law as it related to art. In so doing she draws attention not only to the mechanics of law-making, its human agents and their competing ideologies and agendas, but also to the paths that were not taken, or that were started down and abandoned. Recovering these 'lost narratives' (p 248) helps remind us of the contingent nature of law-making and the enduring possibility of alternate legal futures.