ORIGINALITY: 'Primary, initial, first'

Bill Morrow

Conjectures on originality and copyright infringement.

The avant-garde artist has worn many guises over the first hundred years of his existence: revolutionary, dandy, anarchist, aesthete, technologist, mystic. He has also preached a variety of creeds. One thing only seems to hold fairly constant in the vanguardism discourse and that is the theme of originality. By originality here, I mean more than just the kind of revolt against tradition that echoes in Ezra Pound's 'Make it New!' or sounds in the futurists' promise to destroy the museums that cover Italy as though 'with countless cemeteries'. More than a rejection or dissolution of the past, avant-garde originality is conceived as a literal origin, a beginning from ground zero, a birth.

Rosalind Krauss[1]

This article may be best described as a conjecture about the influence the 'theme of originality' has on the tolerance of copyright law to imitation in the arts. It is not about the requirement of originality for works under Australian copyright law.[2] It is a conjecture that arose from more general interest in the emergence of the modern connotation of originality in the 18th century, the effect that had on artistic practice and attitudes to imitation and the relevance of the concept of originality to contemporary artistic practice.

My starting point is the *Shorter Oxford Dictionary* which defines 'original' as being 'of or pertaining to the origin of something; that existed at first, or has existed from the first; primary; initial, first'. It also defines originality as being 'the origin or source of something primary; originative'. There is, however, a modern connotation of the term original which the dictionary defines as 'such as has not been done or produced before; novel or fresh in character or style 1756' and it is on this connotation I wish to focus.

The 18th century

Originality as an artistic virtue and the problem of plagiarism do not appear to have been major issues in the ancient world nor in the centuries leading to the Middle Ages. Erwin Panofsky notes that:

> In the Middle Ages the concept of 'originality' played no great part in the realm of philosophy; rather the authors strove to demonstrate the opposite — agreement of their own views with those of older authorities'.[3]

The invention of the printing press enabled the cheap and speedy reproduction of literary and artistic works and it was this technological innovation which led to the development of stronger attitudes towards plagiarism because of the economic implications of the publication of copied works. Eventually the response in England was the development of a system of privileges for publishers which later evolved into the law of copyright. The development of those privileges, however, was initially as much about censorship as the protection of publishers and the works of authors.

It was in the 18th century that a public discussion of originality and its value in art occurred, a discourse which was an integral part of the

Bill Morrow is an Adelaide solicitor and artist.

'The Bedroom/Arles', October 1888 by Vincent Van Gogh — the basis of the digitally manipulated work by Bill Morrow on the cover of this issue.

transition from Neo-classicism to Romanticism. This discourse permeated artistic thinking and led to the notion of originality as a major theme of modernist thought.

Imitation was not a problem for neo-classicists because their view was that the imitation of ancient works resulted in an educated artist with correct taste. It was by comparison with the ancients that the modern artists could assess their own achievements. In 1755 Johann Winckelmann said: '[t]here is but one way for the moderns to become great, and perhaps unequalled; I mean, by imitating the ancients'.[4]

While the 18th century was greatly influenced by neo-classical thinking there was also a current of opinion which rejected this reliance on antiquity and advocated an attitude of experimentation and originality. It was only four years after Winckelmann's statement that the author Edward Young published his essay, *Conjectures on Original Composition* in which he eloquently argued the case for originality and the rejection of reliance on imitation.[5]

It is to literary criticism that we must turn in order to see the beginnings of this discussion of originality. In her doctoral thesis entitled 'The Adventurous Muse'[6] Patricia Phillips in examining originality in English poetics in the period 1650-1760 concludes:

> Whereas many of the more eminent literary figures of the period 1650-1760 (and others less distinguished) regarded themselves as the loyal custodians of the classical tradition they had inherited, to a large section of the reading public and those authors who sought to gratify its demands, there was little in this legacy that attracted or inspired. To them its secular and aristocratic bias, its backward-looking aspect, its elements of fantasy and outworn folk-tale, and finally its cosmopolitan, non-English inclination rendered it more and more unpalatable.
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> Often, ill-equipped by either education or tradition to understand or appreciate the languages and literatures of Greece and Rome, this new group of readers and authors sought a poetry which would reflect their immediate concerns and interests. [p.146]

Phillips notes that the movement was not consolidated but came from a number of individuals and was greeted by 'an enthusiastic public'.

There are a number of reasons for the emergence of this new attitude to originality. The advent of the printing press and with it the new power of authorship, and the reaction against neo-classicism were both influential. Patricia Phillips also notes that 'the older notion that the passage of time portended the decay of the world was waning in the face of what was felt to be substantial evidence to the contrary' (p.2). In addition, it was a period of English pride and 'all that was foreign and, in particular, French, was fast becoming anathema to John Bull. He rejoiced in his independence, both political and literary and revelled in his sense of superiority'(p.3).

This sense of independence and freedom which emerged during this period (not only in England) is significant for it was independence and freedom that were so highly prized by the romantic artists and later the modernist movement generally. Closely aligned with these attitudes was the ascendancy of imagination. Phillips notes that imagination 'traditionally distrusted and feared, was now regarded as equal, or occasionally superior to reason and judgment'. She postulates that the cultivation of imagination 'eventually becomes the key to the development of that typically 18th century phenomenon — the original genius' (p.6).

Edward Young's *Conjectures On Original Composition* reflects the attitudes which had developed towards originality. Young was adamantly opposed to imitation. He was in favour of originality and the freedom of the individual arguing:

> Imitations are of two kinds: one of Nature, one of Authors: the first we call Originals, and confine the term Imitation to the second ... Originals are, and ought to be, great Favourites for they are great Benefactors; they extend the Republic of Letters, and add a new province to its dominion: Imitators only give us a fort of duplicates of what we had . . . [pp.9-11]

Young was prepared to acknowledge that imitation may have merit:

> But suppose an Imitator to be most excellent (and such there are), but still he but nobly builds on another's foundation; his Debt is, at least, equal to his Glory; which therefore, on the balance, cannot be very great. On the contrary, an Original, tho' but indifferent (its Originality being set aside) yet has something to boast . . . [it] share[s] ambition with no less than Caesar, who declared he had rather be the first in a village than the second at Rome. [p.11]

Young noted that originals appeared to be few and far between and queried whether that was the result of antiquity 'having left nothing to be gleaned after them'(p.17). His explanation was that 'illustrious examples engross, prejudice and intimidate':

> They engross our attention, and so prevent a due inspection of ourselves; they prejudice our judgment in favour of their abilities, and so lessen the sense of our own; and they intimidate us with the splendour of their renown and thus under diffidence bury our strength. [p.17]

This first theme of originality and imitation in Young's work then gives way to a second theme comparing the merits of genius and learning. For Young there was little choice between the two: '[g]enius can set us right in composition, without the rules of the learned; as conscience sets us right in life, without the laws of the land'(p.31). In Young's view

originality was the product of genius and not of learning. 'Learning we thank, genius we revere' (p.36).

Patricia Phillips and Lorenz Eitner both draw attention to the following statement on page 12 of Young's essay:

> An original may be said to be of a vegetable nature; it rises spontaneously from the vital root of Genius; it grows, it is not made: Imitations are often a sort of Manufacture wrought up by those Mechanics, Art, and Labour, out of pre-existent materials not their own.

Phillips interprets this as meaning 'the original writer is inspired directly by Nature . . .' and Eitner that 'the vital power which acts through him (the artist) does not imitate nature it belongs to nature itself, it is natural genius, and its works have the qualities which are founded in nature's authentic creation — organic unity and life'.[7]

Young's remedy to prevent the evils of imitation and dependence on the ancients, was to 'know thyself' and 'reverence thyself'. Of the former he said:

> Learn the depth, extent, bias and full sort of thy mind; contract full intimacy with the Stranger within thee; excite and cherish every spark of Intellectual light and heat, however, smothered under former negligence or scattered through the dull dark mass of common thoughts . . .

Of the latter he said:

> Let not great Examples, or Authorities, brow-beat thy Reason into too great a diffidence of thyself. [p.53]

It was not only Young who published works on these themes. Joseph Addison in the *Spectator* had earlier taken up this theme of originality and the natural genius. Phillips notes that 'he gave common currency to the image of the truly great poet as the man of free imagination and uncultivated genius, whose effect is to transport and astonish, unaided either by learning or conscious art.'[8]

Both Young and Addison regarded Shakespeare as an exemplary example of the original genius. It was Addison who said:

> Who would not rather read one of his Plays, where there is not a single Rule of the Stage observed, than any Production of a modern Critick, where there is not one of them violated?[9]

In direct contrast was the imitative genius of whom Pope was a prime example. Young said of Pope:

> He chose rather, with his namesake of Greece to triumph in the old world, than to look out for a new. [p.67]

It is interesting to note that the poet Pope was a friend of the 18th century lawyer and judge, Lord Mansfield. Mansfield was an accomplished orator and it is noted that 'he declaimed in his chambers before a mirror with Pope as a critic'.[10] In 1754 he became Attorney-General, and in 1756 Lord Chief Justice of the Kings Bench. Pope referred to their friendship in his poetry and may well have influenced his thinking and instilled in him a tolerance of imitation. Lord Mansfield himself, however, had made a serious study of classical models. He translated the orations of Cicero into English and then back into Latin.

In 1785 in the copyright case of *Sayre v Moore* dealing with maps and charts he gave an indication of his attitude when he stated:

> We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. [102 Eng. Rep. 139]

Influenced by Mansfield's opinion the courts initially were reluctant to find infringement of copyright where the alleged infringer had used skill and judgment in adding to or altering the original work. Mansfield's approach was tolerant to imitation. His views and tolerance of imitation appear to have been superseded by the cult of originality expounded by Edward Young and others. Benjamin Kaplan says of the period:

> In placing a high value on originality, the new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect 'new', to encourage a mere suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found.[11]

The 19th century

Collingwood also recognised this attitude when he wrote, '[a] new code of artistic morality grew up in the 19th century, according to which plagiarism was a crime'.[12]

So it seems that with the emergence of the theme of originality came a decreased tolerance of imitation. There is little doubt that the theme of originality influenced and was adopted by the visual arts. Eitner notes that during the period 1820-1850, although the greatest artists drew heavily on traditional material there was a difference of approach from other periods:

> Claude was to Turner, Raphael to Ingres, Rubens to Delacroix far more than a brief stimulus or passing influence. Such dependence on tradition was not unprecedented in the history of art, but what distinguished the particular situation of 19th century art from that of earlier periods of eclecticism was the modern artist's claim to originality and individual freedom.[13]

This search for originality (that which had not been done or produced before) goes some way to explain the progression of artistic movements which started in the latter part of the 19th century and has continued to the present time. In the eyes of some it represents a 'ritual of novelty' where originality is not just desirable but obligatory.[14]

There is, however, a paradox in the quest for originality and the 'beginning from ground zero' . We regard the Futurists as originals but, like other original movements, Futurism was not innocent of culture. As Theodore Greene points out:

> Originality in art can have no meaning save by reference to an artistic tradition which must be defined in terms of past conventions and various types of orders.[15]

The postmodern age

In the postmodern age, originality has been questioned, and there are indications that the cult of originality may have exhausted itself. The search for originality, however, in the visual arts is likely to continue if for no other reason than that the art market uses it as a criteria of marketability and, therefore, commercial value. Conditioned by the progression of original movements in modernism the art market and art public now anticipate the next original or novel movement.

Today, as in 1759, Edward Young's argument that originality is valuable because it expands the 'Republic of Letters' is still persuasive. Originality provides diversity, choices and vitality in the arts. Although we still must judge whether the diversity offered is good, bad or irrelevant, at least we are offered the choice. The pursuit of originality for its own sake is a questionable activity for it is what we do with the results of originality and how it influences us that gives it value.

The attitudes of postmodernism question whether the pursuit of originality is still possible or worthwhile. In 1981 Sherrie Levine said:

> The world is filled to suffocating. Man has placed his token on every stone. Every word, every image, is leased and mortgaged. We know that a picture is but a space in which a variety of images, none of them original, blend and clash. A picture is a tissue of quotations drawn from the innumerable centres of culture.[16]

Although this may be an overly pessimitic view of our cultural condition, it does help explain the practice of appropriation which is a feature of postmodern artistic practice. If nothing can be original then imitation is inevitable.

The conflict between the practices of appropriation and contemporary copyright law have been the subject of comment by a number of authors.[17]

If the cult of originality in modernist thought contributed to a decreased tolerance of imitation by copyright law can we then expect that postmodern suspicion of originality and practices of appropriation will lead to an increased tolerance of imitation; an appropriation? Jeff Koon's experience in the United States suggests that such a change has not yet occurred.[18] Similarly in Australia the manner in which courts determine what constitutes a substantial part of a work when determining whether a copyright infringement has occurred, suggests that there is only very limited tolerance of imitation.[19]

There are many who feel that there is a need for greater tolerance by copyright law to the use by artists and other authors of the copyright material of other authors. If questioning the status quo is a legitimate activity for authors, then the use of copyright material forming part of the status quo is defensible provided that use is relevant. Expanding concepts of fair dealing may provide a solution although it is difficult to see changes in that area accommodating the appropriations of Jeff Koons.

It is of course possible — perhaps even desirable — for copyright law to be responsive to changes in artistic thinking and practice, provided that any increased intolerance of imitation and/or appropriation is carefully balanced against rights traditionally granted to authors and currently protected by copyright.

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18. See Wallis, Brian, 'The Case of the Copyrighted Canines', (1991) *Art in America,* February, p.39; and Pettigrew, Kim 1993, 'Portrait of a Commodities Broker as Thieving Artist: Parody, Fair Use and Contemporary Art', (1993) 2 *Arts and Entertainment Law Review,* April, p.1.
19. See for example the recent decision of Von Doussa J in *Milpurrurru & Others v Indofurn Pty Ltd and Others* (unreported), No DG4 of 1993, Adelaide, 13 December 1994). Von Doussa in considering the application of the works of Aboriginal artists to carpets found in relation to some of the works that while the area of copied material was not great compared to the whole, the copying was substantial in a qualitative sense. It should be noted that the *animus furandi* was a 'predominant consideration' in this case.