

# What Is a Copyright Work?

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*The work, which came into its own with the emergence of modern copyright law at the turn of the twentieth century, occupies a pivotal (but largely unexplored) position in copyright law. Focusing on the question of how copyright decides whether part of a work should be treated as a separate and distinct object, this Article looks at some of the techniques that copyright law uses to decide both what is a work and when a new work comes into being. The Article shows that in spite of the central role that the work plays in copyright doctrine the law is not well equipped to explain when a new work has come into being.*

What . . . is the strange unit designated by the term, work? . . . If we wish to publish the complete works of Nietzsche, for example, where do we draw the line? . . . What if, in a notebook filled with aphorisms, we find a reference, a reminder of an appointment, an address, or a laundry bill, should this be included in his works? Why not?

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## INTRODUCTION

Over time, the "work" has been called on to perform a number of different roles in copyright law. One persistent and longstanding function is as shorthand for the output of an author. For example, as Justice Willes said in *Millar v. Taylor*, "it is certainly not agreeable to natural justice that a stranger should reap the beneficial pecuniary produce of another man's

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<sup>1</sup> MICHEL FOUCAULT, *What Is an Author?*, in *THE ESSENTIAL FOUCAULT* 377, 379 (Paul Rabinow & Mark Rose eds., 2003).

work."<sup>2</sup> Work has also been used, albeit much less frequently, as a verb. Thus, the 1787 Calico Printers' Act provided owners with a right to "print, work, or copy,"<sup>3</sup> while the 1844 International Copyright Act provided rights to "every Person who invents or designs, engraves, etches, or works in Mezzotinto or Chiaro-oscuro, or from his own Work, Design, or Invention causes or procures to be designed, engraved, etched or worked in Mezzotinto or Chiaro-oscuro and historical prints."<sup>4</sup> Work has also been used as a collective term to refer to a group of creations. Thus, the 1798 Models and Busts Act spoke of a "Model, Copy, or Cast in Alto or Basso Relievo or any such Work as aforesaid."<sup>5</sup> The catchall work was also used in the 1862 Fine Art Copyright Act — which protected "Copyright in Works of the Fine Arts" — as a collective term to cover the different forms of subject protected under the Act: namely, "original Paintings, Drawings, and Photographs."<sup>6</sup>

By the end of the nineteenth century, the term "work" had been used both as shorthand for authorial output and as a collective term to refer to a class of objects (by this time the use of work as a verb had largely fallen out of favor). While these ways of talking about the work persist today, the nature of the work and the role that it plays in British copyright law fundamentally changed with the passage of the 1911 Copyright Act, which marked the transition from pre-modern to modern copyright law.<sup>7</sup> Prior to the passage of the 1911 Act, the pre-modern law tended to be subject-specific and reactive; it responded to particular problems as and when they arose. As a result, legislation focused on specific types of creations such as engravings,<sup>8</sup>

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2 Millar v. Taylor, (1769) 98 Eng. Rep. 201 (K.B.).

3 Act for the Encouragement of the Arts of Designing and Printing Linens, Cottons, Callicoes, and Muslins, by Vesting the Properties Thereof, in the Designers, Printers and Proprietors, for a Limited Time, 1787, 27 Geo. 3, c. 38, § 1 (Eng.).

4 International Copyright Act, 1844, 7 & 8 Vict., c. 1, § 73 (Eng.). The work is used here both as a verb and a noun.

5 Act for Encouraging the Art of Making New Models and Casts of Busts, and Other Things Therein Mentioned, 1798, 38 Geo. 3, c. 71, § 1 (Eng.).

6 Fine Art Copyright Act, 1862, 25 & 26 Vict., c. 68, § 7 (Eng.). Interestingly, the 1862 Act also used work in a more general sense when it said that "[n]othing herein contained shall prejudice the Right of any person to copy or use any Work in which there shall be no Copyright." *Id.* § 2.

7 On this see BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW* (1999).

8 Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and Other Prints, by Vesting the Properties Thereof in the Inventors and Engravers, During the Time Therein Mentioned, 1735, 8 Geo. 2, c. 13 (Eng.).

lectures,<sup>9</sup> and sculptures.<sup>10</sup> There was also a sense of openness, fluidity, and uncertainty about the content, shape and nature of the law. Lord Monkswell summed up this aspect of pre-modern law when he said in 1891 that the law was in a "glorious muddle." This was because,

since the first Statute on the subject of copyright was passed in the time of Queen Anne, the Law of Copyright seems to have been the sport of some malignant demon as it were, and we find that at present the Law of Copyright is contained in eighteen Acts of Parliament, and in some ill-defined common law principles.<sup>11</sup>

The 1911 Act set out to bring order out of this chaos and to reduce the subject to "an intelligible and systematic form." It did this by replacing the previous enactments with a "homogenous code of Copyright Law, drafted in the whole on sound and generous lines."<sup>12</sup> That is, the 1911 Copyright Act codified the preexisting law into a single coherent form. In so doing, the focus of the legislation changed from being subject-specific and reactive to become more abstract and forward-looking.<sup>13</sup>

The shift from a reactive, specific law to a modern law which was abstract and forward-looking brought about a change in the ontological status of the law: "[A] move from linguistic patterns mastered at the practical level to a

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9 Publication of Lectures Act, 1835, 5 & 6 Will. 4, c. 65 (Eng.).

10 Sculpture Copyright Act, 1814, 54 Geo. 3, c. 56 (Eng.).

11 Lord Monkswell, 353 PARL. DEB., H.L. (3d ser.) (1891) 438.

12 *Copyright Law Reform*, 216 Q. REV. 483, 489 (1910).

13 The changes brought about by the 1911 Act are evident if we compare successive editions of *Copinger on Copyright* from 1904 and 1915. The fourth edition, which was edited by J.M. Easton and published in 1904, was organized on pre-modern lines. The book was divided into separate parts that dealt with literary copyright, musical and dramatic copyright, artistic copyright, and copyright in designs. Each of these sections, in turn, looked at relevant substantive issues. This is in marked contrast to the fifth edition, also edited by Easton and published in 1915, which begins with an historical introduction and an "analysis of the nature of copyright." This is followed, in Part II, by the General Law of Copyright (which follows a similar structure of textbooks today). Compare WALTER ARTHUR COPINGER, *THE LAW OF COPYRIGHT IN WORKS OF LITERATURE AND ART: INCLUDING THAT OF THE DRAMA, MUSIC, ENGRAVING, SCULPTURE, PAINTING, PHOTOGRAPHY, AND ORNAMENTAL AND USEFUL DESIGNS* (J.M. Easton ed., 4th ed. 1904) with WALTER ARTHUR COPINGER, *THE LAW OF COPYRIGHT, IN WORKS OF LITERATURE, ART, ARCHITECTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA: INCLUDING CHAPTERS ON MECHANICAL CONTRIVANCES* (J.M. Easton ed., 5th ed. 1915).

code, a grammar, via the labor of codification, which is a juridical activity."<sup>14</sup> In so doing it fundamentally changed the nature of the work and the role that it plays in copyright law. The reason for this was that the process of codification not only required the law to find a way to abstract away from the hitherto disparate and often unconnected areas of law, it also required the law to find a way of uniting the different aspects of copyright doctrine. Under pre-modern law, the doctrinal rules had been linked by virtue of their reference to the particular subject matter in question. One consequence of the shift to a more abstract regime was that this was no longer possible. In order to codify the law it was thus necessary to find a common denominator that simultaneously enabled the doctrinal rules to be framed in such a way that they were able to move beyond the subject-specific laws and, at the same time, ensure that the doctrinal rules were consistent. It was this task that the work was called on to perform. In responding to these tasks, the work not only enabled the doctrinal rules to be framed in (more) abstract terms, it also became the thread that linked the various provisions of the Act together.

While the work had been used sporadically and inconsistently in earlier legislation,<sup>15</sup> under the 1911 Copyright Act the work was suddenly everywhere; from the definition of copyright through to the rules about subject matter, subsistence, ownership, and infringement.<sup>16</sup> The work, now elevated to the status of concept, was not only a creature of modern copyright law, it also played a key role in the way that the law was organized. The work, in effect, became the basis on which the doctrinal edifice of modern copyright was built.

Despite the pivotal role that the work plays in modern copyright law, it has attracted remarkably little attention.<sup>17</sup> The aim of this Article is to

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14 PIERRE BOURDIEU, *Codification, in IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 76, 80 (1990).

15 There were some exceptions. For example, the Copyright Law Amendment Act, 1842, 5 & 6 Vict., c. 45 (Eng.) spoke both of "books" (broadly construed), and "also of the need to encourage the production of literary works" (where work was used as a collective neutral term that encompasses an array of subject matter). Section 19 also protected "copyright in any Encyclopaedia, Review, Magazine, Periodical Work, or other work published in a series of Books or parts."

16 For example, Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 1(1) (U.K.), said that copyright subsists in "every original literary, dramatic, musical and artistic work." It was also reflected in the definition of copyright as "the sole right to produce or reproduce the work or any substantial part thereof in any material form." *Id.* § 1(2).

17 *Cf.* RayMing Chang, *A Work Is a Work Is a Work: There Is No Fixation Requirement Inherent in the Terms "Work" or "Derivative Work" Under the Copyright Act* (May 16, 2006) (unpublished manuscript), *available at* <http://ssrn.com/abstract=900060>. As the U.S. Register of Copyright, Marybeth Peters, said, "[a]lthough one might

rectify this oversight by looking at how the work is configured in Anglo-Australian copyright law.<sup>18</sup> In so doing, it aims to make explicit a dimension of copyright law that is rarely discussed or considered, but is nonetheless of critical importance to an understanding of the law. After looking, in Part I, at some of the different roles that the work plays in copyright law, Part II looks at the techniques that have been used to give shape to the intangible work. These include the material form of the object in which the work coexists; the idea that the work is a "natural legal kind" which has to be unearthed; and the doctrinal rules of subsistence (notably subject matter and originality). Part II ends by highlighting some of the problems with these approaches. The Conclusion of the Article returns to an issue raised in the Introduction, namely, the intangible nature of the work and its relationship with the tangible.

### I. THE ROLE OF THE WORK IN COPYRIGHT LAW

While copyright law does not formally require a plaintiff to show that she has created a work, nonetheless many different aspects of copyright law presuppose that the work has been identified. For example, before being in a position to ascertain whether a work is original, it is first necessary to have some sense of what the work is. Similarly, when deciding who is the author or owner of the copyright in a work, it is necessary to have an idea of what is under consideration. While commentators regularly discuss whether a particular work is original or has been infringed, it is not usually the business of copyright doctrine to highlight the techniques that allow it to identify and talk about the work in the first place.

One notable exception is in relation to the well-known maxim that copyright only protects the way that ideas are expressed, rather than the ideas themselves.<sup>19</sup> The idea-expression dichotomy, which is notoriously

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expect the extensive list of definitions in § 101 of the [U.S.] Copyright Act to include a definition of as fundamental a term as 'work', no such definition exists." *Family Movie Act of 2004: Hearing on H.R. 4586 Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 108th Cong. 12 (2004) (statement of Marybeth Peters, Register of Copyrights).

18 The Article will focus on Anglo-Australian copyright law. While the approach in the U.S. does not follow the approach in the U.K. (particularly in terms of the use of the work as an organizing principle), there are conceptual similarities. To the extent that this is not the case, it raises interesting questions about comparative copyright law.

19 Problems with recognizing copyright protection of ideas have a long pedigree. See *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.).

difficult to pin down, is an attempt to deal with a specific problem that arose as a result of the decision that protection was not limited to the surface of the object in which copyright subsists<sup>20</sup>: namely, how far from the surface of the material object was copyright law willing to extend the owner's rights? How far, for example, is it permissible to abstract away from the surface of the printed word to the intangible ideas that are presumed to lie behind the text? While the idea-expression dichotomy plays an important role in shaping the nature of the copyright work, it only provides us with a partial picture. In particular, while the idea-expression dichotomy influences the scope of what is protected, it tells us very little about how the intangible is represented or about its relationship with the material form in which it subsists.

The closest copyright doctrine comes to addressing the question of how the work is represented is in terms of the requirement of material form. Typically, however, this is dismissed on the basis that it is merely an evidential (factual, tangible) requirement, which is normally followed by a reminder of the intangible nature of copyright. For example, we are told that "the definitions of literary, dramatic and musical forms imply that while works may be evidenced by their material fixations, they are created and exist independent of those fixations."<sup>21</sup> While the focus on the intangible nature of the copyright work is important, there is no reason why this needs to occur in lieu of the tangible. By focusing on the intangible at the expense of the tangible, we lose sight of the material dimension of the work and the way that this interacts with the intangible. It also leads us to lose sight of the fundamental question: how does an immaterial form become visible and tractable in the first place? How is the intangible phantom that is the copyright work able to be presented for doctrinal analysis and speculation?

Questions about the scope of the work and its relationship to a particular material form arise in a number of situations, the most important being where a material object can be divided into smaller parts. In these cases, the question may arise as to whether the parts should be treated as separate and distinct works in their own right. If we take the case of a monograph, for example, while it is clear that the book as a whole is a copyright work, what of the chapters, pages, paragraphs, sentences, words and letters that are included in the book?<sup>22</sup> What is the situation where snippets of a book (à la Google) are reproduced online? While a page, a paragraph, a sentence,

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20 For discussion see SHERMAN & BENTLY, *supra* note 7, at 31-32.

21 Justine Pila, *Copyright and Its Categories of Original Works* 4 (Oxford Legal Studies Research Paper No. 22/2008, 2008), available at <http://ssrn.com/abstract=1160176>.

22 There are other dimensions to this question, which are mainly dealt with by subject matter, about other elements of the book, such as drawings or typographical design,

or a word may be recognized as discrete literary forms, there is nothing to suggest that the copyright work necessarily corresponds to these forms. In these cases, copyright law must pass judgment as to whether a specific form, which might be part of a larger whole, should be treated as a discrete work in its own right. The chair of the Australian Standing Committee on Legal and Constitutional Affairs Into the Digital Agenda Bill summed up the problem when he asked a witness to the Committee, "[I]s there some need to further define what we mean by 'a work'? . . . Let me take an example. If you are talking about a collection of High Court reports is the report of one case a work, is the collection a work, or is the judgment of one judge a work. What is 'a work'?" In response, the witness said: "That is a good question. I would not mind a bit of guidance on that myself . . . It is not an easy question, but it is not one you can get around, I do not think."<sup>23</sup>

Many issues in copyright law turn on the way that the work is construed. For example, the remuneration payable under a collective license may depend on the scope and size of the works covered by the license. The three-step test employed in international copyright law, which provides that copyright defenses are only allowed in domestic law insofar as they do not conflict with the normal use of the work, also begs the question: what is the work?<sup>24</sup> While the way that the work is construed plays a role in many aspects of copyright doctrine — from subject matter and originality through to fair dealing and ownership — its importance is most telling when considering whether copyright has been infringed. Even when we are being admonished to look at the quality rather than the quantity of what has been taken, the

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which attract separate and distinct protection. On this see Justine Pila, *An Intentional View of the Copyright Work*, 71 MOD. L. REV. 535 (2008).

23 H.R. STANDING COMM. ON LEGAL AND CONSTITUTIONAL AFFAIRS (LEGISLATION COMM.), COMMONWEALTH OF AUSTRALIA PARLIAMENT, DIGITAL AGENDA REFERENCE 109 (1999).

24 Article 9(2) of the Berne Convention provides that: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." While the scope of this provision, and with it national defenses, turns on a range of factors, one of these is the way that the work is configured. Article 13 of TRIPS and Article 10(1)(2) of the 1996 WIPO Copyright Treaty are couched in similar terms. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 331 U.N.T.S. 218; Agreement on Trade Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 33 I.L.M. 1197, 1869 U.N.T.S. 299; World Intellectual Property Organization Copyright Treaty art. 10(1)(2), Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 36 I.L.M. 65.

qualitative question is still framed in terms of the part's relationship to the work as a whole. Where someone photocopies a monograph or downloads a film, for example, the parameters of the work will not be in dispute. In other situations, however, the size of the work may have an important bearing on whether the courts will find a defendant liable for infringement. The role that the work potentially plays in shaping the outcome of an infringement action can be seen in the British decision of *Hyperion Records v. Warner Music*.<sup>25</sup> This was an application for summary judgment brought by Hyperion Records who owned copyright in a sound recording of the medieval chant, *O Eucharisti*. The chant, which was 5 minutes and 18 seconds long, appeared on the album, *A Feather on the Breath of God*. Hyperion Records alleged that their copyright had been infringed when the group the Beloved copied (or sampled) eight notes from *O Eucharisti* and incorporated them into their record, *Happiness*. While it was clear that the song *O Eucharisti* was a work, Hyperion Records argued that the 8 notes sampled by the Beloved also formed a distinct copyright work in their own right.<sup>26</sup> If this was accepted it would clearly have been an infringement, as 100 percent of the "work" would have been taken. As Judge Laddie Q.C. said, "if the copyright owner is entitled to redefine his copyright work so as to match the size of the alleged infringement, there would never be a requirement for substantiality."<sup>27</sup> In a case such as this, the size of the work effectively determines the outcome of the action. Similar problems arise in other situations. For example, while a weekly schedule of television programs may be classified as a (literary) work, what is the standing of the programs for an individual day, or a column in that compilation? Similarly, is a broadcast of the 100 meters final in the Olympics, which forms a small part of the athletics coverage which, in turn, is a part of wider sports coverage, a work in its own right? While there is little doubt that the copying of a newspaper article will infringe the literary copyright in the article, the fate of the published edition copyright (or the copyright in the typographical arrangement) in a page reproduced from a newspaper is less clear-cut.<sup>28</sup> In situations such as these, the way that the work is defined has the

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25 *Hyperion Records v. Warner Music*, (unreported case, May 17, 1991) (Ch.) (on file with author).

26 They also argued that the whole track was the work and that the defendant had reproduced a substantial part thereof.

27 *Hyperion Records*, at 8 (on file with author).

28 More specifically, it depends on whether there is published edition copyright in each of the articles in the newspaper, or only in the newspaper as a whole. If copyright was recognized in each article, there would be no question as to whether the copies formed a substantial part of the copyright work. As with the literary work, the taking of an article would infringe the published edition copyright in the work (or article).

potential to play a pivotal role in determining whether or not there has been an infringement.

While the size of the work plays an important role in various aspects of copyright law, the task that confronts the law in this context is not so much a quantitative inquiry into the size of the work per se, as it is an inquiry into whether part of work should be recognized as a *new* work. Underpinning this inquiry is a simple taxonomic question: under what circumstances is copyright law willing to recognize part of a work as a discrete work in its own right? That is, when does a new work come into being? It is important to note that this is not an inquiry into the novelty of the work, along the lines of the novelty inquiry in patent law. That is because novelty as used in patent law presupposes that the invention has already been determined. Instead, the task confronting copyright law here is to determine whether a new work should be recognized in the first place.

## II. WHEN DOES A WORK COME INTO BEING?

In many ways the role played by the work in copyright law is similar to that played by the invention in patent law.<sup>29</sup> The work and the invention both allow the respective branches of intellectual property law to protect various types of creations in a range of situations. They also operate as common denominators that ensure that the relevant doctrinal rules are able to operate, if not as a coherent whole, then at least in such a way that they do not contradict each other. Despite these similarities, however, there are a number of notable differences, one of the most important being in terms of the way that the common denominator is configured. While the task of configuring the invention in patent law is resolved bureaucratically via the registration system, the lack of an equivalent mechanism in copyright law means that the law has had to develop other techniques to enable it to visualize the work. Over time, three different approaches have been used to decide how the copyright work should be configured.

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However, if published edition copyright was only recognized in the newspaper as a whole, the copying of an article would only infringe if it constituted a substantial part of the whole.

<sup>29</sup> It is also similar for the sign, design and variety in their respective areas of law.

### **A. Where the Work Coincides with the Tangible**

The most consistent and widespread approach that has been used to determine the ambit of the work has been to equate it with the parameters of the material object in which it coexists. In many situations the task of ascertaining the ambit of the work is relatively straightforward. That is because the scope of the work often coincides with the contours of the material object in which it is fixed. In these situations, the law is able to rely, either explicitly or implicitly, upon the material parameters of the cultural objects recognized by copyright law. Thus, where we are talking about a monograph or a painting, few problems arise in determining the scope of the work. In these situations the work simply follows the external contours of the tangible object which acts as a physical hologram of the work.<sup>30</sup> In some cases, in some jurisdictions, this can be attributed to the way that copyright subject matter is defined. This is particularly the case in relation to artistic works which tend to be defined by reference to specific types of objects (such as paintings, sculptures, buildings and so on).<sup>31</sup> In other cases, however, it is as if modern (abstract) copyright law retained a cultural memory of the pre-modern categories. That is, it is as if the subject-specific (material) categories utilized in pre-modern law (such as the book) were carried over into the abstract definitions used in modern copyright law (literary work).<sup>32</sup>

While there are many situations where the contours of the intangible are indistinguishable from the contours of the material object in which the intangible is fixed, it cannot be presumed that the work necessarily coincides with the shape of a particular material object. Indeed, the history of copyright offers many examples where there is a disjuncture between object and work. An early example of the way that a work potentially transcends the physical limits of the object with which it is associated is offered by the case

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30 One exception to this may be where a material cultural object (such as a book) forms part of a series. (such as the string of books that make up the Harry Potter series). Here the question may arise as to whether the series as a whole, as distinct from an individual book, is a separate work.

31 This is not to deny that in some cases difficult questions arise in construing these terms. Nonetheless in many cases, the parameters of the work-object will be clearly ascertained.

32 One of the features of pre-modern copyright legislation is that it tended to focus on specific cultural objects, such as books, paintings, and engravings. While modern law still refers to these specific material objects, at the same time it also abstracts away to talk, for example, about literary or artistic works. Not surprisingly, the pre-modern material categories have been used when the modern abstract terms have been interpreted.

of the *Trustees of the British Museum v. Payne & Foss* (1828).<sup>33</sup> The decision concerned the operation of the 1814 Act for the Encouragement of Learning which required "11 copies of the whole of every book, and of every volume" thereof to be deposited with the Stationers Company, which, in turn, distributed the copies to cultural institutions such as the British Museum and the Libraries at Oxford and Cambridge Universities.<sup>34</sup> The question in the case was whether part nine of the fifth volume of *Flora Græca* — a publication, ultimately of 10 volumes, of the plants of Greece published at intervals from 1806 until 1840 — was a "book" that had to be deposited under the 1814 Act.<sup>35</sup> In arguing that the publishers were liable for non-deposit, the plaintiffs argued that the "power for enforcing penalties for not making entries at the Stationers' Hall should be co-extensive with the power of claiming copyright."<sup>36</sup> That is, the plaintiffs drew upon the self-regulatory logic that ties registration to protection to argue that copyright was coextensive with deposit. The plaintiff's arguments were rejected, primarily on the basis that the court was not willing to construe "book" in anything other than its "usual and natural import."<sup>37</sup> On that basis, the court held that the publishers were not liable for their failure to deposit copies of part nine of volume five of *Flora Græca* at the Stationers' Hall. The court also considered the ramifications that this had for the idea that the deposited (tangible) book somehow corresponded to the copyright in that book. As the court said, it "has been asked, if this fasciculus [or part of the book] is not demandable, nor required under as penalty to be entered — has the author any copyright in it? I answer, that it is a different question, and whichever way it be answered, would not rule the present question."<sup>38</sup> The decision highlights the potential disjuncture that exists between the cultural objects which copyright law regulates and the legal concept of the work which is often closely associated with these objects: a gap which copyright owners have continually exploited in their attempts to control how their "works" are used. It also highlights why copyright law had

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33 *Trs. of the British Museum v. Payne & Foss* (1828) 130 Eng. Rep. 877 (Exchequer Chamber).

34 Act to Amend the Several Acts for the Encouragement of Learning, by Securing the Copies and Copyright of Printed Books, to the Authors of such Books or Their Assigns, 1814, 54 Geo. 3, c. 156 (Eng.).

35 STEPHEN HARRIS, *THE MAGNIFICENT FLORA GRAECA; HOW THE MEDITERRANEAN CAME TO THE ENGLISH GARDEN* (2007); *see also* H. WALTER LACK & DAVID MABBERLEY, *THE FLORA GRAECA STORY: SIBTHORP, BAUER, AND HAWKINS IN THE LEVANT* (1999).

36 *Trs. of the British Museum*, 130 Eng. Rep. at 878.

37 *Id.* at 880.

38 *Id.*

to develop other mechanisms to determine whether part of a work should be recognized as a work in its own right.

### **B. The Work as a Natural Legal Kind**

The second approach that has been used to ascertain when a work comes into existence operates on the assumption that the work is a natural legal kind. While the courts have not developed a theory of the work so to speak, there is a sense in which they have operated, at least in some situations, on the basis that the work is a "naturally" occurring object that has to be unearthed or found.<sup>39</sup> They have also worked on the basis that the copyright work is imbued with certain distinctive traits or characteristics that enable it to be identified and distinguished.<sup>40</sup> Importantly, they have also operated on the basis that these traits help to determine when something qualifies as a work.

Concerns about the uncertain nature of the protection offered by copyright have led parties who work with copyright on a regular basis to call for determinate and fixed limits, particularly in relation to the vexed question of what is a non-infringing copy. While not widespread, there has been some willingness to accede to these demands. For example, Australian copyright law provides that a reasonable portion of a published edition is a fair dealing. A portion is said to be reasonable if the number of pages copied does not exceed 10 percent of the number of pages in that edition.<sup>41</sup> While quantitative solutions such as these are more concerned with the amount of a work that can be copied rather than what a work is in the first

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39 This builds upon the (discredited) idea of the natural kind — as the idea that certain non-artificial, naturally occurring objects, notably things such as chemical elements or biological species, actually exist in nature.

40 The idea of the sanctity of the copyright work — that is, the idea that the work is akin to a natural kind that cannot and should not be disturbed — is reflected in the decision to reject the maxim, "what is worth copying is worth protecting." In so doing, the courts have reinforced the idea that there is something particular about copyright, rather than the conduct of the defendant, that determines the ambit of protection. *University of London Press v. University Tutorial Press* [1916] 2 Ch. 601, 610. Focusing on the conduct of the defendant (and her decision that something is worth copying), means that it is possible that a part of work (which had been copied) would be eligible for copyright protection. Following the logic of the maxim, if a defendant copied a sentence from a book, the sentence would, potentially, be protected.

41 Copyright Act, 1968 (Cth), §§ 10(2), 40(3) (Austl.); *see also* COPYRIGHT LAW REVIEW COMM., SIMPLIFICATION OF THE COPYRIGHT ACT 1968 PART I, at para. 6.56 (1998).

place, nonetheless they represent a particular way of thinking about copyright that has occasionally influenced attempts to determine the ambit of a work. For example, there have been attempts to argue that "each and every single visual image" of a broadcast is a separate work.<sup>42</sup> So too, it was implied that the words in a newspaper article might be treated as separate elements that can be protected by copyright. However tempting these arguments might be, the courts have consistently rejected attempts to recalibrate copyright so that the work can be reduced to quantifiable units of measurement.<sup>43</sup> In a sense, the courts have accepted that the fact that a work can be divided into smaller parts does not, of itself, justify treating those smaller parts as new works. By rejecting the idea that the work can be reconfigured in a more elemental and quantifiable form, the courts have reinforced the sanctity of the work as a fundamental juridical (taxonomic) category: a common denominator that unites and underpins copyright doctrine.<sup>44</sup>

The idea of the sanctity of the work and the role it plays in determining whether part of a work should be recognized as a work in its own right can be seen from *Hyperion Records*<sup>45</sup> where, as was mentioned earlier, the plaintiffs argued that the 8 seconds sampled by the defendant made up a distinct copyright work in their own right. In rejecting this argument, Judge Laddie Q.C. reinforced the sanctity of the work as an organizing principle of copyright law. As he said:

[T]he fact that one copyright work may be made up by blending together a number of smaller copyright works does not justify taking

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42 *TCN Channel Nine Pty. v. Network Ten Ltd.* [2001] F.C.R. 108, *aff'd* (2004) 218 C.L.R. 273, para. 754 (Austl.) (rejecting the argument that television broadcast copyright relates to each and every single visual image as a discrete subject matter and that it relates to the length of time an image is broadcast, viz a day or a week).

43 "Words as such do not . . . constitute elements covered by the protection." Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening* 2009 E.C.R I-0000, para. 46 (E.C.J.). The High Court of Australia rejected the notion that any image or sound broadcast by way of television in the course of these programs satisfied the statutory description. *TCN Channel Nine Pty.* 218 C.L.R. at para. 754.

44 In many ways the belief in the sanctity of the work is reminiscent of the principle of the unity of invention, which ensures that each patent contains a single inventive concept. Although unity of invention is usually explained in terms of administrative expediency (as a means of ensuring that applicants do not obtain protection for two inventions for the price of one), it also plays an important role in ensuring that the rules and procedures are operational. See Peter Kirby, *Unity of Invention in Canada*, 39 J. PAT. & TRADEMARK OFF. SOC'Y. 250 (1957).

45 *Hyperion Records v. Warner Music*, (unreported case, May 17, 1991) (Ch.) (on file with author).

one large discrete copyright work and notionally splitting it into a myriad of artificial smaller parts, none of which exist as a discrete work in reality, simply as a means for avoiding the substantiality requirements under the Act.<sup>46</sup>

This was because Judge Laddie Q.C. did not "accept that all copyright works can be considered as a package of copyright works, consisting of the copyright in the whole and an infinite number of sub-divisions of it."<sup>47</sup> As a result, it was not legitimate "to arbitrarily cut out of a large work that portion which has been allegedly copied and then to call that the copyright work."<sup>48</sup>

While the idea of the sanctity of the work plays an important role in countering efforts to reduce the work to smaller and smaller units, in itself this does not provide any real guidance when deciding whether part of a work should be recognized as a work in its own right. In answering this question, the courts have operated on the basis that the work has certain defining traits or characteristics. Importantly, they have also operated on the basis that for a would-be work to be recognized as a work, it must exhibit or share some of these defining traits. More specifically, the courts have operated on the basis that part of a larger work will only be treated as a separate work if it has a discrete, coherent, natural or non-artificial shape. As Judge Laddie Q.C. says in *Hyperion Records*:

I believe that Jean Luc Goddard is reported to have said: Of course, a film should have a beginning, middle and an end, but not necessarily in that order. In my judgement, a copyright sound recording must have a beginning, middle and end. That does not mean that a sound recording may not be made by mixing together a number of longer or shorter sound recordings, each of which has copyright in its own right.

Keeping with the example of a film, a film shot during one day's shooting during the making of a cinema epic is protected as a copyright film, even though it is subsequently taken and blended with other film footage to make the final version of the epic. No doubt the epic would itself be protected by copyright. Each day's footage can be regarded as a discrete product of the film-maker's art and protected under the 1988 Act, no matter how valueless it may be to the general public. Similar considerations apply to the taking of numerous individual

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<sup>46</sup> *Hyperion Records*, at 8 (on file with author); see also *Express Newspapers v. Liverpool Daily Post & Echo plc*, [1985] 1 W.L.R. 1089 (Eng.).

<sup>47</sup> *Hyperion Records*, at 12 (on file with author).

<sup>48</sup> *Id.*

sound recordings from which the final commercial sound recording is produced.<sup>49</sup>

The idea that the copyright work has a particular shape or form that (somehow) coalesces into a coherent self-standing whole has been used on a number of occasions to determine whether something should be treated as a separate work. Thus, a day's footage on a film that is "a discrete product of the film-maker's art," and presumably the result of a recording session, as distinct from the final product, would also attract separate copyright protection. A similar logic was used to decide that a color supplement to a weekend newspaper which was "complete in itself" was a separate work for the purposes of published edition copyright.<sup>50</sup> While the color supplement was sold as part of the paper, the court held that it was not merely a selection of the newspaper. Instead, the color supplement was presented as a separate item, which was complete in itself. The reason for this was that the supplement was printed on different quality paper, produced in color, and separately bound. The court also held that separate published edition copyright did not subsist in each of the articles published in the newspaper in question.<sup>51</sup> Instead, the published edition copyright was limited to the newspaper as a whole.<sup>52</sup>

In some situations the scope of the work depends on the nature of the part taken and its relationship to the whole. Thus, if a portion of a work can be removed from its context without changing its character or meaning it is more likely to be treated as a work in its own right, rather than as part of a work. The idea that a work has some sort of internal coherence has also influenced courts when deciding whether something is a work. For example, in one decision it was said that part of television broadcasters' program could be treated as a separate work if it was "susceptible to subdivision by reason of the existence of self contained themes."<sup>53</sup> In some ways the

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49 *Id.* at 8.

50 *Nationwide News Pty. v. Copyright Agency Ltd.* (1996) 136 A.L.R. 273, 291 (Austl.).

51 *Id.*

52 In addition to the published edition copyright in the newspaper as a whole, each of the newspaper articles were separately protected by literary copyright. A similar approach to that adopted in *Nationwide News* was followed in the decision of *Newspaper Licensing Agency* where the British House of Lords rejected the idea that the work protected by published edition copyright was congruent with the underlying literary works. Instead, they held that for the purpose of published edition copyright the newspaper as a whole was a work. *Newspaper Licensing Agency v. Marks & Spencer plc* [2001] UKHL 38, [2003] 1 AC 551 (U.K.).

53 *TCN Channel Nine Pty. v. Network Ten Ltd.* [2001] F.C.R. 108 (Austl.).

approach suggested here builds upon an image of the work that is similar to that which is used, at least in some jurisdictions, to decide whether the moral right of integrity has been infringed. Under this approach it is assumed that works have an internal structure and to infringe the integrity in the work, the use must interfere with that structure.<sup>54</sup>

Given the inherent difficulties in deciding what the identifying traits of a work are, it is not surprising that the courts have fastened onto external markers to help them decide whether something is a work. Thus in one case, the fact that part of a work was christened with a new name was taken to be indicative of the part being a work in its own right.<sup>55</sup> More specifically, it was held that a television broadcast for the purpose of copyright law included the programs "put out to the public, the object of the activity of broadcasting, as discrete periods of broadcasting identified and promoted by a title."<sup>56</sup> The form of the work has also been linked to the purpose that it is intended to achieve. Thus, in an infringement action brought in relation to a listing of television programs, it was held that as the purpose of the weekly television schedules was to impart the totality of the information, the plaintiffs could only claim copyright in the weekly schedule as a whole and not in parts of the weekly schedule as if they were separate compilations.<sup>57</sup> In other contexts, the courts have looked to industry norms to help them decide the limits of the work. For example, in talking about published edition copyright in a newspaper, Lord Hoffmann said,

[T]he frame of reference for the term "published edition" is in the language of the publishing trade. The edition is the product, generally between two covers, which the publisher offers to the public. There

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54 The moral right of integrity protects authors from derogatory treatment of a work. For a discussion see LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 252-57 (3d ed. 2009).

55 Compare similar practice with patents where a new name is sometimes taken as being indicative of a new invention. See Brad Sherman, *Taxonomic Property*, 65 *CAMBRIDGE L.J.* 560, 573 (2008).

56 *TCN Channel Nine Pty. v. Network Ten Ltd.* (2004) 218 C.L.R. 273, para. 754.

57 *Nine Network Australia v. Ice TV* [2007] F.C.R. 1172, paras. 43-44. The idea of the sanctity of the work was reflected in the defendant's argument that if each "sliver" or element of the Nine compilation is entitled to copyright protection, Ice [the defendants] accept[s] that it cannot defend these proceedings. Ice submits that a piece of information about, for example, a change in episode sequence is not a copyright protected work but "at best, a tiny star in the galaxy of compilation."

may be borderline cases in which two or more distinct products are offered simultaneously at a single price, such as a newspaper with typographically distinct supplements or "inserts."<sup>58</sup>

### C. Subject Matter and Originality

The third general approach that has been used to determine whether part of a work should be recognized as a separate work is to rely upon the doctrinal rules of subsistence. This is the approach advocated by the European Court of Justice (E.C.J.) in the *Infopaq* decision where the court said that as "regards the parts of a work, it should be borne in mind that there is nothing in [the Information Society Directive] or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole."<sup>59</sup> This type of approach proceeds on the basis that so long as a plaintiff is able to convince the court that the would-be work complies with the relevant rules for protection (notably subject matter and originality), then the part will be treated as a work in its own right.

The doctrinal rules in relation to subject matter play an obvious role in determining whether something should be recognized as a work. In some cases, the way that subject matter is construed may color the way that the work is interpreted.<sup>60</sup> In other situations, a would-be-work may be rejected on the basis that it does not comply with the way that the subject matter is defined. This might occur, for example, where the material in question is so

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58 *Newspaper Licensing Agency v. Marks & Spencer plc* [2001] UKHL 38, [2003] 1 AC 551, para. 14 (U.K.) (Hoffmann L.J.). Hoffmann treated the articles as substantial parts of the newspaper edition from which they were extracted. Even with an authorial-focused approach as espoused by the E.C.J., it seems that the sanctity of the work still has a role to play. This is reflected in the technique used to determine whether the author had exercised the requisite degree of intellectual creation. As the court said as "regards newspaper articles, their author's own intellectual creation . . . is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression." Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening* 2009 E.C.R I-0000, para. 44 (E.C.J.).

59 *Infopaq Int'l A/S*, 2009 E.C.R I-0000 at para. 38. While the facts of the case dictated that the E.C.J. focus on originality, their comments relate to subsistence more generally.

60 In *Exxon*, Lord Stephenson said that "[l]iterary' is given a broader meaning in the [Copyright] Act of 1956 than it was given in the Act of 1842, and that broader meaning must colour and extend the meaning of 'work.'" *Exxon Corp. v. Exxon Ins. Consultants Int'l Ltd.*, [1982] Ch. 119, 139 (Eng.). Interestingly, Lord Oliver said that something was "a 'work' because work or effort went into its invention." *Id.* at 144.

small that it is unable to satisfy the functional definition of the subject matter in question: an explanation often given for not recognizing copyright in titles. A similar approach has also been used to deny protection to individual words in a computer language, on the basis that the words in question were not a set of instructions as required by the statutory definition of a computer program.<sup>61</sup> Failure to comply with the way subject matter is defined was also used to reject the argument that part of a song was a separate work, primarily because the "features identified by" the plaintiff "as the work were not, when taken in isolation, sufficiently separable from the remainder of the song as to constitute a musical work."<sup>62</sup>

In some situations, the originality requirement has also been used to clarify whether part of a work can be treated as a work in its own right. This is the approach adopted by the European Court of Justice (E.C.J.) in the *Infopaq* decision.<sup>63</sup> The case was triggered by a reference for a preliminary ruling made by the Danish Supreme Court (Højesteret), as part of an infringement action brought by Danske Dagblades Forening (a professional association of Danish newspaper publishers) against the Danish media monitoring and analysis business, Infopaq. The complaint was made in relation to Infopaq's practice of summarizing articles from Danish newspapers, which were then emailed to customers. The articles to be summarized were selected on the basis of key words identified by the customers, which were then used to search electronic versions of the newspapers for relevant articles. To ensure that the words that were selected corresponded to the topics chosen by their customers, Infopaq identified, stored and reproduced five words before and after the search word ("extract of 11 words"). One of the questions referred by the Danish Court to the E.C.J., which related to the standing of the 11 words, was: "Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction which are protected (see Article 2 of the Infosociety Directive)?"<sup>64</sup> While

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61 *Data Access Corp. v. Powerflex Servs. Pty.* (1999) 45 I.P.R. 353, 369 (H.C.) (Austl.). Copyright Act, 1968 (Cth), § 10(1) (Austl.) defines a computer program, inter alia, as "an expression in any language, code or notation, of a set of instructions (whether with or without related information)."

62 *Coffey v. Warner/Chappell Music Ltd.*, [2005] EWHC (Ch.) 449, [11]-[12] (Eng.). The work was defined or determined by its ability to be "separated." Given that it is clear that the parts were able to be (physically) separated from the whole, it is unclear what this means.

63 *Infopaq Int'l A/S*, 2009 E.C.R I-0000.

64 *Id.* at para. 26.

framed as a question of reproduction, the matter effectively turned on whether the 11 words could be treated as a separate work.

In answering this question, the E.C.J. noted that copyright protection only arises in relation "to a subject-matter which is original in the sense that it is its author's own intellectual creation."<sup>65</sup> The court went on to say that "the various parts of a work thus enjoy protection . . . provided that they contain elements which are the expression of the intellectual creation of the author of the work."<sup>66</sup> Using this test, the court said that individual words were not protected,<sup>67</sup> the reason being that words, when considered in isolation, were not "an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."<sup>68</sup> While individual words may not have been protected, the court felt that this was not necessarily the case in relation to isolated sentences, or even parts of sentences, so long as they were able to convey to "the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article."<sup>69</sup> While the language of the court was not as clear as it might have been, the result of the decision is: namely, that it is possible for a sentence (or even part of a sentence) to be treated as a distinct entity protected by copyright in its own right.<sup>70</sup> Despite what the language of the court might suggest, the consequence of this approach is to treat elements as if they were (potentially) works: the sub-element is a work, in all but name.<sup>71</sup>

The *Infopaq* decision has important ramifications for the operation of copyright; particularly in terms of the way that it enhances the copyright owners' portfolio. The decision also has ramifications for the way we think

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65 *Id.* at para. 37 ("In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.").

66 *Id.*

67 *Id.* at para. 46.

68 *Id.* at para. 45.

69 On this basis, the court said that such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive. *Id.* at para. 47; *see also* paras. 48, 50-51.

70 The court seems to vacillate between element as a work and element as part of a work.

71 Stewart suggests that questions of this type were gradually resolved in copyright law by the cult of authorship, originality and genius. SUSAN STEWART, CRIMES OF WRITING 32 (1991).

about copyright, given that by recognizing an "element of a work" as a *new* unit of doctrine, it undermines the idea of the sanctity of the work as a core concept — or common denominator — of copyright law. By suggesting that an element of a work may be protected if it contributes to the originality of the whole, the decision potentially shifts the focus away from a taxonomic inquiry into when part of a work might be treated as a separate work in its own right.

The E.C.J. decision also reflects another way of deciding whether part of a work should be recognized as a distinct work in its own right. In the same way the author operates as an ideological figure to constrain meaning, so too the author operates here to constrain the limits of the work.<sup>72</sup> While the focus on the author and the intellectual contribution they make to the work might have provided the court with some comfort, it is inherently problematic. It not only leaves unanswered the question "what is the nature of the work," but also further exposes copyright to the litany of problems associated with authorship and originality. If we take scientific publishing as a case in point, the approach advocated by the E.C.J. is difficult to apply, given that "the value of a scientific work is not expressible in a standardised unit of measurement . . . scientific authorship seems to be like a hologram in which each fragment 'contains' the whole."<sup>73</sup> More specifically, the decision to use the intellectual creation of an author as a way of determining whether something should be treated as a work is made all the more difficult by the multitude of relations that coexist within a scientific publication, which, in turn, suggests that a scientific article

is not so much a "work," that is, a well-demarcated object produced by one author. Rather, it is something whose demarcated boundaries are harder to define, something that, while attached to the name of an author, was constituted through the work and resources of many actors (who, nevertheless, may not be called authors).<sup>74</sup>

Similar problems arise with other copyright works, sometimes even more acutely.

While subject matter may provide a more helpful option, nonetheless it

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<sup>72</sup> FOUCAULT, *supra* note 1, at 390.

<sup>73</sup> Mario Biagioli, *Documents of Documents: Scientists' Names and Claims*, in DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 129, 150 (Annelise Riles ed., 2006).

<sup>74</sup> *Id.* at 134. In relation to scientific publishing, we are no longer talking about "the name of the author (or of several authors, but about many different names) of journals, institutions, editors, referees, 'ghost-writers', private-sector sponsors, and public funding agencies, and their complex relations." *Id.*

is still problematic. In particular, it suffers from the fact that the size of the work will depend on the way that the subject matter is interpreted; which is, in itself, often a vexed and problematic issue. It also suffers from the fact that in order to accommodate creative innovations, the subject matter protected by copyright needs to be framed in open-ended and fluid terms which enable the law to adapt and change when needed. While such open-ended and flexible definitions may be helpful in so far as they allow the law to respond to change, they do not provide much assistance in helping to determine whether part of a work should be treated as a separate work. One of the lessons to be drawn from the history of taxonomy is that open-ended and fluid definitions cannot function as effective mechanisms for deciding taxonomic questions. Instead, what is needed is a fixed, stable referent to function as a means of fabricating objectivity.<sup>75</sup> While there is nothing to stop copyright law from jettisoning the work as a basic unit of doctrine, until it does so it seems that subject matter can only provide limited assistance in deciding when a work has come into being.

### CONCLUSION

As Foucault noted in his celebrated essay, *What Is an Author?*, the uncertainty associated with the work has both a theoretical and technical dimension. As he said, a "theory of the work does not exist, and the empirical task of those who naively undertake the editing of works often suffers in the absence of such a theory."<sup>76</sup> While the nature of the work and the resulting problems that Foucault identified cannot simply be transposed into the legal arena, nonetheless a number of problems arise as a result of the uncertain standing of the copyright work. As well as giving rise to a number of practical problems, the uncertain nature of the copyright work is one of the reasons why it is so difficult to explain when and why the law recognizes something as a work in the first place. The idea that the copyright work is ontologically unstable led Pila to suggest that even if the instability could be "resolved for certain doctrinal purposes," it still "undermines the law's claim to theoretical coherence, and the possibility of understanding the copyright work."<sup>77</sup> While the unstable nature of the work may lead us to question the theoretical coherence of the law,

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<sup>75</sup> See Lorraine Daston, *Type Specimens and Scientific Memory*, 31 *CRITICAL INQUIRY* 153 (2004).

<sup>76</sup> FOUCAULT, *supra* note 1, at 379.

<sup>77</sup> Pila, *supra* note 21, at 5.

this does not necessarily undermine our capacity to understand the copyright work. What it does mean, however, is that we have to change the way we think about the work and the role it plays in copyright law.

In order to understand the "fiction of the work,"<sup>78</sup> we need to resist the temptation to purify the law into clean, clear-cut categories. It is also important that we recognize that the copyright work cannot be seen purely in intangible terms — whether as a creature of the rules of copyright law or as an immaterial object protected by the law. While there is a close correlation between work and subject matter, the work cannot be equated with the way that the subject matter is defined. Nor can it be determined, at least in any helpful way, using the intellectual contribution of the author. While the contours of the tangible object in which the work manifests itself may sometimes be coextensive with the work, it is important to appreciate that the copyright work transcends the tangible material form. In line with this, we should not assume that the work has the characteristics of a naturalistic object which is "out there, passive and boring, waiting to be unveiled."<sup>79</sup> While we cannot deny the tangible and intangible dimensions of the copyright work, this does not mean that we necessarily have to see the work in these terms. Instead of thinking of the work as being either tangible or intangible, the copyright work is better seen as a quasi-object or hybrid that is both tangible and intangible at the same time.<sup>80</sup> What emerges from seeing the copyright work in this way is a very different account both of the work and of copyright law more generally. In particular, it helps us to appreciate that the work not only operates as a common denominator that links the doctrinal rules: it also acts as a go-between that connects the intangible and tangible, and as a mechanism that enables the law to migrate between these different domains. In taxonomic terms, the work is copyright law's version of the species: it is a fabricated concept that operates as if it had a physical empirical reality.<sup>81</sup>

The work, which came into its own with the emergence of modern copyright law, occupies a pivotal (but largely unexplored) position in

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78 FOUCAULT, *supra* note 1, at 382.

79 Interview by T. Hugh Crawford with Bruno Latour (Oct. 1990), 2 CONFIGURATIONS 247, 261 (1993).

80 When seen from this perspective the work "becomes active, and the collective becomes made of things — circulating things — which do not have the characteristics they have in the realist argument. So these hybrids (quasi-objects) start resembling what our world is made of: it is that there are only hybrids." BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 51 (1993).

81 On this see DAVID S. STAMOS, BIOLOGICAL SPECIES, ONTOLOGY, AND THE METAPHYSICS OF BIOLOGY (2003).

copyright law. Despite this, modern copyright law is not well equipped to explain when a new work has come into being. In the same way in which patent law has long grappled with and felt ill at ease with ethical questions about the grant of certain types of patents, so too copyright law has found taxonomic questions about the work to be problematic. In part, that is because the question of how the boundaries of the work are to be determined gives rise to a mode of thinking that largely disappeared from copyright law in the late nineteenth century. While this self-styled metaphysical style of thinking,<sup>82</sup> which might have helped copyright law in its attempt to understand and explain the nature of the work, may have disappeared with the emergence of the modern law, to date copyright law has not found a satisfactory replacement to assist it in the task of explaining what a work is and when it comes into being. As a result, in so far as the modernist exercise heralded by the 1911 Copyright Act was underpinned and sustained by the copyright work, it seems that at least aspects of the modernist project remain unfinished.<sup>83</sup>

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<sup>82</sup> On this see SHERMAN & BENTLY, *supra* note 7, at 175-76.

<sup>83</sup> Ironically, in some situations the black-boxed work operates as a façade that helps to cover up the failure of copyright law's modernist exercise.

